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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JED and ALISA BEHAR, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

NORTHROP GRUMMAN CORPORATION and NORTHROP GRUMMAN SYSTEMS CORPORATION,

Defendants.

Case No. 2:21-cv-03946-HDV-SKx

ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION [115]

I. INTRODUCTION

This case arises out of contamination allegedly released by Litton Systems, Inc.—now owned by Defendants Northrop Grumman Corporation and Northrop Grumman Systems Corporation ("Northrop Grumman")—from Litton's commercial manufacturing facility in Canoga Park between 1968 and 1970. The contaminants have spread to the groundwater, soil, and soil vapor beyond the facility, forming a toxic groundwater plume approximately 2.4 miles long and 1.8 miles wide.

Plaintiffs Jed and Alisa Behar live in a home directly above this groundwater plume. They allege that toxins from the groundwater have the potential to migrate up through the soil as vapor and flow through the foundation and crawlspaces. Plaintiffs also claim they have suffered economic harm in the form of a diminished home value. The Behars bring claims for negligence, trespass, and nuisance on behalf of themselves and all other homeowners with houses directly above the plume. Before the Court is Plaintiffs' Motion for Class Certification ("Motion") [Dkt. No. 115] as well as several evidentiary motions seeking to exclude the testimony of Plaintiffs' experts.[1]

After careful consideration of the requirements of Federal Rule of Civil Procedure 23, the Court finds class certification appropriate. Plaintiffs' claims are well suited for class treatment; they present several common issues of law and fact that are most efficiently resolved on a classwide basis. For those reasons and the additional reasons detailed below, the Court ***grants*** Plaintiffs' Motion for Class Certification.

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[1] Defendants Northrop Grumman Corporation's and Northrop Grumman Systems Corporation's Motion to Exclude Opinions of Dr. Kevin Boyle [Dkt. No. 133]; Defendants Northrop Grumman Corporation's and Northrop Grumman Systems Corporation's Motion to Exclude Opinions of Dr. Mark Kram [Dkt. No. 134]; Defendants Northrop Grumman Corporation's and Northrop Grumman Systems Corporation's Motion to Exclude Opinions of Dr. Jill Ryer-Powder [Dkt. No. 143]; Defendants Northrop Grumman Corporation's and Northrop Grumman Systems Corporation's Motion to Exclude Opinions of Dr. Richard Layton [Dkt. No. 144]; Defendants Northrop Grumman Corporation's and Northrop Grumman Systems Corporation's Motion to Exclude Opinions of Dr. Hugh Gorman [Dkt. No. 145]; Defendants Northrop Grumman Corporation's and Northrop Grumman Systems Corporation's Motion to Exclude Opinions of Dr. Matthew Tonkin [Dkt. No. 147].

II. BACKGROUND

In 1967, Litton Industries, Inc. and Litton Systems, Inc. ("Litton") purchased the industrial property located at 8020 Deering Avenue in Canoga Park (the "Site"). *See* Defendants' Opposition to Plaintiffs' Motion For Class Certification ("Opposition") [Dkt. No. 132] at 3; Opposition, Ex. B at 1659–60. From 1968 to 1970, Litton manufactured printed circuit boards, and conducted related operations such as copper plating, silk screening, photo printing, and chemical stripping at the Site. Opposition, Ex. B at 1659. Litton used in this manufacturing certain toxic chlorinated solvents including trichloroethene ("TCE") and tetrachloroethene ("PCE"). Motion, Ex. 3 at NGSC_0025389.

Contamination at the Site was discovered in the late 1990s, and in 2001, Northrop Grumman acquired Litton. Opposition, Ex. B at 1659–61. Since 2003, the Northrop Grumman Defendants have been investigating and remediating groundwater contamination at the Site under the supervision of the Los Angeles Regional Water Quality Control Board ("Regional Board"). *Id*. at 1660. Defendants began investigating contamination in the water, soil, and soil vapor *beyond* the Site in 2007. *Id*. at 1661. That investigation identified a TCE groundwater plume and soil vapor plume emanating from the Site.[2] *See* Motion, Ex. 3 at NGSC_0025394.

The groundwater plume lies directly beneath 3,294 homes and exceeds California's Environmental Screening Level for TCE. Motion, Ex. 1 at 3; *id*., Ex. 12 at 12; *id*., Ex. 22 at 4. The borders of this plume geographically define Plaintiffs' Proposed Class Area ("PCA").[3] Motion at

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[2] Defendants outlined the TCE groundwater plume based on the drinking water standard of 5 micrograms per liter (µg/L). *See* Motion, Ex. 23 at NGSC_0366380. Because TCE can infiltrate indoor air of homes from the soil gas, Plaintiffs maintain that the drinking water standard is not sufficiently protective and a lower concentration of 1.2 µg/L should be used to protect the public from this risk. Motion at 5; *id*., Ex. 26 at 283. This 1.2 µg/L TCE screening limit for groundwater is based on calculations used by the U.S. Environmental Protection Agency and the State of California. It is the level of TCE groundwater contamination above which vapor intrusion risk exceeds the safe levels of TCE in indoor air (0.48 µg/m^3). Motion, Ex. 26 at 283. Put simply—admittedly, perhaps too simply—it is the level of groundwater contamination that would potentially lead to toxic air levels in the homes above the groundwater.

[3] Plaintiffs' expert, Dr. Richard Laton, re-mapped the geographic boundary of the proposed class area (PCA) based on the 1.2 µg/L metric. *See* Motion, Ex. 12 at 36–37. Every property in the PCA

11. Plaintiffs maintain that TCE is carcinogenic and, because contamination levels exceed screening limits, requires mitigation at each PCA home to prevent resident exposure from soil gas vapors. *See* Motion at 4; *id*., Ex. 16 at 30. Plaintiffs also contend that, by virtue of their position directly above the contamination, their home values have been diminished. *See* Motion at 20; *id*., Ex. 21 at 1–2.

Plaintiffs assert that, even if residents are not drinking the groundwater, TCE and PCE in the groundwater impact PCA homes because the contaminants volatilize and migrate up through the soil to the surface. *See* Motion, Ex. 16 at 1-2, 75. From the soil, TCE and PCE migrate through the foundation and accumulate in indoor air,[4] resulting in toxic exposure to residents. *Id*. at 75. The presence of these chemicals in the air at any given point depends on numerous variables that affect the flow of vapors into the home—meaning vapor intrusion could be occurring in a home on a particular day but not occur in that home on the next. *See id*. at 6–7. Because of this variability, research indicates that as many as 58 rounds of sampling are required within each home to assess contaminant risks.[5] *See id*. at 7, 26–27.

In 2014, the Regional Board directed Defendants to reassess the risk of vapor intrusion related to the contamination. Opposition, Ex. B at 1665. For this study, Defendants collected additional soil vapor samples and developed an indoor air sampling program targeting residential properties that overlaid the plume. *Id*. at 1666. The study also necessitated community outreach—for example, Defendants needed to recruit residents to allow testing in their homes for the indoor air sampling program. *Id*., Ex. C at 2101-07. During this period between 2015 and 2017, Defendants distributed more than 13,000 "Fact Sheets" to homes near the Site containing information about the ongoing contamination investigation and cleanup at and around the Site. *Id.*

Only 26 homes and one commercial property participated in Defendants' indoor air testing

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experiences TCE levels in the groundwater above 1.2 µg/L.

[4] This flow of vapors into the home is called "vapor intrusion," and is the subject of intense disagreement amongst the parties and their experts.

[5] The parties also vigorously dispute (i) the procedures necessary to accurately test for vapor intrusion and (ii) the validity of results from Defendants' previous testing. *See, e.g.*, Motion at 7-9; Opposition at 4.

program, which measured the level of TCE and PCE in the air. *Id.* at 2108–09. The results of Defendants' testing indicated that: (i) none of the homes exceeded action levels that would trigger an urgent or accelerated response; (ii) several homes exceeded screening levels; and (iii) 24 of the 26 homes detected at least some TCE and/or PCE during testing.[6] *Id.*, Ex. B8 at 1732-33, 1764-65; *see also* Motion at 8; Opposition at 4.

III. LEGAL STANDARDS

Rule 23 confers "broad discretion to determine whether a class should be certified, and to revisit that certification throughout the legal proceedings before the court." *Armstrong v. Davis*, 275 F.3d 849, 872 n.28 (9th Cir. 2001), *abrogated on other grounds by Johnson v. California*, 543 U.S. 499, 504–05 (2005). Rule 23 is the "exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (citation omitted). To justify departure from the rule, a class representative must be part of the class and possess the same interest and suffer the same injury as fellow class members. *Id.* (citation omitted); *accord Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 979 (9th Cir. 2011).

A motion for class certification involves a two-part analysis. First, the plaintiffs must demonstrate that the proposed class satisfies the requirements of Rule 23(a): (1) the members of the proposed class must be so **numerous** that joinder of all claims would be impracticable; (2) there must be questions of law and fact **common** to the class; (3) the claims or defenses of the representative parties must be **typical** of the claims or defenses of absent class members; and (4) the representative parties must fairly and **adequately** protect the interests of the class. Fed. R. Civ. P. 23(a). The plaintiffs may not rest on mere allegations, but must provide facts to satisfy these requirements. *Doninger v. Pac. Nw. Bell, Inc.*, 564 F.2d 1304, 1309 (9th Cir. 1977) (citing *Gillibeau v. Richmond*, 417 F.2d 426, 432 (9th Cir. 1969)).

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[6] For this study, Defendants' consultants measured TCE levels of residential indoor air samples against a standard of 2 $\mu g/m^3$ to determine whether an accelerated response was needed and a standard of 6 $\mu g/m^3$ to determine whether an urgent response was needed. To determine whether the indoor air levels exceeded the ambient air screening levels, the consultants used a standard of 0.46 $\mu g/m^3$ for PCE and 0.48 $\mu g/m^3$ for TCE. Opposition, Ex. B8 at 1755-57.

Second, the plaintiffs must meet the requirements for at least one of the three subsections of Rule 23(b). Rule 23(b) defines three different types of classes. *Leyva v. Medline Indus. Inc*., 716 F.3d 510, 512 (9th Cir. 2012). Here, Plaintiffs seek certification under Rule 23(b)(3). Motion at 21. Rule 23(b)(3), which concerns monetary relief, requires the court to find that "questions of law or fact common to class members **predominate** over any questions affecting only individual members" and "that a class action is **superior** to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3) (emphasis added).

The plaintiffs bear the burden of demonstrating that Rule 23 is satisfied. *See Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001), *amended by* 273 F.3d 1266 (2001). The district court must rigorously analyze whether the plaintiffs have met the prerequisites of Rule 23. *Dukes*, 564 U.S. at 350-51 (quoting *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 160 (1982)). The district court need only form a "reasonable judgment" on each certification requirement "[b]ecause the early resolution of the class certification question requires some degree of speculation." *Gable v. Land Rover N. Am., Inc.*, No. 07-CV-0376-AG-RNB, 2011 WL 3563097, at *3 (C.D. Cal. July 25, 2011) (citation omitted); *see also Blackie v. Barrack*, 524 F.2d 891, 901 n.17 (9th Cir. 1975). This may require the court to "'probe behind the pleadings before coming to rest on the certification question,'" and the court "'*must* consider the merits' if they overlap with Rule 23(a)'s requirements." *Wang v. Chinese Daily News*, 737 F.3d 538, 544 (9th Cir. 2013) (quoting *Dukes*, 564 U.S. at 350); *accord Ellis*, 657 F.3d at 983.

IV. DISCUSSION

A. Motions to Strike Expert Testimony

"A plaintiff seeking class certification bears the burden of affirmatively demonstrating through evidentiary proof that the class meets the prerequisites of Rule 23(a)." *Sali v. Corona Reg'l Med. Ctr*., 909 F.3d 996, 1003–04 (9th Cir. 2018) (citation omitted). Plaintiffs proffer the testimony of six experts in support of their Motion; Defendants move to exclude each of them.

"Inadmissibility alone is not a proper basis to reject evidence submitted in support of class

certification." *Id.* at 1004.[7] However, defendants can[8] object to expert testimony at the class certification stage "under the standard set forth in *Daubert*," which the Court will use to determine the proper weight of that evidence. *Id.* at 1006 (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993)); *see also Grodzitsky v. Am. Honda Motor Co.*, 957 F.3d 979, 984-85 (9th Cir. 2020) (affirming District Court's exclusion of expert testimony under the *Daubert* standard at the class certification stage). "For the purposes of class certification, it is proper to evaluate the

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[7] Defendants have levied a litany of evidentiary objections to Plaintiffs' exhibits submitted in support of the Motion. Setting aside Defendants' Federal Rule of Evidence 702 objections to the expert reports (which are evaluated in connection with the *Daubert* Motions), Defendants' evidentiary objections are primarily based on Federal Rule of Evidence 403 (probative value substantially outweighed by unfair prejudice) and Federal Rules of Evidence 801 and 802 (hearsay). *See* Defendant Northrop Grumman Corporation's and Northrop Grumman Systems Corporation's Objections to Evidence Offered in Support of Plaintiffs' Motion for Class Certification [Dkt. No. 132-1]. For the reasons discussed below, the Court ***overrules*** all of Defendants' objections to the admissibility of Plaintiffs' exhibits.

In *Sali v. Carona Regional Medical Center*, the Ninth Circuit held that a plaintiff's evidentiary proof submitted in support of a motion for class certification "need not be admissible evidence." 909 F.3d 996, 1004 (9th Cir. 2018) (holding the district court abused its discretion by declining to consider evidence in support of class certification solely on the basis of inadmissibility). Although Defendants argue that the Court must determine the admissibility of evidence in support of class certification under *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651 (9th Cir. 2022), this Court joins others in finding *Sali* remains good law and was not abrogated by *Olean*. *See Palmer v. Cognizant Tech. Sols. Corp.*, No. 17-cv-6848-DMG-PLAx, 2022 WL 18214014, at *2 (C.D. Cal. Oct. 27, 2022) ("This Court thus reads the Ninth Circuit's statements regarding admissibility in *Olean* in light of [] earlier decisions, and emphasizes the reliability and relevance of evidence rather than the form of the evidence."); *see also Hart v. TWC Prod. & Tech. LLC*, No. 20-CV-03842-JST, 2023 WL 3568078, at *3 (N.D. Cal. Mar. 30, 2023) (agreeing "that *Sali* and *Olean* are reconcilable").

Evidentiary issues "go to the weight that evidence is given at the class certification stage," but "admissibility must not be dispositive." *Sali*, 909 F.3d at 1007; *see, e.g.*, *Palmer v. Cognizant Tech. Sols. Corp.*, No. 17-cv-6848-DMG-PLAx, 2022 WL 18214014, at *2 (C.D. Cal. Oct. 27, 2022) (overruling all evidentiary objections and evaluating the evidence submitted in support of class certification on the basis of its reliability and relevance); *Johnson v. Cnty. of San Bernardino*, No. 18-cv-1121-GW-AFMx, 2023 WL 4291840, at *3 (C.D. Cal. Apr. 27, 2023) (declining to address the admissibility objections because "proof submitted in support of class certification need not consist of admissible evidence, or at least not *only* admissible evidence" but evaluating challenged evidence based on its reliability). Accordingly, in determining the weight to place on evidence at this stage, the Court considers relevance, reliability, and persuasiveness.

[8] Indeed, a defendant is required to raise a challenge to expert testimony to preserve the issue of admissibility on appeal of an order granting class certification. *Olean Wholesale Grocery Coop., Inc.*, 31 F. 4th at 665 (explaining that if a defendant does not raise a *Daubert* challenge to expert evidence proffered in support of a motion for class certification, "the defendant forfeits the ability to argue on appeal that the evidence was inadmissible").

proffered expert testimony under *Daubert* for the purposes of determining its reliability and relevance." *In re Delta Air Lines, Inc.*, No. 20-cv-00786-JAK-SKx, 2023 WL 2347074, at *5 (C.D. Cal. Feb. 8, 2023).

District courts perform a "gatekeeping" function in determining the admissibility of expert testimony. *Daubert*, 509 U.S. at 597. Federal Rule of Evidence 702 governs the admissibility of expert opinion testimony. A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
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> (b) the testimony is based on sufficient facts or data;
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> (c) the testimony is the product of reliable principles and methods; and
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> (d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case.

Fed. R. Evid. 702.

Rule 702 aims to ensure an expert is qualified and their testimony is relevant and reliable. Whether the testimony helps the trier of fact "goes primarily to relevance." *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir. 2010), *as amended* (Apr. 27, 2010) (quoting *Daubert*, 509 U.S. at 591). To assess whether the testimony is reliable, "the court must assess the reasoning or methodology, using as appropriate such criteria as testability, publication in peer reviewed literature, and general acceptance," though the reliability test is "flexible" and the "list of specific factors neither necessarily nor exclusively applies to all experts or in every case." *Primiano*, 598 F.3d at 564 (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999)). A "trial court has broad latitude not only in determining whether an expert's testimony is reliable, but also in deciding how to determine the testimony's reliability." *Ellis*, 657 F.3d at 982.

a. Motion to Exclude Dr. Kevin Boyle

Dr. Kevin Boyle was retained by Plaintiffs to calculate the diminution of property values for each property in the PCA due to groundwater contamination and its proximity to the source of the TCE. *See generally* Expert Report of Dr. Kevin J. Boyle ("Boyle Report") [Dkt. No. 119-1]. Dr.

Boyle holds a PhD in Agricultural Economics with a specialization in Environmental and Resource Economics from the University of Wisconsin. *Id.* at 2. He is currently the Founding Head of the Blackwood Department of Real Estate in the Pamplin College of Business at Virginia Tech. *Id.*

Dr. Boyle purports to calculate the classwide diminution in value for each home in the PCA using hedonic regression analysis and a form of meta-analysis with "benefit transfer". *Id.* at 11. In this two-step approach, he first used the Federal Reserve Bank of St. Louis All-Transactions House Price Index to update sale prices and provide property-specific baseline values for injured properties. *Id.* at 10-11. He then uses a meta-analysis of hedonic property value studies, which quantify the effects of positive and negative attributes on market values, to determine the property value diminution common to injured properties from the groundwater contamination plume. *Id.* at 11-13. Based on this two-step analysis, Dr. Boyle calculated a 9.4% decrease in property value for properties located wholly or partially over the groundwater contamination plume. *Id.* at 1.

In assessing the admissibility and weight to give Dr. Boyle's expert testimony, the Court first observes that Dr. Boyle is well-qualified to offer this expert opinion. Defendants mount no real protest on this point.

Defendants' first main objection is that Dr. Boyle's use of meta-analysis with benefit transfer is not a reliable methodology for determining property value diminution. Motion to Exclude Opinions of Dr. Kevin Boyle ("Motion to Exclude Dr. Boyle") [Dkt. No. 133] at 5. Specifically, Defendants argue that Dr. Boyle's opinion is unreliable because it is based on meta-analysis and "completely ignores real market data from the relevant market at issue." *Id.*

The Court disagrees. "To the extent defendant challenges the inherent accuracy of meta-analysis, those challenges are not meritorious." *Hartle v. FirstEnergy Generation Corp.*, No. CIV.A. 08-1019, 2014 WL 1317702, at *8 (W.D. Pa. Mar. 31, 2014) ("Meta-analysis has been a tool in the scientific repertoire for many years … [and t]here is no evidence that meta-analysis is inaccurate as a mode of analysis." (citation omitted)). In general, the methodology has been accepted and the Court does not find a basis to dismiss it out of hand or as applied here.

But the question of whether Dr. Boyle's analysis helps the trier of fact is complicated by Boyle's assertion that the property value diminution will occur only *after* class notice. While

Plaintiffs explain that the harm to the property is already present in the form of the contamination, the market value of the property only reflects that harm when buyers and sellers are *aware* of it. Whether or not there has been widespread notice of the contamination is a contested fact. If Plaintiffs are correct that classwide knowledge of the contamination has yet to occur, then Dr. Boyle must forecast the harm that will be realized once that information is widespread. Defendants contend it is inappropriate to assess damages by projecting the market value diminution rather than measuring the diminution that exists. But under *Plaintiffs' theory*, the current values would be an unreliable measure of harm given the lack of information in the marketplace.

After notice to the class is completed, there may well be actual sales data for the parties to use to refine or refute Dr. Boyle's projection. That such data does not presently exist under Plaintiffs' theory neither requires exclusion of Dr. Boyle's expert report nor precludes certification. However, "even where damages are recoverable for prospective detriment, the occurrence of such detriment must be shown with such a degree of probability as amounts to a reasonable certainty that such detriment will result from the original injury." *Frustuck v. City of Fairfax*, 212 Cal. App. 2d 345, 368 (Ct. App. 1963) ("[It is a] fundamental rule that damages which are speculative, remote, imaginary, contingent, or merely possible cannot serve as a legal basis for recovery."). Whether Dr. Boyle's expert testimony meets that standard is a question for trial and need not be answered here to consider his report for purposes of certification.

Defendants also challenge Boyle's application of the meta-analysis. Motion to Exclude Dr. Boyle at 9-18. For example, the meta-analysis used by Dr. Boyle (the "S&S Meta-Analysis") includes several studies observing market value impacts of groundwater contamination. But as Defendants point out, the residential properties assessed in these studies had drinking water wells that were contaminated. Arguably, that would impact property value to a different magnitude than vapor intrusion, which is the effect of groundwater contamination for the PCA. *Id.* at 12.

The distinction is not a basis to exclude the report. Where data used is "imperfect, and more (or different) data might have resulted in a 'better' or more 'accurate' estimate in the absolute sense, it is not the district court's role under Daubert to evaluate the correctness of facts underlying an expert's testimony." *i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 856 (Fed. Cir. 2010), *aff'd*,

564 U.S. 91 (2011) ("Questions about what facts are most relevant or reliable to calculating [damages] are for the jury."). The same is true of Defendant's criticism of Dr. Boyle's methodology for determining the market value of each home. *Id.* at 19-21. "[F]aults in his use of [a particular] methodology … go to the weight, not the admissibility, of his testimony." *Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1231 (9th Cir. 1998) (citing *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1044 (2d Cir. 1995)).

Ultimately, given the challenges inherent in Dr. Boyle's attempt to calculate market value diminution and the concerns Defendants raised relating to his methodology, Dr. Boyle's opinion warrants less weight in consideration of the present Motion. But the Motion to Strike Dr. Boyle's testimony is denied because his opinion meets the threshold requirements for admissibility in connection with the Motion for Class Certification. This ruling is not a final determination of the reliability of Dr. Boyle's testimony with respect to future proceedings in this action.

b. Motion to Exclude Dr. Mark Kram

Plaintiffs' expert Dr. Mark Kram opines that the people living over the groundwater plume are at risk of toxic exposure via vapor intrusion and mitigation is the best solution to address this threat. *See generally* Expert Report of Dr. Mark Kram ("Kram Report") [Dkt. No. 118-7]. Dr. Kram is a hydrogeochemist with a Ph.D. in Environmental Science and Management from the University of California at Santa Barbara and holds other degrees in geology and chemistry. *Id.* at 86. Dr. Kram's opinions draw on his over 39-years of professional experience in the fields of chemistry, geology, hydrogeology, geochemistry, spatial statistics, environmental science, contaminant fate and transport, field and laboratory analytical technologies, and site characterization and remediation. *Id.* at 2.

In his report, Dr. Kram states: (i) that residents living above the 1.2 µg/L TCE groundwater plume are at risk of harm from vapor intrusion, (ii) why Defendants' investigation of the vapor intrusion pathway was flawed, and (iii) that conducting a proper assessment of the vapor intrusion risks for every structure in the PCA is more costly and time-intensive than mitigation. *Id.* at 1-2.

Defendants argue Dr. Kram's opinion does not advance a material aspect of Plaintiffs' case in large part because Dr. Kram does not prove vapor intrusion is occurring or quantify the

percentage chance of vapor intrusion for any given home. Motion to Exclude Opinions of Dr. Mark Kram ("Motion to Exclude Dr. Kram") [Dkt. No. 134] at 7-11. The Court disagrees. Dr. Kram's opinion is consistent with Plaintiffs' theory that, through vapor intrusion, a groundwater plume exceeding 1.2 µg/L TCE creates a danger of airborne TCE exposure exceeding safe limits. Dr. Kram's opinion also provides a basis for Plaintiffs' mitigation damages theory.

The Court finds Defendants' other criticisms of Dr. Kram's reporting to be of little consequence at this stage. For example, Defendants criticize Dr. Kram's opinion on the grounds that he did not test homes for vapor intrusion. This criticism—although potentially a reason to place less weight on his conclusion—talks past the opinion itself, which attempts to explain that meaningful testing is prohibitively intensive and argue why mitigation is necessary. Similarly, although Dr. Kram's report does not calculate the cost of testing homes in the PCA, this goes to the weight of his opinions and is not a reason to exclude his testimony at this stage.

Because the Court finds Dr. Kram to be qualified to offer an expert opinion and further finds that his testimony could be helpful to the trier of fact on various relevant issues, the Motion to Strike Dr. Kram's opinion is denied. Again, however, this ruling is not a final determination of the reliability of Dr. Kram's testimony with respect to future proceedings in this action.

c. Motion to Exclude Dr. Jill Ryer-Powder

Plaintiffs retained Dr. Jill Ryer-Powder to provide opinions on whether TCE is toxic and whether there is a pathway for TCE to enter homes in the PCA. Expert Report of Jill E. Ryer-Powder, PhD, DABT ("Ryer-Powder Report") [Dkt. No. 118-11]. Dr. Ryer-Powder holds a Ph.D. in toxicology from Rutgers University and is board certified in toxicology by the American Board of Toxicology. *Id.* at 3. Dr. Ryer-Powder opines that "inhalation of TCE can cause adverse health effects such as cancer and damage to developing fetuses." *Id.* at 12. In reaching this conclusion, she relies on reports by the Center for Disease Control's Agency for Toxic Substances and Disease Registry, the U.S. Environmental Protection Agency, the World Health Organization's International Agency for Research on Cancer, and the Department of Human Health Services. *Id.* at 11–14.

The parties disagree as to whether Dr. Ryer-Powder's opinion is a general causation opinion, and, if so, whether she provides sufficient independent analysis of the studies and reports on which

she relies. *See* Motion to Exclude Opinions of Dr. Jill Ryer-Powder ("Ryer-Powder Motion") [Dkt. No. 143] at 4; Opposition [Dkt. No. 152] at 6. The Court concludes that Dr. Ryer-Powder's opinion is *not* a general causation opinion because Plaintiffs are not claiming a specific adverse health impact caused by TCE exposure, and because Dr. Ryer-Powder's testimony is not being offered for that purpose.[9] For these reasons, more specific findings are not necessary at this posture.

Dr. Ryer-Powder was also retained to present evidence and provide opinions concerning complete exposure pathways from the release of chemicals from the Site to residents in off-site areas. Defendants challenge this portion of her opinion on the grounds that her report improperly applies the guidance from a Preliminary Endangerment Assessment Guidance Manual authored by the California EPA Department of Toxic Substances Control—a report that Defendants contend is not applicable here. Ryer-Powder Motion at 16.

The Court is unconvinced that these technical cavils are relevant to the broader issue of certification. Dr. Ryer-Powder is undoubtedly qualified to opine on these technical issues, and her opinions are exactly those that could assist the trier of fact in determining the broader context of possible health effects as well as the potential necessity and scope of mitigation. The Motion to Exclude her testimony is therefore denied.

d. Motion to Exclude Dr. Richard Layton

Plaintiffs retained Dr. W. Richard Laton "to evaluate and opine on: (1) the scope and nature of the subsurface chemicals of concern ("COC") as they relate to the groundwater plume leaving the Site, (2) the source of the groundwater contamination causing the Site plume, (3) the extent to which the subsurface contamination in the Site plume has been impacting the former and current residents in the area." Expert Report of W. Richard Laton, PhD ("Laton Report") [Dkt. No. 118-2] at 8. Dr. Laton holds a Ph.D. in hydrogeology from Western Michigan University and is currently an Associate Professor of Hydrogeology in the Department of Geological Sciences at California State University, Fullerton and an Adjunct Associate Professor at Western Michigan University,

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[9] To be clear, the Court finds ample evidence in the record of TCE's toxicity. That question cannot reasonably be disputed. Indeed, the literature is replete with studies on this point. *See, e.g.*, Motion, Ex. 34 at 11, 33 (citing studies); Ex. 32 at iv-v, 54 (same).

Department of Geological and Environmental Sciences. *Id.* at 8–9. He is also the President/Owner of Earth Forensics and has consulted on a "variety of issues and cases, including hydrogeology, hydrology, geology, and soil, soil vapor, and aquifer contamination problems." *Id.* at 9.

Defendants assert that Dr. Laton does not have the relevant expertise to opine on various technical topics, including vapor intrusion, the health effects of TCE exposure, and the source of the contamination. Motion to Exclude the Opinions of Dr. Richard Laton ("Laton Motion") [Dkt. No. 144] at 4–5, 7, 8–10. More specifically, Defendants challenge Dr. Laton's testimony that "[s]ince the groundwater impacted by the Northrop [Grumman] Plume is not presently used for drinking water, the most significant health threat from the Northrop [Grumman] Plume is vapor intrusion," Laton Report at 35, and his opinion that the "properties [are] at risk from adverse health effects from TCE vapor intrusion," *id.* at 46.

The Court is unconvinced. Dr. Laton's opinions arise directly out of his extensive experience as an expert on hydrogeology and his testimony concerning the health effects of TCE and vapor intrusion are tied to the environmental screening limits set by the relevant regulatory agencies. Indeed, in forming his source contamination opinion, Dr. Laton testified that he reviewed the data and underlying chemistry in the reports cited in his opinion and came to the same conclusions as those in the reports. *See* Deposition of Dr. Laton at 89:1-13; 91:12-24; *Cholakyan v. Mercedes-Benz, USA, LLC*, 281 F.R.D. 534, 544 (C.D. Cal. 2012) ("[A]n expert can appropriately rely on the opinions of others if other evidence supports his opinion and the record demonstrates that the expert conducted an independent evaluation of that evidence."); *Jerpe v. Aerospatiale*, No. CIV. S–03–555 LKK/DAD, 2007 WL 1394969, *6 (E.D. Cal. May 10, 2007) (crediting an expert's declaration that he "independently arrived" at his opinions despite "deposition testimony [that] was somewhat ambiguous on the issue of whether [expert] was merely relying on the same underlying data set produced at the direction of [another expert], or if he was relying on both that data set and [the other expert's] conclusions"). The Court can rely on his report for purposes of certification analysis.

e. Motion to Exclude Dr. Hugh Gorman

Dr. Hugh Gorman purports to testify on practices associated with the manufacture of printed circuit boards circa 1970, to summarize what is known about Litton's manufacturing process, and to

opine on whether those processes were the source of chlorinated solvents in the plume under the PCA. Expert Report of Hugh S. Gorman, PhD ("Gorman Report") [Dkt. No. 118-9] at 2. Dr. Gorman is a historian of industry, technology, and the environment. He holds a PhD in History and Policy from Carnegie Mellon University. *Id.* at 2. While working as a professor at Michigan Technological University, Dr. Gorman's research focused on "using historical case studies to provide insight into the development of industrial practices that are environmentally sustainable." *Id.* His publications include a book on this history of pollution control in the U.S. petroleum industry. *Id.* at 3.

Defendants argue that Dr. Gorman lacks the required expertise to proffer his opinion about the source of the contamination plume. Motion to Exclude Opinions of Dr. Hugh Gorman ("Gorman Motion") [Dkt. No. 145] at 5-6. Defendants also challenge the opinion on the grounds that Plaintiffs are using Dr. Gorman as a conduit to introduce otherwise inadmissible hearsay and that Dr. Gorman impermissibly parrots the opinions of Dr. Tonkin without any meaningful independent analysis. *Id.* at 11-13.

The Court concludes that Dr. Gorman does not proffer testimony beyond his expertise. But regardless, the Court does not rely on his report in deciding certification and therefore excluding his testimony at this stage would be premature.

f. Motion to Exclude Dr. Matthew Tonkin

The report of Dr. Matthew Tonkin is offered by Plaintiffs to evaluate the extent of groundwater contamination, estimate the TCE present in the subsurface, and determine the most likely geographic location and timing of the primary source of the contaminants. Expert Report of Matthew J. Tonkin, PhD ("Tonkin Report") [Dkt. No. 118-5] at 1-1. Dr. Tonkin is a hydrogeologist who has provided consulting services to public and private sector clients such as the U.S. Environmental Protection Agency and U.S. Department of Energy on "the sources, disposition, transport-and-fate, and remediation, of contamination found in soil, soil vapor, groundwater, and present as non-aqueous phase liquid (NAPL)." *Id.* Dr. Tonkin's opinion concludes, among other things, that the source of the TCE plume was waste product of circuit board manufacturing at 8020 Deering Avenue and those releases occurred between about 1968 and 1975. *Id.* at 1-3.

Defendants move to exclude Dr. Tonkin's testimony on the timing and source of the contaminants, arguing that Dr. Tonkin failed to properly calibrate his model and perform a sensitivity analysis, which makes his conclusions unreliable. Motion to Exclude Opinions of Dr. Matthew Tonkin ("Tonkin Motion") [Dkt. No. 147] at 12.

The Court rejects these challenges. Dr. Tonkin's analysis appears to be within established scientific protocols and of a nature that could be helpful to a trier of fact. Again, Defendants' criticisms go to the weight of the evidence and not to the admissibility of the report for purposes of certification. But, as with Dr. Gorman, the Court does not rely on Dr. Tonkin's testimony in deciding class certification and need not determine the weight to place on his opinions at this stage.

B. Motion for Class Certification

Plaintiffs' Motion seeks class certification of claims against Defendants for negligence, private nuisance, and trespass. Plaintiffs propose two classes: (1) a Mitigation Class, and (2) a Property Damage Class, each comprised of "[a]ll persons who own a single family or townhome within the PCA at the time of Class Certification." Motion at 11. Both classes exclude employees of Defendants as well as anyone who purchased a home with disclosure of contamination at their property from the 8020 Deering Avenue Site.

a. Rule 23(a) Prerequisites

The Court turns first to the requirements of Rule 23(a).

i. Numerosity

Rule 23(a)(1) requires that a class be sufficiently numerous such that it would be impracticable to join all members individually. There is no set number required to satisfy the numerosity requirement; a court must examine the specific facts of each case. *Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 330 (1980). Broadly, however, "courts find the numerosity requirement satisfied when a class includes at least 40 members." *Rannis v. Recchia*, 380 F. App'x 646, 651 (9th Cir. 2010) (citation omitted).

Here, Plaintiffs' PCA includes over 3,200 homes, likely translating to at least 3,200 individual class members. *See* Motion at 11-12. Joinder of this number would undoubtedly be prohibitively difficult. Plaintiffs' proposed class satisfies the numerosity requirement.

ii. Commonality

Rule 23(a)(2) requires that questions of law or fact be common to the class. "The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). The common question "must be of such a nature that it is capable of classwide resolution—which means that the determination of its truth or falsity will resolve an issue that is central to the validity of each of the claims in one stroke." *Dukes*, 564 U.S. at 350. The commonality requirement does not "mean that *every* question of law or fact must be common to the class; all that Rule 23(a)(2) requires is 'a single *significant* question of law or fact.'" *Abdullah v. U.S. Sec. Assocs., Inc*., 731 F.3d 952, 957 (9th Cir. 2013) (emphasis in original); *accord Dukes*, 564 U.S. at 359.

Here, the commonality requirement is met because the class action will resolve issues central to the validity of the claims, including (i) whether Litton's conduct at the Site caused TCE and PCE to be released and contaminate the groundwater; (ii) whether TCE contamination has caused injury to PCA properties in the form of financial damage; and (iii) whether exceedance of the TCE contamination threshold of 1.2 µg/L necessitates mitigation. As discussed further in the predominance inquiry, *infra* IV.B.b.i., each of Plaintiffs' claims requires the resolution of a question of law or fact that can (and should) be decided on a classwide basis.

iii. Typicality

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Typicality tests "whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same source of conduct." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (citation omitted). "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Castillo v. Bank of Am., N.A.*, 980 F.3d 723, 729 (9th Cir. 2020) (citation omitted). "[C]lass certification is inappropriate where a putative class representative is subject to unique defenses which threaten to

become the focus of the litigation." *Hanon*, 976 F.2d at 508 (citation omitted).

The Court finds the Behars meet the typicality requirement of Rule 23. Plaintiffs have submitted more than sufficient evidence to establish for certification purposes that the Behars are in the same position as the putative class members, have similar legal claims, and share common economic injuries by owning a home situated above the groundwater plume that could be subject to diminished value as a result of the contamination. There is nothing to indicate that the Behars have divergent claims or that other class members have different injuries.

Defendants nonetheless challenge this Rule 23 requirement on the ground that the Behars are subject to unique factual and legal defenses. Defendants contend that the Behars are atypical because their home is located over a clean water lens that prevents vapor intrusion into their home. Defendants also point to purported distinctions relating to Defendants' statute of limitations defense, namely, that the Behars do not recall receiving a fact sheet about the groundwater plume and that they purchased their home before the 2015 fact sheets were mailed. Opposition at 9.

Defendants' objections are meritless. The factual issue relating to the clear water lens is hotly contested by the parties and, in any case, irrelevant here given that the Plaintiffs' theory of damages (diminished value) does not depend on any experiential effects of the contamination. And Defendants have not shown that the Behars stand in any appreciably different position than other class members with respect to the amount of knowledge that they had when they purchased their property. In short, the record presented sufficiently establishes that the Behars' claims are "reasonably coextensive" with those of the class. Typicality is satisfied.

iv. Adequacy

Rule 23(a)(4) requires that the representative party "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). "This requirement is grounded in constitutional due process concerns: 'absent class members must be afforded adequate representation before entry of a judgment which binds them.'" *Evans v. IAC/Interactive Corp.*, 244 F.R.D. 568, 577 (C.D. Cal. 2007) (quoting *Hanlon*, 150 F.3d at 1020). A named plaintiff satisfies the adequacy test if she has no conflict of interest with other class members and if the named plaintiff will prosecute the action vigorously on behalf of the class. *Ellis*, 657 F.3d at 985. The Court sees no such conflict and finds

that the Behars and their counsel are equipped to prosecute the action vigorously for the class.

Defendants argue that the Behars are not adequate representatives because they have abandoned viable claims including medical monitoring, fear of cancer, and personal injury. Opposition at 10-11. These claims are potentially significant, Defendant argues, and therefore create a conflict between the Behars and class members with these claims. *Id*.

Not so. In general, Plaintiffs' "strategic decision to pursue those claims a plaintiff believes to be most viable does not render her inadequate as a class representative." *Painters & Allied Trades Dist. Council 82 Health Care Fund v. Takeda Pharm. Co. Ltd.*, 674 F. Supp. 3d 799, 817 (C.D. Cal. 2023) (quoting *Todd v. Tempur-Sealy Int'l, Inc.*, 2016 WL 5746364, at *5 (N.D. Cal. Sept. 30, 2016). Indeed, "[r]efusing to certify a class because the plaintiff decides not to make the sort of person-specific arguments that render class treatment infeasible would throw away the benefits of consolidated treatment." *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006).[10]

The Behars are adequate class representatives for purposes of Rule 23.

b. Rule 23(b)(3)

Having considered the prerequisites of Rule 23(a), the Court now addresses whether the proposed class satisfies the requirements of Rule 23(b)(3). Subdivision (b)(3) encompasses those cases "in which a class action would achieve economies of time, effort, and expense, and promote ... uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953, 958 (9th Cir. 2009) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997)). A class may be certified under this subdivision where common questions of law and fact predominate over questions affecting individual members, and where a class action is superior to other means to adjudicate the controversy. Fed. R. Civ. P. 23(b)(3).

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[10] The Court recognizes that whether class members can later bring individual claims for personal injury damages is an open question in this Circuit. *See, e.g.*, *Andren v. Alere, Inc.*, No. 16-cv-1255-GPC(AGS), 2017 WL 6509550, at *7 (S.D. Cal. Dec. 20, 2017) ("[T]he Ninth Circuit has not ruled on whether Plaintiffs' certification under Rule 23(b)(3) seeking damages would bar subsequent individual suits for another type of damages."). But to address this concern, courts can and do rely on the opt-out provisions of Rule 23(b)(3). *Id*. at *8 (collecting cases).

i. Predominance

The Rule 23(b)(3) predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) (citation omitted). While similar to commonality, the inquiry requires a heightened showing that facts and issues common to the class predominate over any individual issues that may be present. Fed. R. Civ. P. 23(b)(3); *Amchem Prods*., 521 U.S. at 624. But Rule 23(b)(3) requires a showing that common questions predominate, "not that those questions will be answered, on the merits, in favor of the class." *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 459 (2013). In assessing predominance, the court "is limited to resolving whether the evidence establishes that a common question is *capable* of classwide resolution, not whether the evidence in fact establishes that plaintiffs would win at trial." *Olean*, 31 F.4th at 666–67 (emphasis in original). A court does not have "license to engage in free-ranging merits inquiries at the certification stage" and therefore "cannot decline certification merely because it considers plaintiffs' evidence relating to the common question to be unpersuasive and unlikely to succeed in carrying the plaintiffs' burden of proof on that issue." *Id.* at 667.

1. Negligence

"In order to establish liability on a negligence theory, a plaintiff must prove duty, breach, causation, and damages." *Conroy v. Regents of Univ. of Cal*., 45 Cal. 4th 1244, 1250 (2009). All of these elements present common questions for purposes of predominance.

As to the issue of duty, "[e]veryone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person." Cal. Civ. Code § 1714. Under California law, courts presume the defendant owed the plaintiff a duty of care and then ask whether the circumstances "justify a departure" from that usual presumption. *Cabral v. Ralphs Grocery Co*., 51 Cal. 4th 764, 771 (2011). Factors that may bear on that question include the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to

the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved. *See Rowland v. Christian*, 69 Cal.2d 108, 112-13 (1968). In evaluating predominance, these "factors are evaluated at a relatively broad level of factual generality."[11] *Cabral*, 51 Cal. 4th at 772. Applying this standard, the Court finds that the existence and scope of a duty turns on issues susceptible to classwide proof. Indeed, Plaintiffs' negligence theory—that Defendants owed a duty to use reasonable care in handling, storing, disposing of, disclosing the presence of, and abating and managing the Site Contaminants—is precisely the kind of theory that presents common questions and should be adjudicated on a classwide basis. *See, e.g.,* SAC ¶¶ 59-62.

Second, the element of breach is particularly well suited for class treatment here. Assuming a duty exists, whether Defendants breached that duty can be established through common evidence of Litton's conduct leading to the contamination, as well as post-contamination conduct including testing, disclosure, and remediation efforts.

Causation arguably presents both common and individualized issues. "The causation element of a negligence claim generally has 'two aspects': (1) whether the defendant's action or inaction was a 'cause in fact' of the plaintiff's injury, also known as 'but for' causation; and (2) whether, based on 'the degree of connection between the conduct' and considerations of public policy, it would be 'unjust to hold [the defendant] legally responsible,' often referred to as 'proximate' causation." *Steinle v. United States*, No. 16-CV-02859-JCS, 2020 WL 60204, at *7 (N.D. Cal. Jan. 6, 2020), *aff'd*, 17 F.4th 819 (9th Cir. 2021) (quoting *State Dep't of State Hosps. v. Superior Court*, 61 Cal. 4th 339, 352−53 (2015)). Plaintiffs argue they can show causation through evidence of the migration, source, and presence of the contaminants in the proposed class

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[11] The Court need not consider the foreseeability of harm as to each individual class member as Defendants suggest. Opposition at 15-16; *Cabral v. Ralphs Grocery Co*., 51 Cal. 4th 764, 772 (2011) ("[A]s to foreseeability, we have explained that the court's task in determining duty 'is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed....' (emphasis in original) (citation omitted)).

area. Motion at 17; *see also id*. Ex. 12-13. The Court agrees that Defendants' role in the creation of the groundwater plume has the potential to be established with expert testimony regarding the source and migration of contaminants.

Defendants' response is that causation presents individualized issues because each class member will need to show that their particular vapor intrusion risk was not caused by other sources such as businesses nearby and that the diminution in their home value was not due to other factors. Opposition at 16-17. This argument is unpersuasive because, even on these issues, the purported individualized issues will have to be decided by reference to common evidence regarding these third party sources. Indeed, Defendants implicitly concede this point by referring to common evidence in their argument. *Id.*

Defendants also argue that causation questions relating to home value diminution will be individualized, and rely primarily on *Dep't of Fish & Game v. Superior Ct.*, in which the Court found "causation must be determined on an individual basis" because "the impact of the 2007 poisoning on property values will depend on the relative proximity of the properties in question to the lake and the myriad other factors that go into valuation of real property." 197 Cal. App. 4th 1323, 1358 (2011). But *Dep't of Fish & Game* is distinguishable. Here, Plaintiffs' expert reports purport to isolate the cause of property value diminution to a far greater degree than the plaintiffs in *Dep't of Fish & Game*.[12] Indeed, Plaintiffs' damages model for property value diminution *controls* for many individual characteristics of each property including differences in lot size, living area, age, and proximity to the contamination source. Reply at 5-6; Motion, Ex. 21 at 6-

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[12] Moreover, the class that Plaintiffs were trying to certify in *Dep't of Fish & Game v. Superior Ct.* was much broader than the one here. It included "[a]ll persons, entities and/or political subdivisions owning real property" in the area, *id*. at 1330-31—meaning homeowners *and* businesses as disparate as RV parks and jewelers, *id*. at 1344-45. And in addition to diminution in property value, Plaintiffs were seeking to recover for "lost property and sales tax revenues [and] lost economic development and economic growth." *Id*. at 1331. Thus, in addition to the broader class, Plaintiffs were asserting a much broader theory of economic harm. The Court reasonably found the real property losses among the class would necessarily vary depending on whether the property was used as a residence or business, and if a business, what kind. *Id*. at 1354. But the class here avoids those pitfalls by including only homeowners and asserting a narrower conception of economic harm.

8, 14. Of course, Defendants may—and likely will—challenge this aspect of causation by attacking the model itself, but this dispute still depends on common evidence.

As to other potential sources of contamination, both Plaintiffs and Defendants have put forth expert testimony that shows potential alternate sources of contamination near and within the PCA. *See, e.g.*, Motion, Ex. 12, Figure 26; Opposition, Ex. A3 at 92, Figure 24; *id.*, Ex. A12 at 1438–40. It seems likely, therefore, that Defendants will challenge causation with *common* evidence of other potential sources and by arguing Plaintiffs' evidence fails to take these other sources into account. But the vehicle for that type of challenge lies elsewhere. "When, as here, 'the concern about the proposed class is not that it exhibits some fatal dissimilarity but, rather, a fatal similarity—[an alleged] failure of proof as to an element of the plaintiffs' cause of action—courts should engage that question as a matter of summary judgment, not class certification.'" *Tyson Foods*, 577 U.S. at 457 (citation omitted). And, in any case, the Court finds that these individual inquiries would not overcome the common issues relating to duty and breach.

Finally, on the question of damages, discussed *supra* sections IV.B.b.i.5−6, common questions predominate because Plaintiffs have shown—sufficiently for this stage—that their damages models are consistent with their theory of liability.

In summary, the Court finds that the essential elements of Plaintiffs' negligence claim are all amenable to classwide treatment because common issues (and common proof) predominate throughout the analysis. The predominance requirement is met for this first claim.

2. Private Nuisance

Plaintiffs' second claim for private nuisance requires Plaintiffs to establish: (1) an interference with the use and enjoyment of property, (2) the interference caused the plaintiffs to suffer substantial actual damage, and (3) the interference is unreasonable. *San Diego Gas & Elec. Co. v. Superior Ct.*, 13 Cal. 4th 893, 937−38 (1996). The latter two factors are evaluated under an objective standard. *Id*. at 938-39.

The Court finds that common issues predominate on Plaintiffs' claim for private nuisance because each element can be established with classwide proof. The interference of which Plaintiffs complain is the presence of TCE on their property in excess of screening limits, which may be

established with common proof of the contamination, including through the expert testimony of Dr. Laton and Dr. Kram. *See* Motion, Exs. 12 and 16. And whether that interference is substantial and unreasonable under objective standards can be assessed by an evaluation of the diminution in market value to the home and evidence of the risk of and harms associated with TCE vapor intrusion.

In response, Defendants argue that impaired use and enjoyment of property is inherently individualized. Ordinarily, that would be true. But here, Plaintiffs' theory of harm is more tailored. Plaintiffs do not seek to certify a class based on *experiential* loss of use and enjoyment. In other words, the harm at the center of Plaintiffs' claim is not that Plaintiffs no longer allow their children to play in the backyard or eat fruit off their orange tree. It does not matter under Plaintiffs' theory whether residents inside the plume have changed their behavior because of the contamination. What matters is that—allegedly—their homes will be worth less. Individualized inquiries as to enjoyment simply do not factor in this analysis.

It is this distinction that separates this case from several of those in which nuisance claims have not been certified. For example, in *In re Delta Air Lines, Inc*., the Court declined to certify Plaintiffs' private nuisance claim "premised on the contention that the release of liquid jet fuel onto the property of each of the class members caused a foul odor that prevented them from the full use and enjoyment of their properties for several days." No. 20-CV-00786-JAK-SKx, 2023 WL 2347074, at *14 (C.D. Cal. Feb. 8, 2023). Plaintiffs' nuisance theory there depended on how long and to what extent the class members experienced the foul odor. The Court also found that to determine whether the presence of the fuel constituted a health risk, the trier of fact would need to know the amount of fuel on a given property. *Id*. at *15. Because there was significant variation in the amount of jet fuel dumped on each property, the Court found this was an individualized inquiry.

Similarly, in *City of San Jose v. Superior Court*, all real property owners in the flight pattern of San Jose Municipal Airport brought nuisance and inverse condemnation claims due to the loss of market value attributable to the experienced effects of aircraft noise, vapor, dust, and vibration. 12 Cal. 3d 447, 453 (1974). The Court found there was an insufficient community of interest because liability for nuisance was "predicated on variables like the *degree* of noise, vapor, and vibration," *id.* at 462 (emphasis added), and the various diverse uses of the property owners, which included single-

family residences, warehouses, office buildings, and farmed and vacant land, *id*. at 461.

Again, Plaintiffs' theory here is different because the harm depends not on the degree of vapor intrusion in a given household, but, instead, on the common exceedance of the environmental screening limit across the PCA. Plaintiffs' claim is that a TCE level exceeding that threshold is a substantial and unreasonable interference resulting in economic harm.

Defendants also rely on *Navarro v. Exxon Mobil Corp*., in which the Court decertified the private nuisance claims on similar facts finding that the Court must look household by household to assess the impact on use and enjoyment. No. 17-cv-2477 DSF (SKX), 2022 WL 22248790, at *13 (C.D. Cal. July 5, 2022). The Court explained that "there is simply no common injury that would overcome the necessary finding that litigation would be better conducted on behalf of a class rather than by individual named parties." *Id.* The classes in *Navarro* included both renters and owners of property. Renters, by nature as mere possessors of property, have claims that are limited to their experience on the land—how they use and enjoy the property. These interests are inherently individualized and differ from owners. The classes in *Navarro* also included "commercial properties that are not used for the same duration as residential properties." *Id*. at *14.

Here, by contrast, Plaintiffs' theory of injury is sufficiently discrete that it is shared amongst the class. The harm Plaintiffs allege here is that their homes are worth less because they are sitting atop a contaminated groundwater plume. Dr. Boyle's testimony attempts to measure this diminution of value using common evidence. There is also the harm associated with the contamination itself, which Plaintiffs argue can be remedied by mitigation. As evidence of this injury, Plaintiffs proffer environmental screening limits and results showing the groundwater contamination exceeds such limits, historical evaluation and analysis of the Site, as well as reports and testimony concerning vapor intrusion and the health effects associated with TCE. *See, e.g*., Motion, Exs. 5, 9-13, 23, 27, 30, 33-34.

The Court finds common issues predominate as to Plaintiffs' private nuisance claim.

3. Trespass

Plaintiffs allege that Defendants trespassed upon their land by causing TCE to enter into their properties without permission. "Trespass is an unlawful interference with possession of property."

Staples v. Hoefke, 189 Cal. App. 3d 1397, 1406 (1987). "The elements of trespass are: (1) the plaintiff's ownership or control of the property; (2) the defendant's intentional, reckless, or negligent entry onto the property; (3) lack of permission for the entry or acts in excess of permission; (4) harm; and (5) the defendant's conduct was a substantial factor in causing the harm." *Ralphs Grocery Co. v. Victory Consultants, Inc.*, 17 Cal. App. 5th 245, 262 (2017). For the entry of an imperceptible substance to be a trespass, the substance "must either (1) 'deposit ... particulate matter upon the plaintiffs' property' or (2) cause 'actual physical damage thereto'…." *Palmisano v. Olin Corp*., No. C-03-01607 RMW, 2005 WL 6777560, at *12 (N.D. Cal. June 24, 2005) (citing *Wilson v. Interlake Steel Co*., 32 Cal. 3d 229, 233 (1982); *San Diego Gas*, 13 Cal.4th at 936).

Of the required elements, Defendants only argue there is no classwide proof that could show soil vapor intrusion deposited particulate matter on Plaintiffs' property or caused physical damage. But Plaintiffs put forward expert testimony, such as that of Dr. Kram and Dr. Laton, on the presence of TCE contamination in the groundwater, soil, and soil vapor of the PCA. Defendants are free to contest this evidence, but under these experts' models, the location and extent of TCE contamination and whether it reaches the homes above the plume are subject to common proof.

Defendants also take issue with the fact that the class is comprised of owners of homes rather than all possessors—arguing that the Court must determine individually whether each class member has a possessory property interest. But "an out-of-possession property owner may recover for an injury to the land by a trespasser which damages the ownership interest." *Smith v. Cap Concrete, Inc*., 133 Cal. App. 3d 769, 774–75 (Ct. App. 1982) (citations omitted). "[T]he inquiry in a case involving unlawful intrusion on property rights should focus upon the nature of the injury and the damages sought … ." *Id*. Clearly, the Property Damage Class centers on a harm to an ownership interest. Characterizing harm to the Mitigation Class is more complicated. But even if Plaintiffs can only show harm to a possessory interest for the Mitigation Class, determining whether each owner is also a possessor of the property is an individual inquiry that does not overwhelm the common questions.

The Court finds that common issues predominate as to Plaintiffs' trespass claim.

4. Defendants' Statute of Limitations Defense

Defendants contend that Plaintiffs' claims are barred by the statute of limitations and argue adjudicating this defense presents individualized questions that predominate over common ones. The Court disagrees. While it is true that a statute of limitations defense may require individualized inquiries, doing so raises common questions capable of classwide resolution, and the individualized questions that *are* presented do not predominate.

Courts have long recognized this principle. "The existence of a statute of limitations issue does not compel a finding that individual issues predominate over common ones." *Williams v. Sinclair*, 529 F.2d 1383, 1388 (9th Cir. 1975); *see also Arthur Young & Co. v. U.S. Dist. Court*, 549 F.2d 686, 696 (9th Cir. 1977) (holding it was not error to certify the class and separate out the statute of limitations issues for individual adjudication at the end of trial). Indeed, "[c]ourts have been nearly unanimous ... in holding that possible differences in the application of a statute of limitations to individual class members, including the named plaintiffs, does not preclude certification of a class action as long as the necessary commonality and, in a 23(b)(3) class action, predominance, are otherwise present." *Schramm v. JPMorgan Chase Bank, N.A.*, 2011 WL 5034663, at *10 (C.D. Cal. Oct. 19, 2011) (quoting *In re Energy Sys. Equip. Leasing Sec. Litig.*, 642 F. Supp. 718, 752–53 (E.D.N.Y. 1986)).

Defendants argue *O'Connor* compels a different result. *O'Connor v. Boeing N. Am., Inc.*, 311 F.3d 1139 (9th Cir. 2002). *O'Connor* was an environmental contamination class action. The Plaintiffs in *O'Connor* alleged the hazardous substances released from nuclear and rocket testing facilities near their homes caused latent illnesses. *Id.* at 1143. However, Plaintiffs' claims were barred by the statute of limitations unless Plaintiffs could show the discovery rule[13] tolled their

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[13] Under California law, "a cause of action accrues at the time when the cause of action is complete with all of its elements." *Fox v. Ethicon Endo-Surgery, Inc.*, 35 Cal. 4th 797, 806 (2005) (citation omitted). Because "the last element to occur is generally, as a practical matter, the injury to the future plaintiff," the statute of limitations typically begins to run on the date of the plaintiff's injury. *Id.* However, California's "discovery rule ... delays accrual until the plaintiff has, or should have, inquiry notice of the cause of action." *Id.* at 807. Under this rule, a cause of action accrues and the statute of limitations begins to run when a plaintiff "at least suspects a factual basis, as opposed to a legal theory, for its elements, even if he lacks knowledge thereof—when, simply put, he at least 'suspects ... that

claims. "Plaintiffs have the burden of proof at trial to establish that they are entitled to the benefit of the discovery rule … ." *Id*. at 1150. They must "explain, and support by way of evidence, how they discovered their claims." *Id*. at 1157. In *O'Connor*, a subset of the Plaintiffs failed to put forward this evidence,[14] and therefore Defendant was entitled to summary judgment on their claims.

Defendants contend there is no way for Plaintiffs to meet their burden on the discovery rule with common evidence. Opposition at 18. That is an issue for trial. But this individual inquiry does not defeat predominance. In fact, Defendants' statute of limitations defense also presents several issues that can be adjudicated classwide. For example, a series of fact sheets were circulated throughout the proposed class area disclosing the contamination and cleanup efforts, and Defendants argue these fact sheets put homeowners on notice of their claims. *Id*. at 18-19. Whether the content in those fact sheets is sufficient to put a reasonable person on notice of their claims is a common question. Plaintiffs also allege that Defendants fraudulently concealed information that would have put class members on notice of their claims, which would toll the statute of limitations if true. *See, e.g.*, SAC ¶¶ 29, 36; Reply at 7-8. Whether Defendants' conduct amounts to fraudulent concealment similarly can be determined for the whole class based on common evidence.

That the discovery rule is at issue here does not, as a matter of law, prevent the Court from finding that common issues predominate. *See Cameron v. E. M. Adams & Co*., 547 F.2d 473, 478 (9th Cir. 1976) (finding that even where the discovery rule was at issue, "the presence of individual issues of compliance with the statute of limitations here does not defeat the predominance of the

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someone has done something wrong' to him ...." *Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 397 (1999) (quoting *Jolly v. Eli Lilly & Co.*, 44 Cal.3d 1103, 1110 (1988)). "Plaintiffs are required to conduct a reasonable investigation after becoming aware of an injury, and are charged with knowledge of the information that would have been revealed by such an investigation." *Fox*, 35 Cal. 4th at 808.

[14] To meet their burden on summary judgment, the *O'Connor* plaintiffs cited a UCLA study released on September 11, 1997, which concluded that the employees at one of the testing facilities were at an increased risk of cancer. *Id*. at 1145. But a subset of plaintiffs filed their claims prior to the release of the 1997 UCLA study. *Id*. at 1157. And while plaintiffs' brief explained that these plaintiffs were aware of the study prior to its release, their declarations did not include such an explanation. *Id*. Therefore, the Ninth Circuit granted summary judgment for Defendant as to these plaintiffs because they failed to put forward *any* evidence explaining how they discovered their claims. *Id*.

common questions"); *McClure v. State Farm Life Ins. Co*., 341 F.R.D. 242, 254 (D. Ariz. 2022) (explaining a statute of limitations defense did not preclude a finding of predominance even where it is Plaintiff's burden to establish the discovery rule applied to toll the statute of limitations). Here, even if Plaintiffs must individually explain, and support with evidence, how they discovered their claims, such an individualized inquiry does not—in the context of this case—defeat predominance.

5. Damages: Economic Property Damages

Where damages are sought on a classwide basis, a plaintiff must show that their calculation is subject to common proof. *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013). Such calculations "need not be exact." *Id.* However, at the class-certification stage, "any model supporting a plaintiff's damages case must be consistent with its liability case ... [and] courts must conduct a rigorous analysis to determine whether that is so." *Id.* at 1433 (citation omitted). Even so, in the Ninth Circuit, "damage calculations alone cannot defeat certification." *Yokoyama v. Midland Nat. Life Ins. Co*., 594 F.3d 1087, 1094 (9th Cir. 2010); *see also Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975) ("The amount of damages is invariably an individual question and does not defeat class action treatment.").

As discussed in the context of Defendant's Motion to Strike Dr. Boyle's testimony, at this stage of litigation (and as Dr. Boyle's analysis currently stands) the Court places little weight on Dr. Boyle's assessment that properties in the PCA are devalued 9.4% due to the contamination. But confidence in this conclusion is not required at this juncture. Rather, the Court must decide whether the damages model is consistent with Plaintiffs' theory of liability. The Court concludes that it is.

The Court cannot, and does not, decide at this stage whether Dr. Boyle's methodology will measure damages with exacting precision. But that is not the question presented here. What is important is that Boyle's methodology demonstrates to the Court's satisfaction that it is possible to measure the harm to individual plaintiffs based on common proof. "At class certification, plaintiff must present a likely method for determining class damages, though it is not necessary to show that his method will work with certainty at this time." *Chavez v. Blue Sky Nat. Beverage Co.*, 268 F.R.D. 365, 379 (N.D. Cal. 2010) (citation omitted). Because the Court has determined the testimony meets this threshold, the specific criticisms and challenges raised with this methodology bear on the weight

of the evidence, not on whether the calculation of damages is subject to common proof.

6. Damages: Property Mitigation

Plaintiffs' property mitigation class is premised on the assertion that, because TCE levels in groundwater throughout the PCA exceed threshold levels, mitigation is required to prevent toxic vapors from entering homes. Defendants argue that, given the variation of TCE levels throughout the PCA, Plaintiffs' proposal to require mitigation for all homes—whether needed to prevent vapor intrusion or not—is overbroad and bars certification. Opposition at 21.

Plaintiffs' response seems to be that mitigation of all homes is not overbroad because it will be cheaper than determining (through testing) which exact homes actually need it. Whether they will be successful on this theory is an open question, but the Court finds it is consistent with Plaintiffs' theory of liability. *Comcast Corp*., 569 U.S. at 35; *see also Basin Oil Co. of Cal. v. Baash-Ross Tool Co*., 125 Cal. App. 2d 578, 606 (1954) (citing *Nat. Soda Prod. Co. v. City of Los Angeles*, 23 Cal. 2d 193, 200–01 (1943)) ("There is no fixed, inflexible rule for determining the measure of damages for injury to, or destruction of, property; whatever formula is most appropriate to compensate the injured party for the loss sustained in the particular case will be adopted."). Because Plaintiffs put forward evidence about the vapor intrusion pathways, need for mitigation, and comparative expense and feasibility of remediation as common proof of their damages theory, this issue does not preclude certification at this time. *See generally* Motion, Exs. 1, 16; *see also id*. Ex. 35 at 110:2–24.

Defendants also argue that Plaintiffs' Mitigation Class fails because the remedy is not available on Plaintiffs' permanent nuisance and trespass claims. *Phila. Indem. Ins. Co. v. Broan-Nutone, LLC*, No. 12-cv-01811, 2015 WL 1737697, at *3 (N.D. Cal. Apr. 13, 2015) (A plaintiff may "recover the lesser of (1) the cost of repairing the property to its state prior to the tort or (2) the diminution in the fair market value."). But Defendants' argument conflates abatement and mitigation. As to the Mitigation Class, Plaintiffs are not asking that the groundwater contaminants be cleaned up (or abated).[15] Rather, Plaintiffs are arguing they are entitled to damages to "prevent[]

[15] *See Starrh & Starrh Cotton Growers v. Aera Energy LLC*, 153 Cal. App. 4th 583, 599 (2007) ("In

the harmful impacts" of the contamination, which Plaintiffs theorize is permanent and therefore entitles them to such damages. Reply at 9. Defendants provide no authority for the proposition that this form of relief is unavailable to Plaintiffs.[16]

ii. Superiority

Finally, the Court considers whether a class action would be superior to individual suits. "The purpose of the superiority requirement is to assure that the class action is the most efficient and effective means of resolving the controversy." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010) (citation omitted). "A class action is the superior method for managing litigation if no realistic alternative exists." *Valentino v. Carter-Wallace, Inc*., 97 F.3d 1227, 1234–35 (9th Cir. 1996); *Zinser v. Accufix Research Inst., Inc*., 253 F.3d 1180, 1190 (9th Cir. 2001).

Rule 23(b)(3) provides a non-exhaustive list of factors relevant to the superiority analysis, including: "(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3).

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this context, abatement is simply another word for restoration. In order to abate or restore the subsurface trespass, the contamination must be cleaned up."); *id*. at 589 (abatement damages are "those designed to return the property to its native condition"); *Mangini v. Aerojet-Gen. Corp*., 12 Cal. 4th 1087, 1098 (1996) (explaining "an abatable [] nuisance is one which as a practical matter considering hardship and cost can be removed" and referring to abatement as "decontamination").

[16] The Court is also persuaded by the reasoning of other courts that have found common questions predominate for punitive damages because the analysis "focuses on the conduct of the defendant and not the individual characteristics of the plaintiffs." *Ellis v. Costco Wholesale Corp*., 240 F.R.D. 627, 643 (N.D. Cal. 2007), *aff'd in part, vacated in part*, 657 F.3d 970 (9th Cir. 2011) (citation omitted); *see also Barefield v. Chevron, U.S.A., Inc*., No. C 86-2427 THE, 1988 WL 188433, at *3 (N.D. Cal. Dec. 6, 1988) ("Because the purpose of punitive damages is not to compensate the victim, but to punish and deter the defendant, any claim for such damages hinges, not on facts unique to each class member, but on the defendant's conduct toward the class as a whole." (citation omitted)). The assessment of Defendants' culpability for the alleged harms requires no individualized questions and is well suited for class treatment.

The first factor is the interest of each member in "individually controlling the prosecution or defense of separate actions." Fed. R. Civ. P. 23(b)(3)(A). Homeowners may be unlikely to independently assert claims of this nature because the costs of individual litigation may exceed the value of individual recovery. In particular, the claims at issue here require expert analysis, which makes this type of litigation especially costly for individual plaintiffs. A class action, therefore, may be the only realistic vehicle for homeowners to recover on their claims.

The second factor concerning the extent of related litigation that has already begun "is intended to serve the purpose of assuring judicial economy and reducing the possibility of multiple lawsuits." *Zinser*, 253 F.3d at 1191 (citation omitted). The Court is not aware of—nor have either of the parties identified—any existing litigation by members of the potential class.

The third factor asks the Court to evaluate the desirability of concentrating claims in this particular forum. For example, courts sometimes find it undesirable to hear large, nationwide class actions in a particular forum when the potential plaintiffs, witnesses, and evidence are located across the country. *Id.* at 1191–92 (citing *Haley v. Medtronic, Inc.*, 169 F.R.D. 643, 653 (N.D. Cal. 1996)). By their nature, Plaintiffs' claims are anchored to a specific geographical area, which is within this District. Therefore, the Court finds this a desirable forum for concentrating claims.

Finally, under the fourth factor, "when the complexities of class action treatment outweigh the benefits of considering common issues in one trial, class action treatment is not the 'superior' method of adjudication." *Id.* at 1192 (citation omitted). "If each class member has to litigate numerous and substantial separate issues to establish his or her right to recover individually, a class action is not 'superior.'" *Id.* For the reasons discussed with respect to commonality and predominance, the likely difficulties in managing this class action do not outweigh the benefits of classwide adjudication.

The Court concludes a class action is superior to other available methods for fair and efficient adjudication of the controversy.

V. CONCLUSION

Plaintiffs' Motion for Class Certification is ***granted***.

Dated: July 1, 2024

Hernán D. Vera
United States District Judge