

2025CA40060

NOV 10, 2025 02:45 PM



Kim Windle James, Clerk
Chattooga County, Georgia

IN THE STATE COURT OF CHATTOOGA COUNTY
STATE OF GEORGIA

THE TOWN OF LYERLY, GEORGIA,

Plaintiff,

v.

3M COMPANY, et al.,

Defendants.

CIVIL ACTION FILE NO.:
24SCA4052

**NOTICE OF FILING COURTESY COPIES OF
PRIOR PFAS ORDERS AND RELATED FILINGS**

COMES NOW, the Town of Lyerly, Georgia (“Lyerly”), and files this Notice of Filing Courtesy Copies of Prior PFAS Orders and Related Filings, which are contained in the following Appendices:

Appendix A	<i>City of Rome, Georgia v. 3M Co. et al.</i> , No. 19-CV-02405-JFL003 (Floyd Cty. Sup. Ct. Dec. 17, 2020) (Order Denying Shaw and Mohawk’s Motion to Dismiss Rome’s Second Amended Complaint).
Appendix B	<i>City of Rome, Georgia v. 3M Co. et al.</i> , No. 19-CV-02405-JFL003 (Floyd Cty. Sup. Ct.) (Mohawk’s Motion to Dismiss the City of Rome’s Second Amended Complaint).
Appendix C	<i>City of Rome, Georgia v. 3M Co. et al.</i> , No. 19-CV-02405-JFL003 (Floyd Cty. Sup. Ct. Oct. 25, 2022) (Order Denying Dalton Utilities’ Motion to Dismiss).
Appendix D	<i>City of Rome, Georgia v. 3M Co. et al.</i> , No. 19-CV-02405-JFL003 (Floyd Cty. Sup. Ct. Apr. 5, 2022) (Order Denying Daikin’s Motion to Dismiss).
Appendix E	<i>The Water Works and Sewer Board of the City of Gadsden, Alabama v. 3M Company, Inc., et al.</i> , No. 31-CV-2016-900676

(Etowah Cty. Ala. Cir. Ct. Aug. 13, 2018) (Order Denying Defendants' Dispositive Motions).

Respectfully submitted this 7th day of October, 2024.

DAVIS LUCAS CARTER, LLP

210 East 2nd Ave., Suite 301
Rome, GA 30161
Phone No.: 706-842-7555
adavis@davislucascarter.com

/s/ J. Anderson Davis
J. Anderson Davis
Georgia Bar No. 211077
Counsel for the Town of Lyerly, Georgia

**MCCAMY, PHILLIPS, TUGGLE &
FORDHAM, LLP**

P.O. Box 1105
Dalton, GA 30722
Phone No.: 706-278-4499
rsmalley@mccamylaw.com

/s/ Robert H. Smalley, III
Robert H. Smalley, III
Georgia Bar No. 653405
Counsel for the Town of Lyerly, Georgia

FRIEDMAN, DAZZIO & ZULANAS, P.C.

3800 Corporate Woods Drive
Birmingham, AL 35242
Phone No.: 205-278-7000
mconn@friedman-lawyers.com
lpatterson@friedman-lawyers.com
ewright@friedman-lawyers.com
mgitschier@friedman-lawyers.com

/s/ Matt Conn
Matt Conn
Admitted pro hac vice
Lee Patterson
Admitted pro hac vice
Ethan Wright
Admitted pro hac vice
Madison M. Gitschier
Admitted pro hac vice

Appendix A

IN THE SUPERIOR COURT OF FLOYD COUNTY
STATE OF GEORGIA

FILED IN OFFICE

THE CITY OF ROME, GEORGIA,

Plaintiff,

v.

3M COMPANY, et al.,

Defendants.

DEC 17 2020

CIVIL ACTION FILE

NO.: 19CV02405JFL003

CLERK

**ORDER ON DEFENDANTS' MOTIONS TO DISMISS SECOND AMENDED
COMPLAINT, FOR JUDGMENT ON THE PLEADINGS, AND/OR FOR
SUMMARY JUDGMENT**

The above matter came before this Court on various Defendants' Motions to Dismiss Plaintiff's Second Amended Complaint, for Judgment on the Pleadings, and/or for Summary Judgment¹ as follows:

1. Defendants Aladdin Manufacturing Corporation's, Mohawk Carpet, LLC's, and Mohawk Industries, Inc.'s Motion to Dismiss Plaintiff's Second Amended Complaint and Memorandum in Support, filed on April 29, 2020;
2. Shaw Industries, Inc. and Shaw Industries Group, Inc.'s Motion to Dismiss for Lack of Subject Matter Jurisdiction, filed on May 1, 2020;
3. Defendant The Dixie Group, Inc.'s Motion to Dismiss, filed on May 14, 2020;
4. Lexmark Carpet Mill's Motion to Dismiss Second Amended Complaint and Memorandum of Law in Support, filed on May 14, 2020;
5. Tarkett USA Inc.'s Motion to Dismiss Second Amended Complaint and Memorandum of Law in Support, filed on May 18, 2020;
6. Defendants Syntrex, LLC and Syntrex MFG's Motion to Dismiss, filed on May 29, 2020;

¹ Defendant Add Bac, Inc. filed a Request for Oral Hearing on its Motion to Dismiss and Alternative Motion for Summary Judgment, filed on April 23, 2020, pursuant to Uniform Superior Court Rule 6.3. The hearing has not yet taken place, and this Order does not apply to Add Bac, Inc.'s Motion.

7. Defendant Milliken & Company's Joinder with Codefendants' Motion to Dismiss Plaintiff's Second Amended Complaint, filed on June 12, 2020;
8. Defendant Mannington Mills Inc.'s Motion to Dismiss Plaintiff's Second Amended Complaint, filed on June 12, 2020;
9. Defendant Invista S.À.R.L.'s Motion to Dismiss Plaintiff's Second Amended Complaint and Memorandum in Support, filed on June 12, 2020;
10. Defendant Engineered Floors, LLC's Motion to Dismiss Plaintiff's Second Amended Complaint and Incorporated Brief in Support, filed on June 15, 2020;
11. Defendants Shaw Industries, Inc.'s and Shaw Industries Group, Inc.'s Motion for Judgment on the Pleadings, filed June 18, 2020;
12. Defendant Indian Summer Carpet Mills, Inc.'s Motion to Dismiss Plaintiff's Second Amended Complaint, or Alternatively, Motion for Summary Judgment, filed on May 13, 2020; and
13. Defendants Chem-Tech Finishers, Inc.; Global Textile Services, LLC; and Premier Polymers, LLC's Motion to Dismiss, filed on August 13, 2020.

These motions are referred to collectively as "Defendants' Motions." While a hearing has not been held on these motions, the parties have extensively briefed the issues raised in Defendants' Motions. Further, Uniform Superior Court Rule 6.3 provides in pertinent part that "all motions in civil actions, including those for summary judgment, shall be decided by the court without oral hearing, except motions for new trial and motions for judgment notwithstanding the verdict." Ga. Unif. Super. Ct. R. 6.3.

After careful review and consideration of the motions, arguments, briefs, responses, reply brief, verified pleadings, and exhibits of the parties, Defendants' above-listed Motions are **HEREBY DENIED.**

IT IS SO ORDERED, this 17 day of December, 2020.



J. Bryant Durham, Chief Judge
Floyd County Superior Court
Rome Judicial Circuit

Prepared and presented by:

**BRINSON, ASKEW, BERRY, SEIGLER,
RICHARDSON & DAVIS, LLP**

/s/ J. Anderson Davis

J. ANDERSON DAVIS

Georgia Bar No. 211077

A. FRANKLIN BEACHAM III

Georgia Bar No. 043743

SAMUEL L. LUCAS

Georgia Bar No. 142305

LEE B. CARTER

Georgia Bar No. 595903

SARAH C. MARTIN

Georgia Bar No. 440539

P.O. Box 5007

Rome, GA 30162-5007

Phone: 706.291.8853

Fax: 706.234.3574

adavis@brinson-askew.com

fbeacham@brinson-askew.com

slucas@brinson-askew.com

lcarter@brinson-askew.com

smartin@brinson-askew.com

Attorneys for Plaintiff

The City of Rome, Georgia

**FRIEDMAN, DAZZIO, ZULANAS
& BOWLING, P.C.**

/s/ Jeffrey E. Friedman

JEFFREY E. FRIEDMAN

LEE T. PATTERSON

MATT D. CONN

CARMEN E. WEITE

Admitted Pro Hac Vice

3800 Corporate Woods Drive

Birmingham, AL 35242

Phone: 205.278.7000

Fax: 205.278.7001

Attorneys for Plaintiff

The City of Rome, Georgia

Appendix B

IN THE SUPERIOR COURT OF FLOYD COUNTY
STATE OF GEORGIA

THE CITY OF ROME, GEORGIA	)	
	)	
Plaintiff,	)	CIVIL ACTION NO.
	)	19CV02405JFL003
v.	)	
	)	
3M COMPANY, <i>et al.</i> ,	)	
	)	
Defendants.	)	
_____	)	

**DEFENDANTS ALADDIN MANUFACTURING CORPORATION'S,
MOHAWK CARPET, LLC'S, AND MOHAWK INDUSTRIES, INC.'S
MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT
AND MEMORANDUM IN SUPPORT**

The City of Rome filed its Second Amended Complaint ("SAC") in an attempt to remedy flaws in its original Complaint that several Defendants identified in motions to dismiss. However, Rome's legal claims in the SAC suffer from the same deficiencies as before and should still be dismissed.

First and foremost, Rome's claims fail because they are barred by Georgia's Public Services Doctrine. Georgia law prohibits municipalities from recovering costs associated with providing a public service unless one of a few limited exceptions apply. Rome filed this lawsuit to recover damages related to the treatment of drinking water—a public service it provides its constituents. Though Rome tries to cartwheel into the exceptions through new allegations in the SAC, it cannot save its claims from the Public Services Doctrine's preclusive effect. The Public Services Doctrine can lead to harsh results, but Georgia courts recognize "reallocat[ion] [of] how those costs are spread necessarily implicates fiscal policy, a matter best left to the legislature and

its public deliberative processes, rather than the court.” *Walker Cty. v. Tri-State Crematory*, 284 Ga. App. 34, 37, 643 S.E.2d 324 (2007) (citation omitted). The bar is absolute and strict.

Even if some of Rome’s claims do survive the Public Services Doctrine, Rome fails to plead facts establishing liability on the part of the Aladdin Manufacturing Corporation, Mohawk Industries, Inc., or Mohawk Carpet, LLC (the “Mohawk Defendants”). Rome lodges serious and specific allegations against defendant chemical manufactures (3M and DuPont) that allegedly knew of certain perfluorinated chemicals’ (“PFCs”) toxicity or paid handsomely to resolve PFC-related liability. *See* SAC ¶¶ 65-78. Rome simply predicates its negligence-based claims against the Mohawk Defendants on allegations made “on information and belief,” *id.* ¶¶ 79, 81, while ignoring altogether Dalton Utilities’ potential intervening effect. That is insufficient under Georgia law.

Rome’s non-negligence claims against the Mohawk Defendants also fail. Rome lumps all of the chemical manufacturers and the carpet manufacturers together and seeks to compel them all to pay for a new water treatment facility. Not all defendants are the same, however, and the differences between them are material to whether a viable claim exists against each. Rome’s claim for punitive damages is a prime example. Though Rome alleges all kinds of nefarious actions taken by the chemical manufacturers, it alleges that the Mohawk Defendants merely sent wastewater from their manufacturing operations in Dalton for treatment and disposal in accordance with a state-issued permit. Permit compliance does not equate to wantonness. Because Rome’s other non-negligence claims suffer similar fatal flaws, they too should be dismissed.

SUMMARY OF ALLEGATIONS

The SAC adds new defendants and new allegations, but its crux remains the same: chemical and carpet manufacturers allegedly contaminated Rome’s drinking water supply with certain

perfluorinated compound (‘‘PFCs’’).¹ SAC ¶¶ 1, 51. Specifically, Rome contends that PFC manufacturers (e.g., 3M and DuPont) sold PFCs to carpet manufacturers (e.g., the Mohawk Defendants). *Id.* ¶¶ 3-4, 49. These carpet manufacturers in turn used the PFCs at their facilities in and around Dalton, Georgia, and then sent wastewater containing the PFCs to a municipal wastewater treatment facility. *Id.* That facility, Dalton Utilities, then treated the wastewater and land-applied it across its 9,800-acre Land Application System pursuant to a ‘‘No Discharge Permit’’ issued by the Georgia EPD. *Id.* ¶ 51. Sometime thereafter, that treated, land-applied wastewater containing PFCs allegedly migrated to and through various media into the Conasauga River, then the Oostanaula River, and then to Rome’s water intake site. *Id.* ¶¶ 2-4, 52-53.

Rome does not allege any damages related to the cleanup or abatement of PFCs in the Oostanaula River itself—or any other surface water for that matter. *See id.* ¶¶ 88-90. Rather, Rome alleges that the PFCs have caused it to incur various economic damages including past and future monitoring and testing expenses, lost revenues and profits, and other related expenses. *Id.* ¶ 90.

Rome contends two groups of defendants are liable for these damages: (i) PFC manufacturers; and (ii) carpet manufacturers. Rome packs the SAC full of allegations about 3M and DuPont’s historical manufacturing practices, their cover-up of scientific testing suggesting certain PFCs could be toxic to humans, and the hefty penalties they had to pay to resolve alleged PFC liability (3M: \$850 million; DuPont: \$10.25 million). *See id.* ¶¶ 65-78. In stark contrast, Rome simply alleges ‘‘on information and belief’’ that the carpet manufacturing defendants (as a whole

¹ Specifically, Rome’s new allegations that specifically relate to the Mohawk Defendants are: (i) Rome ‘‘owns property in Floyd County through which the Oostanaula River flows, and Rome has a proprietary interest in the water,’’ *id.* ¶ 13; (ii) a Mohawk Defendant discharged untreated process water from a facility in Dalton, Georgia into Drowning Bear Creek in August 2016, *id.* ¶ 51; and (iii) a Mohawk Defendant discharged 600 gallons of a spinfinish chemical into a stormwater drain in March 2019. *Id.*

and without differentiation) “have long been aware of the persistence and toxicity of PFCs . . . at least as the result of communications with” 3M, DuPont, and others. *Id.* ¶ 79. Rome also alleges “on information and belief” that the Mohawk Defendants “knew or should have known that PFCs were potentially harmful.” *Id.* ¶¶ 79, 81.

While making these allegations, Rome ignores altogether that Dalton Utilities serves as a critical intermediary between the carpet manufacturers and Rome. *See id.* ¶¶ 49-51. The carpet manufacturing defendants send their wastewater to Dalton Utilities for treatment in accordance with its the Georgia Department of Natural Resources Environmental Protection Division (“EPD”) “No Discharge Permit” and application across 9,800 acres of land. Among other things, that permit requires: (1) treated water cannot be discharged directly into a river, lake, or other ground water, Section 12; and (2) “ground water leaving the land application system boundaries must not exceed the maximum contaminant levels [MCL] for drinking water,” Section 12.²

Rome also does not allege that PFCs in its water supply exceed any MCL—“the maximum permissible level of a contaminant in water which is delivered to any user of a public water system,” *see* 40 C.F.R. § 141.2. That’s because EPA has not set an MCL for any PFC. EPA has only issued a health advisory for two PFCs: PFOA and PFOS. SAC ¶ 60 (noting the Health Advisory of 70 parts per trillion).³ In other words, neither the federal nor the state government has

² *See* Georgia Department of Natural Resources, Letter RE: Dalton-Utilities Riverbend at 3 (April 30, 2007),

https://archive.epa.gov/pesticides/region4/water/documents/web/pdf/dalton_utilities_las_permit.pdf.

³ A “health advisory” is a non-enforceable concentration of drinking water contaminants. Health advisories “serve as informal technical guidance to assist federal, state and local officials, and water systems managers.” *Fact Sheet PFOA & PFOS Drinking Water Health Advisories*, United States Environmental Protection Agency (May 2016), https://www.epa.gov/sites/production/files/2016-05/documents/drinkingwaterhealthadvisories_pfoa_pfos_5_19_16.final_1.pdf. Health advisories are distinguishable from Maximum Contaminant Levels (“MCLs”), which are enforceable drinking water standards. EPA has set

set *any* legal limits on the amount of PFCs in water, and both have implicitly acknowledged that PFOA and PFOS only become potentially problematic at a lifetime exposure over a certain threshold level. As it must, Rome admits that EPA permits a certain level of PFOA and PFOS in drinking water to this very day. *Id.* ¶¶ 58, 60, 64.

Finally, Rome also ignores that its claims arise out of the provision of a public service: drinking water. All claims in the SAC should be dismissed on that basis alone.

LEGAL STANDARD

“In ruling on a motion to dismiss, the trial court must accept as true all well-pled material allegations in the complaint and must resolve any doubts in favor of the plaintiff.” *Roberson v. Northrup*, 302 Ga. App. 405, 405, 691 S.E.2d 547 (2010) (citations and punctuation omitted). “But in the absence of any specifically pled facts to support what amount[s] to a legal conclusion couched as fact, the trial court [i]s not required to accept this conclusion as true.” *Mabra v. SF, Inc.*, 316 Ga. App. 62, 65, 728 S.E.2d 737 (2012) (citations omitted). In addition, allegations based “on information and belief” are not sufficient factual allegations to withstand a motion to dismiss. *See Elrod v. Hulett*, 62 Ga. App. 659, 661, 9 S.E.2d 279 (1940) (“The original petition was subject to general demurrer because paragraph 7 alleged that the allegations therein were true ‘upon information and belief.’”).

A claim should be dismissed on a Rule 12(b)(6) motion if the claim is “clearly without any merit; and this want of merit may consist in an absence of law to support a claim of the sort made, or of facts sufficient to make a good claim[.]” *Mabra*, 316 Ga. App. at 66 (quoting *Poole v. City of Atlanta*, 117 Ga. App. 432, 434, 160 S.E.2d 874 (1968)). Additionally, a trial court may consider

MCLs for over 90 drinking water contaminants. It has not set an MCL for either PFOA, PFOS, or any other per- or poly-fluoroalkyl substances. *PFAS Laws and Regulations*, United States Environmental Protection Agency, <https://www.epa.gov/pfas/pfas-laws-and-regulations>.

exhibits attached to and incorporated into the pleadings when ruling upon a motion to dismiss.
Dennis v. City of Atlanta, 324 Ga. App. 659, 664, 751 S.E.2d 469 (2013).

ARGUMENT

I. Rome's claims are barred by the Public Services Doctrine.

Georgia law precludes municipalities from recovering costs associated with providing a public service unless the claim is for “damage to government-owned property” or is specifically authorized by statute. *Tri-State Crematory*, 284 Ga. App. at 37. As explained below, neither exception applies here, so the city “cannot recover the costs of carrying out public services [even] from a tortfeasor whose conduct caused the need for the services.” *Id.*

The Georgia Court of Appeals has emphasized the breadth of the doctrine. In *Tri-State Crematory*, “Walker County discovered hundreds of human bodies in an uncremated, decayed state that ‘were stacked, stored, dumped, buried in septic tanks, commingled in common graves and scattered about the service (sic) of the property.’” *Id.* at 35. Walker County sued for negligence and public nuisance, seeking to recover “the facility, equipment, and employment costs associated with recovering, identifying, and properly disposing of the human remains discovered at the crematorium property.” *Id.* at 37. But the Court of Appeals affirmed the trial court’s dismissal because the county was seeking “costs it incurred in performing public services of cleaning up the crematorium.” *Id.* at 38. The Court of Appeals held that the doctrine applied “irrespective of whether the county’s decision to provide the public service was statutorily mandated or discretionary.” *Id.* Indeed, according to the Court of Appeals, “reallocate[ion] [of] how those costs are spread necessarily implicates fiscal policy, a matter best left to ‘the legislature and its public deliberative processes, rather than the court’.” *Id.* (quoting *City of Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co.*, 719 F.2d 322, 323-24 (9th Cir. 1983)).

Like Walker County, Rome seeks to recover costs for performing a public service—providing drinking water to its residents. Rome may be providing water to its constituents in a quasi-private or private capacity, but it is nonetheless a “public water system” under the Safe Water Drinking Act. *See* 42 U.S.C. § 300f(4)(A) (defining “public water system” in part as “a system for the provision to the public of water for human consumption”). And the Georgia Supreme Court has previously acknowledged that supplying water to a municipality or its constituents is a “public service.” *See, e.g., Freeman v. Macon Gas Light & Water Co.*, 126 Ga. 843, 845, 56 S.E. 61 (1906) (citing 1 Farnham on Waters & Water Rights, § 162) (“When a private corporation undertakes to supply water to a municipality and its inhabitants for toll, it enters upon a **public service**.”) (emphasis added)).

The Public Services Doctrine’s exceptions do not apply here. First, Rome has not incurred costs to government-owned property. Rome may have “property interest” in the water flowing through the Oostanaula River, SAC ¶ 13, but the water itself is not “government-owned property.” Although O.C.G.A. § 44-8-1 states that water “belongs” to the owner of the land on which it runs, the Georgia Supreme Court has made clear a landowner has “no property in the water itself”—only “**simple usufruct** while [the water] passes along.” *Robertson v. Arnold*, 182 Ga. 664, 672, 186 S.E. 806 (1936) (emphasis added); *see also Hodges v. Pine Prod. Co.*, 135 Ga. 134, 136, 68 S.E. 1107 (1910) (quoting 2 Farnham on Water & Water Rights, § 462) (“The property, therefore, consists, not in the water itself, but in the added value which the stream gives to the land through which it flows.”). In maintaining a usufruct, Rome has a mere “license” and does not “possess[] any estate or interest therein.” *See GeorgiaCarry.Org, Inc. v. Atlanta Botanical Garden, Inc.*, 306 Ga. 829, 838, 834 S.E.2d 27 (2019) (quoting *Jekyll Dev. Assocs., L.P. v. Glynn Cty. Bd. of Tax Assessors*, 240 Ga. App. 273, 274, 523 S.E.2d 370 (1999)). Accordingly, Rome cannot allege any

damages to government-owned property, and thus cannot rely on this exception to rescue its claims from the Public Services Doctrine.

Second, there is no “specific statutory authorization” for Rome to bring these claims. Neither of Rome’s asserted statutory claims—Count Four, Abatement of Nuisance (O.C.G.A. § 41-2-1) nor Count Nine, Georgia Water Quality Control Act (the “GWQCA” or the “Act”) (O.C.G.A. § 12-5-51) —provide exception.⁴ As explained in Section IV, Rome’s nuisance claim fails as a matter of law. Even if it was viable, Rome cannot recover damages under O.C.G.A. § 41-2-1 *et seq.*—by the statute’s plain terms, any recovery would be limited solely to abatement.

Likewise, the GWQCA does not authorize the recovery of costs associated with providing drinking water to constituents. The Act’s purpose is to “to restore and maintain a reasonable degree of purity in the waters of the state.” O.C.G.A. § 12-5-21(a). To that end, the Act allows certain entities to recover costs and expenses reasonably incurred in cleaning up and abating spills, discharges, or deposits resulting in a condition of pollution to waters of the state. O.C.G.A. § 12-5-51.

Rome, however, has not cleaned up or abated pollution in “waters of the state.” *See* O.C.G.A. § 12-5-22(13) (defining “waters of the state” as among other things “rivers, streams, creeks, branches, lakes, reservoirs, ponds, drainage systems, springs, wells, and all other bodies of surface or subsurface water”). Rome alleges it has incurred economic damages associated with cleanup and abatement of pollution *after* water was withdrawn from a river and while it was being

⁴ The Mohawk Defendants acknowledge that Rome has added new allegations to the SAC about two discrete spills from their facilities in 2016 and 2019. To the extent either count is solely predicated on these newly alleged spills (and other spills alleged in SAC ¶ 51), this is a very different case than the one advanced in Rome’s original complaint. Under this scenario, Rome’s claims for damages under Count Four or Nine would be limited to costs and expenses related to cleaning up or abating those *specific spills* only.

treated at the Bruce Hamler Water Treatment Facility. *See* SAC ¶¶ 4-5, 87. Plainly, then, Rome has not incurred any costs for cleanup or abatement of pollution as contemplated by the Act. In other words, Rome does not allege that it cleaned a river, but rather water it withdrew from the river for purposes of selling it to the citizens of Floyd County.

Even if “drinking water” is considered a “water of the state,” Rome cannot rely on the Act to save its claims from the Public Services Doctrine’s effect. To recover costs and expenses under the Act, there must be an underlying “spill, discharge, or deposit” giving rise to the pollution being abated. The terms “spill, discharge, or deposit” all contemplate affirmative conduct. *See Carson Harbor Vill., Ltd. v. Unocal Corp.*, 270 F.3d 863, 879 (9th Cir. 2001) (“[T]he gradual passive migration of contamination through the soil that allegedly took place . . . was not a ‘discharge, deposit, [or] spilling.’”). The gravamen of Rome’s action is gradual migration—that the Mohawk Defendants (and others) lawfully sent water to Dalton Utilities, which land-applied treated water pursuant to a “No Discharge” permit, and then over time, the PFCs concentrated and eventually slow marched to Rome’s intake site. SAC ¶ 49. Such passive migration is not a “spill, discharge, or deposit.” Therefore, Rome cannot rely on the Act as an exception to the Public Services Doctrine.

II. Breaks in causation warrant dismissal of Plaintiff’s claims.

There are several other reasons Rome’s SAC fails to state a claim. First, as alleged by Rome, the Mohawk Defendants did not proximately cause Rome’s alleged injuries. According to the SAC, Rome’s injuries were caused by a chain of events several times removed from any of the Mohawk Defendants’ actions. On the front end, the chemical suppliers allegedly supplied harmful chemicals and allegedly covered up their harmful effect. On the back end, Dalton Utilities was obligated under the “No Discharge” permit to sufficiently treat the wastewater. Dalton Utilities’

participation breaks any potential causal link between the Mohawk Defendants and Rome and demands dismissal of the claims against the Mohawk Defendants.

“Causation is an essential element of nuisance, trespass, and negligence claims.” *Alexander v. Hulsey Envtl. Servs.*, 306 Ga. App. 459, 462, 702 S.E.2d 435 (2010) *cert. denied sub nom LHR Farms, Inc. v. Alexander*, No. S11C0367, 2011 Ga. LEXIS 233 (Ga. Mar. 7, 2011). “To establish proximate cause, a plaintiff must show a legally attributable causal connection between the defendant's conduct and the alleged injury.” *Id.* Proximate cause is “that which, in the natural and continuous sequence, **unbroken by other causes**, produces an event, and without which the event would not have occurred.” *Yearly v. Scott Holder Enters.*, 349 Ga. App. 718, 722, 824 S.E.2d 817 (2019) (emphasis added) (quoting *Zwiren v. Thompson*, 276 Ga. 498, 500, 578 S.E.2d 862 (2003)). Rome cannot establish that the Mohawk Defendants proximately caused its alleged injuries.

Alexander is illustrative. There, landowners sued a neighboring waste facility alleging that the facility “processes the waste and sprays the resulting wastewater into the air through a sprinkler system, and that the waste disposal operation generates offensive odors and attracts pests,” causing a nuisance. *Alexander*, 306 Ga. App. at 460-61. Defendant Hulsey Environmental Services (“HES”) was a “customer which brings waste material to [a] site for disposal.” *Id.* at 461. The court found that, as a customer, HES “does not direct or control any conduct of the waste disposal operation” and dismissed the claims for lack of proximate cause. *Id.* at 461-62.

Same thing here. The Mohawk Defendants send their wastewater to Dalton Utilities to be treated and disposed. *See id.* at 461. As a customer of Dalton Utilities, the Mohawk Defendants do not and cannot direct or control any of Dalton Utilities’ operation under its permit. *See id.* Indeed, the SAC identifies other intervening and fortuitous events that take place after Dalton Utilities’

land-application: the waste *accumulates* on the land, SAC ¶ 50; Mother Nature causes *runoff* to pollute the Conasauga River, *id.*; and the allegedly-contaminated water *travels* downstream from the Conasauga River to the Oostanaula River to Rome's water intake site. *Id.* ¶ 3. The Mohawk Defendants do not direct or control any of these, so there is even less causal connection here than in *Alexander*. Accordingly, the entire SAC should be dismissed for failure to plead proximate cause.

III. Rome fails to allege the Mohawk Defendants owed and breached a duty to Rome.

A. Rome has not alleged a viable legal duty.

"The threshold issue in any cause of action for negligence is whether, and to what extent, the defendant owes the plaintiff a duty of care. Whether a duty exists upon which liability can be based is a question of law." *Glover v. Ga. Power Co.*, 347 Ga. App. 372, 375, 819 S.E.2d 660 (2018). Duties arise either by statute or are "imposed by a common law principle recognized in the case law." *Id.*

The duty that Rome alleges here—"to prevent the discharge of toxic PFCs into the Rome water supply," SAC ¶ 94—is not one that arises from valid legislative enactment or that is imposed by a common law principle recognized in the case law. On the contrary, the EPA permits a certain level of PFOA and PFOS in drinking water, a concept that Rome recognizes throughout its SAC. *Id.* ¶¶ 58, 60, 64.

As for arising by statute, the GWQCA does not apply to Rome's claims for the reasons specified in Section I above. Because Rome has not pled a cognizable legal duty owed by the Mohawk Defendants, its negligence claim should be dismissed.

B. The Mohawk Defendants did not owe a duty to Rome.

Rome's allegations also fail because the Mohawk Defendants owed no duty to the City of Rome. "Before negligence can be predicated upon a given act, some *duty to the individual complaining* must be sought and found, the observance of which duty would have averted or avoided the injury or damage." *City of Douglasville v. Queen*, 270 Ga. 770, 771, 514 S.E.2d 195 (1999) (quotations and citations omitted) (emphasis added). It matters not "how innocent the plaintiff may be, he is not entitled to recover unless the defendant did something that [it] should not have done, or failed to do something that [it] should have done *pursuant to the duty owed the plaintiff*." *Id.* (quotations and citations omitted) (emphasis added).

In *City of Douglasville*, the Georgia Supreme Court found the City was not liable for negligence when two girls were hit by a train while walking to meet their parents at a Fourth of July parade. *Id.* at 771-73. The Court held the City did not have an affirmative duty to act to protect the girls because, among other things, it "did not own, possess or exercise any degree of control over the railroad tracks where the Queen girls were injured." *Id.* at 772. The Court declined to hold that the mere foreseeability that folks would "walk on train tracks adjacent to the parade route . . . places an affirmative duty upon a municipality to protect individuals from all privately-created and privately-maintained hazards they might encounter on the properties of third parties while approaching, viewing, and departing the parade." *Id.* at 773.

The Mohawk Defendants, like the City of Douglasville, do not have a general, nebulous duty to protect all entities downstream of Dalton, Georgia from any alleged shortcomings of third parties—including Dalton Utilities—in treating wastewater. And, as noted above, the Mohawk Defendants definitely do not have the claimed "duty to Plaintiff to exercise due and reasonable care in their . . . carpet manufacturing operations *to prevent the discharge of toxic PFCs* into the

Rome water supply.” SAC ¶ 94 (emphasis added). Again, that legal conclusion is devoid of legal support since the SAC itself acknowledges that EPA’s health advisory level is non-zero. *Id.* ¶¶ 60, 64.

C. The alleged harm was not foreseeable by the Mohawk Defendants.

“[T]he legal duty to exercise ordinary care arises from the foreseeable, unreasonable risk of harm from such conduct.” *Hodges v. Putzel Elec. Contractors., Inc.*, 260 Ga. App. 590, 594, 580 S.E.2d 243 (2003). “Negligence is predicated on what should be anticipated, rather than on what happened, because one is not bound to anticipate or foresee and provide against what is unlikely, remote, slightly probable, or slightly possible.” *Id.*

No facts in the SAC establish foreseeability of the alleged harm (here, economic damages from purchasing, filtering, and monitoring water). SAC ¶ 90. Rome does not sufficiently allege that the Mohawk Defendants: (1) knew that Dalton Utilities’ treatment would not remove or otherwise neutralize the Mohawk Defendants’ alleged PFCs specifically; (2) knew that the alleged PFCs would persist in the environment; or (3) knew that EPA would set health advisory levels. Alleging a bunch of ambiguous legal conclusions “on information and belief” will not save a claim from dismissal. *Elrod*, 62 Ga. App. at 661.

Tellingly, EPA did not create or publicize non-provisional drinking water health advisories for PFOA and PFOS until 2016. SAC ¶ 60. And even if EPA had released its health advisories for PFOA and PFOS earlier, it still would not have been foreseeable—at least, to the Mohawk Defendants—that any PFOA or PFOS coming from the Mohawk Defendants’ facilities would have been the cause of any particular amount of PFOA or PFOS in the water downstream of Dalton. According to Rome, all of the carpet manufacturers’ wastewater is aggregated by “Dalton Utilities and other wastewater treatment plants, including, but not limited to, the Loopers Bend Wastewater

Treatment Plant.” *Id.* ¶ 50. Dalton Utilities and these other wastewater treatment plants—none of which is a named defendant in this case—are the entities that decide how and how much wastewater to treat and disperse in compliance with their Georgia EPD-issued permits.

The SAC therefore lacks any factual allegations that the Mohawk Defendants could foresee that their facilities’ discharge of wastewater would have even the potential to cause—much less actually cause—Rome to be injured.

IV. Both nuisance counts fail as a matter of law.

The Mohawk Defendants delivered their wastewater to Dalton Utilities, and Dalton Utilities lawfully treated and land-applied the wastewater pursuant to an EPD permit. “That which the law authorizes to be done, if done as the law authorizes, cannot be a nuisance.” *City of Douglasville*, 270 Ga. at 773 (quoting *Mayor of Savannah v. Palmerio*, 242 Ga. 419, 425, 249 S.E.2d 224 (1978)); *see also Burrus v. Columbus*, 105 Ga. 42, 45-46, 31 S.E. 124 (1898). The only exception is “where there is negligence or error in the execution of the plans and specifications adopted or prescribed by the governing authority.” *Atlanta v. Due*, 42 Ga. App. 797, 803, 157 S.E. 256 (1931).

Rome does not allege that Dalton Utilities in any way violated or acted in contravention to its permit.⁵ And both the Mohawk Defendants’ and Dalton Utilities’ permits did not contain any requirements related to PFCs—despite that EPA, EPD, and Dalton Utilities all knew about PFCs in the wastewater. Any claim for nuisance should therefore be dismissed because the law authorized the underlying actions and there was no error in carrying out the terms of the permits.⁶

⁵ To the extent Dalton Utilities was non-compliant, that liability would inure to Dalton Utilities, not the Mohawk Defendants.

⁶ If the nuisance claims are dismissed, the Abatement of Nuisance claim should be dismissed as well.

The nuisance claims also fail because, as described above, the Mohawk Defendants do not—and cannot—control Dalton Utilities. “[T]he essential element of nuisance is control over the cause of the harm.” *Grinold v. Farist*, 284 Ga. App. 120, 122, 643 S.E.2d 253 (2007) (quoting *Fielder v. Rice Constr. Co.*, 239 Ga. App. 362, 366 (1), 522 S.E.2d 13 (1999)); *see also Citizens & S. Tr. Co. v. Phillips Petroleum Co.*, 192 Ga. App. 499, 500, 385 S.E.2d 426 (1989). Once the Mohawk Defendants sent their wastewater to Dalton Utilities for treatment pursuant to Dalton Utilities’ EPD permit, they no longer had control over any later resulting harm. Rome’s nuisance claims against the Mohawk Defendants should therefore be dismissed.

V. The trespass claim should be dismissed for failure to plead direct infringement, duty, or title to land, as well as consent.

In addition to the lack of causation discussed above, the trespass claim should be dismissed for four additional reasons:

First, Rome does not sufficiently allege that any of its property rights were violated. “The person having title to lands” is the one who “may bring an action for a trespass thereon.” O.C.G.A. § 51-9-4. As explained above, Rome has a usufruct at most. *See Robertson*, 182 Ga. at 672.

Second, Rome has not alleged that the Mohawk Defendants interfered with any property rights by using PFCs in their manufacturing process or in the disposal of wastewater to Dalton Utilities. Unlike a nuisance, trespass requires “a *direct* infringement of [Rome’s] right of property” by the Mohawk Defendants. *Ga.-Pac. Consumer Prods., LP v. Ratner*, 345 Ga. App. 434, 444, 812 S.E.2d 120 (2018). In its SAC, Rome alleges no act by the Mohawk Defendants that directly infringed on Rome’s property rights. Rather, the SAC alleges the Mohawk Defendants sent their wastewater to Dalton Utilities. As such, there can be no act of trespass by the Mohawk Defendants. *See id.* at 443.

Third, Rome alleges continuing trespass, SAC ¶ 136, but does not allege that the Mohawk Defendants “ha[d] a legal right and [were] under a legal duty to terminate the cause of the injuries sustained.” See *Briggs & Stratton Corp. v. Concrete Sales & Servs.*, 971 F. Supp. 566, 573 (M.D. Ga. 1997) (citing *Bodin v. Gill*, 216 Ga. 467, 117 S.E.2d 325 (1960)). As explained in Sections II and III above, the allegations, even construed in the light most favorable to Rome, show that the Mohawk Defendants had no legal right—and certainly were under no legal duty—to interfere with Dalton Utilities’ EPD-permitted processes.

Finally, even if Rome had properly alleged all of the above, Rome consented to any interference with its property rights. A trespass must be non-consensual. Here, Rome alleges that it draws water from the rivers into its water treatment facility. By doing so, Rome consents to the presence of the water and its contents on Rome’s property. See, e.g., *Evans v. Walter Indus., Inc.*, 579 F. Supp. 2d 1349, 1375-76 (N.D. Ala. 2008) (dismissing trespass claim under similar Alabama law when the plaintiffs either purchased or accepted as free contaminated foundry sand, either of which constituted consent to put the sand on their properties).

For all four of these reasons, Rome’s continuing trespass claim should be dismissed.⁷

⁷ In addition, any claim for damages under Rome’s continuing trespass theory, SAC ¶¶ 136-38, must be limited to damages “inflicted within four years before the time of filing suit.” *Goble v. Louisville & N. R.R.*, 187 Ga. 243, 249, 200 S.E. 259 (1938). See also *Smith v. Branch*, 226 Ga. App. 626, 628, 487 S.E.2d 35 (1997); *Culbertson v. Coats Am., Inc.*, 913 F. Supp. 1572, 1582 (N.D. Ga. 1995). Given that Rome admits that its drinking water levels have not exceeded EPA’s health advisory limit at least since 2016, it is unclear whether Rome is actually entitled to any injunctive or monetary relief since then. Compare Governments of Floyd County and City of Rome, GA, *PFAS Update July 2019*, <https://d1or5lo377vjm3.cloudfront.net/system/resources/W1siZiIsIjIwMTkvMDcvMjYvMTQvNDkvNTYvYTU3ZWFKNGEtNTg4Yi00Y2Q0LWE1ZGUtZjEyMWZmOTBmZGFIL1BGQVMgVVBEQVRFDlIwMTkucGRmIlId/PFAS%20UPDATE%202019.pdf> with SAC ¶¶ 85-88.

VI. Rome's wantonness and punitive damages claims fail because the Complaint lacks factual allegations that the Mohawk Defendants acted with conscious indifference.

Rome fails to state a claim for punitive damages because it does not show and will not be able to show "by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences." O.C.G.A. § 51-12-5.1(b). Rome does not sufficiently allege facts showing the Mohawk Defendants knew (i) that PFCs (and specifically, the PFCs the Mohawk Defendants were allegedly sending to Dalton Utilities) were potentially harmful or (ii) consciously disregarded that knowledge when they allegedly sent the PFCs to Dalton Utilities. That omission is glaring when juxtaposed against the allegations against 3M and DuPont.

The allegations Rome does plead show that the Mohawk Defendants lawfully sent water from their Dalton-area operations to the local utility for lawful treatment and disposal. SAC ¶¶ 49-51. Compliance with the law tends to "show that there is no clear and convincing evidence of 'willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences.'" *Stone Man v. Green*, 263 Ga. 470, 472, 435 S.E.2d 205 (1993) (quoting *Gen. Refractories Co. v. Rogers*, 240 Ga. 228, 239 S.E.2d 795 (1977)). "This is especially true in the case of a commercial enterprise the operation of which is accompanied by a certain amount of unpleasant but unavoidable effects or byproducts." *Stone Man*, 263 Ga. at 472. The Mohawk Defendants complied with the law when they properly disposed of their wastewater by sending it to a permitted wastewater treatment facility. The Court should therefore dismiss the wantonness and punitive damages claim.

VII. Count Seven for injunctive relief fails as a matter of law.

As a threshold issue, if the underlying claims are dismissed, Rome is not entitled to injunctive relief. But even if some claims survive, the injunctive relief claim should not. “[I]njunctive relief should be granted cautiously and only if there was no adequate remedy at law.” *City of Duluth v. Riverbrooke Props.*, 233 Ga. App. 46, 55, 502 S.E.2d 806 (1998). Here, Rome alleges no irreparable harm. *See City of Waycross v. Pierce Cty. Bd. of Comm’rs*, 300 Ga. 109, 111, 793 S.E.2d 389 (2016) (quoting *Bishop v. Patton*, 288 Ga. 600, 604, 706 S.E.2d 634 (2011)). The SAC does offer the legal conclusion that Rome is being irreparably harmed by “Defendants’ chemicals in its water supplies pose a continuing threat to Plaintiff’s property interest.” SAC ¶ 152. Yet Rome also alleges: “In order to permanently remove the Defendants’ PFCs from its water supply, Rome must install a new and permanent filtration system” that will cost “tens of millions of dollars.” *Id.* ¶ 89. Because money will fix the alleged issue, Count Seven should be dismissed.

VIII. Rome is not entitled to attorneys’ fees or expenses of litigation.

As above, of course, attorneys’ fees and expenses of litigation also are not available if the underlying claims fail. *See Rigby v. Flue-Cured Tobacco Coop. Stabilization Corp.*, 339 Ga. App. 558, 563, 794 S.E.2d 413 (2016) (quoting *Quantum Trading Corp. v. Forum Realty Corp.*, 278 Ga. App. 485, 490, 629 S.E.2d 420 (2006)). But even if an underlying claim survives this Motion, Rome is not entitled to the fees and expenses under O.C.G.A. § 13-6-11. Those fees and expenses may be awarded only “where the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense.” O.C.G.A. § 13-6-11. The Mohawk Defendants have done no such thing.

CONCLUSION

For the foregoing reasons, the Mohawk Defendants respectfully move the Court to dismiss Plaintiff's claims.

Respectfully submitted this 29th day of April, 2020.

/s/ Doug Scribner

Doug Scribner
Georgia Bar No. 632755
David Carpenter
Georgia Bar No. 292101
Geoffrey Rathgeber
Georgia Bar No. 195334
Phil Sandick
Georgia Bar No. 217486

ALSTON & BIRD LLP
1201 W. Peachtree Street
Atlanta, Georgia 30309
Tel: 404-881-7000
Fax: 404-881- 7777
doug.scribner@alston.com
david.carpenter@alston.com
geoff.rathgeber@alston.com
phil.sandick@alston.com

*Attorneys for Defendants Aladdin Manufacturing
Corporation, Mohawk Carpet, LLC, and Mohawk
Industries, Inc.*

IN THE SUPERIOR COURT OF FLOYD COUNTY
STATE OF GEORGIA

THE CITY OF ROME, GEORGIA	)	
	)	
Plaintiff,	)	CIVIL ACTION NO.
	)	19CV02405JFL003
v.	)	
	)	
3M COMPANY, <i>et al.</i> ,	)	
	)	
Defendants.	)	
_____	)	

CERTIFICATE OF SERVICE

This is to certify that I have this day served a true and correct copy of the within and foregoing document upon Plaintiff's counsel and all other counsel of record via electronic mail by filing same with the Odyssey e-file system.

This 29th day of April, 2020.

/s/ Geoffrey Rathgeber
Geoffrey Rathgeber
Georgia Bar No. 195334

ALSTON & BIRD LLP
1201 W. Peachtree Street
Atlanta, Georgia 30309
Tel: 404-881-7000
Fax: 404-881- 7777
geoff.rathgeber@alston.com

Attorney for Defendants Aladdin Manufacturing Corporation, Mohawk Carpet, LLC, and Mohawk Industries, Inc.

Appendix C

**IN THE SUPERIOR COURT OF FLOYD COUNTY
STATE OF GEORGIA**

THE CITY OF ROME, GEORGIA,

Plaintiff,

v.

3M COMPANY, et al.,

Defendants.

)
)
)
)
)
)
)
)
)
)
)

CIVIL ACTION FILE

NO.: 19CV02405JFL003

**ORDER ON DALTON UTILITIES' MOTION TO DISMISS PLAINTIFF'S FOURTH
AMENDED COMPLAINT OR, IN THE ALTERNATIVE, TO TRANSFER VENUE**

The above matter came before this Court on Defendant The City of Dalton, Georgia, acting through its Board of Water, Light and Sinking Fund Commissioner, d/b/a Dalton Utilities' ("Dalton Utilities") Motion to Dismiss. After reviewing the motion, brief, responses, and verified pleadings of the parties, the Court finds as follows:

In this action, the City of Rome claims that Defendants each played a role in causing toxic chemicals, called PFCs, to pollute the City of Rome's primary water source, the Oostanaula River. (See Pl's Verif. Fourth Am. Compl.) Rome alleges that chemical suppliers and owners and operators of carpet plants have caused and contributed to the pollution by respectively supplying PFCs to manufacturing facilities and using or having used PFCs in manufacturing processes. (*Id.* ¶¶ 3–6, 32–36.) Rome further alleges that the PFCs discharged by these chemical suppliers and/or carpet plants are treated by Dalton Utilities before being sprayed onto Dalton Utilities' 9,800-acre Land Application System ("LAS"). (*Id.* ¶ 33.) According to Rome, the PFCs that Dalton Utilities sprays onto its LAS resist degradation and flow into the Conasauga River and, eventually, the City of Rome's water supply. (*Id.* ¶ 34.)

The City of Rome alleges that the chemical suppliers, the carpet plants, and Dalton Utilities are jointly causing a nuisance, trespass, and injury in Floyd County, Georgia and are joint tortfeasors and joint trespassers. (*Id.* ¶¶ 11, 13–49, 84, 96, 122, 160, 172, 198.) Rome seeks an injunction against all Defendants requiring Defendants to stop releasing more of these toxic chemicals and to remediate the existing contamination. (*Id.* ¶¶ 6, 134–36, 210–12, and Relief Demanded.) Rome also seeks damages, attorneys’ fees, costs, and expenses of litigation. (*Id.* ¶¶ 5–6, 72–74, 137–38, 213–14, and Relief Demanded.)

I. Plaintiff’s Nuisance Claim Is Not Time Barred

Dalton Utilities argues that Rome’s nuisance claim is subject to a four-year statute of limitations and is therefore time barred because Rome did not serve its *ante litem* notice within four years of first observing Dalton Utilities’ alleged nuisance. (Dalton Utilities’ Mem. of Law in Spt. of Mot. Dismiss at 7–8.) To reach this conclusion, Dalton Utilities argues that its alleged nuisance is permanent, causing the statute of limitations to run only once, rather than continuous, which would cause the statute of limitations to “begin to run at the time of each continuance of the harm.” *See Oglethorpe Power Corp. v. Forrister*, 289 Ga. 331, 333 (2011) (citing *City of Atlanta v. Kleber*, 285 Ga. 413, 416 (2009)). Therefore, the viability of Rome’s nuisance claim turns on whether it is properly classified as permanent or continuous. *See id.*

Rome’s nuisance claim is properly classified as continuous, and therefore not time barred, for two reasons. First, under Georgia’s deferential notice pleading standards, Rome has sufficiently pleaded a continuous nuisance. Rome’s Fourth Amended Complaint contains numerous allegations of Dalton Utilities’ “continuous nuisance” and “continuing discharge of PFCs.” (*See* Pl.’s Verif. Fourth Am. Compl. ¶¶ 166, 171, 184–85, 196, 211–12.) Moreover, Dalton Utilities has not pointed to any case where a plaintiff’s allegations of a continuous nuisance were disregarded

as permanent at the motion to dismiss stage. On these facts alone, Rome has sufficiently stated a claim for continuous nuisance. *See Carley v. Lewis*, 221 Ga. App. 540, 542 (1996) (“[I]t is immaterial whether a pleading states conclusions or facts as long as fair notice is given, and the statement of claim is short and plain. The true test is whether the pleading gives fair notice and states the elements of the claim plainly and succinctly, and not whether as an abstract matter it states conclusions or facts.”).

Second, going beyond providing mere notice, the factual allegations in Rome’s Fourth Amended Complaint set out a continuous nuisance under Georgia law. While a public utility’s alleged nuisance resulting from improper installation or construction is properly considered permanent, a nuisance that arises from improper maintenance or operation of the utility is considered continuous. *See Forrister*, 289 Ga. at 335; *Kleber*, 285 Ga. at 417 (emphasis in original) (“To the extent that the homeowners complain that the *mere presence* [of a culvert and pipe] creates a nuisance due to improper installation, their nuisance claim is permanent in nature and is presently barred by the statute of limitations. . . . On the other hand, to the extent that the homeowners contend that the culvert and drainage pipe have not been properly *maintained*, their nuisance claim is continuing in nature.”).

Rome alleges in its Fourth Amended Complaint that Dalton Utilities continuously discharges PFCs from its LAS in violation of “no-discharge” permits. (*See* Pl.’s Verif. Fourth Am. Compl. ¶¶ 148–58; 166; 177; 191–98.) According to Rome, this continuous discharge of PFCs to the Conasauga River and its tributaries and the build-up of PFCs at the LAS has the same ongoing polluting effect on surface waters as the initial pollution. (*Id.* ¶¶ 166; 171; 184–85; 196; 211–12.) These allegations arise from the way Dalton Utilities *operates* the LAS, not from the way it designed or constructed the LAS. As Rome alleges, Dalton Utilities is required by its permits to

operate the LAS so that it does not discharge PFCs to surface waters, including the rivers that supply Rome's drinking water. By alleging that Dalton Utilities has operated its LAS in violation of its permits and in a manner that continuously discharges PFAS into the Conasauga River, Rome has set forth factual allegations that support a claim for continuous nuisance under Georgia law. Therefore, the Court finds that the statute of limitations for Rome's nuisance claim against Dalton Utilities has not run, but instead restarts with each new continuance of Dalton Utilities' alleged discharge of PFCs from the LAS. *See Kleber*, 285 Ga. at 416 ("Where a nuisance is not permanent in its character, but is one which can and should be abated by the person erecting or maintaining it, every continuance of the nuisance is a fresh nuisance for which a fresh action will lie.").

II. Plaintiff Complied with the *Ante Litem* Statute

Under Georgia's *ante litem* statute, a plaintiff with a claim against a municipal corporation must "present the claim in writing to the governing authority of the municipal corporation" within six months of the happening of the event upon which the claim is predicated. O.C.G.A. § 36-33-59(b). The notice provided must state "the time, place, and extent of the injury, as nearly as practicable, and the negligence which caused the injury." *Id.* Dalton Utilities does not attack the substance of Rome's *ante litem* notice, but rather its timing.

First, Dalton Utilities argues that Rome's *ante litem* notice was untimely because it was presented more than six months after the "happening" of Dalton Utilities' alleged nuisance. (Dalton Utilities' Mem. of Law in Spt. of Mot. Dismiss at 14.) This argument is premised on Rome's nuisance being permanent, rather than continuous. Because Rome has sufficiently pleaded a continuous nuisance, and a continuous nuisance restarts the six-month countdown every day the nuisance continues, Rome's *ante litem* notice was timely. *See City of Chamblee v. Maxwell*, 264

Ga. 635, 636–37 (1994) (“Thus, each day that the trespass continues necessarily begins another six-month period during which ante litem notice must be given pursuant to OCGA § 36–33–5.”).

Second, Dalton Utilities argues that, if Rome’s nuisance claim is considered continuous, then Rome’s damages should at least be limited to those accruing after September 14, 2021, six months prior to Rome serving the *ante litem* notice. (Dalton Utilities’ Mem. of Law in Spt. of Mot. Dismiss at 14.) While Dalton Utilities is correct that damages should ordinarily be limited to those that accrue from six months prior to the presentation of the *ante litem* notice, *see City of Chamblee*, 264 Ga. at 637, its argument for a limitation of damages is premature at this stage. The timing of damages is necessarily fact-driven, and the continuous nature of Rome’s claims against Dalton Utilities means that Rome’s claimed damages from before the six months preceding the *ante litem* notice are nearly indistinguishable from those that Rome alleges it suffers today. Therefore, the Court will refrain from making a determination as to the timeliness of Rome’s claimed damages at this stage of the proceedings.

III. Plaintiff’s Claims Are Not Barred by Sovereign Immunity

Dalton Utilities further argues that Rome’s claims against are due to be dismissed because Dalton Utilities is entitled to sovereign immunity, and Rome has failed to identify a waiver of that immunity. (Dalton Utilities’ Mem. of Law in Spt. of Mot. Dismiss at 16–17.) This argument fails for two reasons.

1. Sovereign Immunity Does Not Apply Because Both Parties Are Political Subdivisions of the State of Georgia.

Dalton Utilities argues that, as a political subdivision of the State, it is entitled to sovereign immunity in this case. While this might ordinarily be the case, the present lawsuit involves political subdivisions on *both* sides of the litigation.

The Georgia Supreme Court has held that, where one political subdivision of the State sues another, the rationale behind sovereign immunity no longer applies: “There is no sovereignty to be maintained. There are only two political subdivisions, neither of which controls the court into which it was called or has governing authority over the other party with respect to the matter in dispute.” *City of College Park v. Clayton Cnty.*, 306 Ga. 301, 311 (2019). Here, as in *City of College Park*, neither Rome nor Dalton Utilities is a sovereign over the other, and “[n]either entity retains a superior authority over the other that would prevent it from being hailed into a court of law by the other.” *Id.* Therefore, Dalton Utilities is not entitled to sovereign immunity in this case, and Rome’s claims against it are not barred as a result.

2. Dalton Utilities Is Not Entitled to Sovereign Immunity Under the Nuisance Doctrine.

Rome’s nuisance claim against Dalton Utilities would also survive even if Dalton Utilities were otherwise entitled to sovereign immunity in this case. Under Georgia’s “nuisance doctrine,” a municipality “‘may be liable for damages it causes to a third party from the operation or maintenance of a nuisance, irrespective of whether it is exercising a governmental or ministerial function.’” *Gatto v. City of Statesboro*, 312 Ga. 164, 168 (2021) (quoting *City of Thomasville v. Shank*, 263 Ga. 624, 625 (1993)). Municipal responsibility for nuisance “is based on the principle that a municipal corporation cannot, under the guise of performing a governmental function, create a nuisance dangerous to life and health or take or damage private property for public purpose, without just and adequate compensation first being paid.” *Id.*

“Traditionally, a municipality’s liability in nuisance was limited to situations where the alleged injury related to the physical condition of the plaintiff’s property or the plaintiff’s use and enjoyment thereof.” *Gatto*, 312 Ga. at 169 (compiling cases). The Georgia Supreme Court recently acknowledged that the scope of municipal nuisance liability was expanded further in *Town of Fort*

Oglethorpe v. Phillips, 244 Ga. 834 (1968) “to [also] include personal injuries beyond those tied to the plaintiff’s property. . . .” *Gatto*, 312 Ga. at 170.

Dalton Utilities argues that neither the traditional nor expanded approach overcomes its municipal immunity. It argues that traditional nuisance liability is inapplicable because the City of Rome lacks an ownership interest in or the authority to regulate the water quality of the waters of the State and also that the City of Rome lacks standing to sue for an expanded nuisance based on a condition that threatens the health and well-being of the City of Rome’s customers. (Dalton Utilities’ Reply in Spt. of Mot. Dismiss at 10).

Georgia is a riparian rights state, where landowners have a right to reasonable use of riparian water. *See Stewart v. Bridges*, 249 Ga. 626 (1982). As recognized by the district court in *Johnson v. 3M Company*, 563 F. Supp. 3d 1253, 1307 n.12 (N.D. Ga. 2021), Georgia courts have treated water taken into lawful possession and control as personal property. This is particularly true in the utility context, where water theft has been held to be larceny. *See Reynolds v. State*, 101 Ga. App. 715, 716 (1960) (holding water stolen from city pipes to be larceny and finding “[o]wnership properly laid in the city”). Georgia courts have also held water and electricity sold to customers by utilities to be, respectively, “goods” under the Georgia Commercial Code and “personal property” under Georgia’s products liability statute. *See Zepp v. Mayor & Council of Athens*, 180 Ga. App. 72, 73–77 (1986); *Monroe v. Savannah Elec. and Power Co.*, 267 Ga. 26, 27 (1996). As such, the Court finds that water drawn by the City for distribution to its customers is the City’s property while in its possession, all the way to its customers’ meters, where it becomes the customers’ property.

The Court agrees that the City of Rome has alleged a property interest in the water it draws from the Oostanaula River, (Pl.’s Verif. Fourth Am. Compl. ¶¶ 169, 176-177), and therefore Dalton

Utilities is not immune from the City's nuisance claims under the traditional understanding of municipal nuisance liability. Thus, the Court need not determine whether the City has standing to sue under the more expansive nuisance doctrine.

IV. Dalton Utilities' Free Public Services and Transfer of Venue Arguments Have Already Been Raised and Rejected in this Case.

Dalton Utilities argues in support of its motion that Rome's claims against it are barred by the free public services doctrine. (Dalton Utilities' Mem. of Law in Spt. of Mot. Dismiss at 23–24.) The Court has previously heard and rejected this exact argument from other defendants in this case. (Order on Defs.' Mot. Dismiss Second Am. Compl. (Dec. 17, 2020); Order on Defs.' Mot. Dismiss (April 4, 2022).)

Dalton Utilities also argues that venue is not proper in Floyd County and that the case should be transferred to Whitfield County. (Dalton Utilities' Mem. of Law in Spt. of Mot. Dismiss at 26–29.) This exact argument has likewise been raised and rejected by the Court in this case. (Order on Def's Mots. to Transfer Venue (Dec. 16, 2020).)

V. Punitive Damages

Dalton Utilities argues that Rome's punitive damages claims against it should be dismissed because Dalton Utilities' status as a political subdivision protects it from such an award. Under Georgia law, awards of punitive damages against municipal corporations are generally against public policy, as they “are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill.” *Metro. Atlanta Rapid Transit Auth. v. Boswell*, 261 Ga. 427, 428 (1991) (quoting *City of Newport v. Fact Concerts*, 453 U.S. 247, 267 (1981)).

On the other hand, Georgia courts have routinely allowed plaintiffs to recover punitive damages from public utility providers. *See, e.g., Oglethorpe Power Corp. v. Sheriff*, 210 Ga. App.

299, 302 (1993); *Oglethorpe Power Corp. v. Est. of Forrister*, 332 Ga. App. 693 (2015); *Walton Elec. Membership Corp. v. Snyder*, 226 Ga. App. 673, 678 n.7 (1997), *aff'd*, 270 Ga. 62 (1998); *Rossee Oil Co. v. BellSouth Telecommunications, Inc.*, 212 Ga. App. 235, 236 (1994); *Black v. Georgia Power Co.*, 151 Ga. App. 727, 729 (1979). Rome's allegations against Dalton Utilities arise out of Dalton Utilities' status as a public utility provider. (Pl.'s Verif. Fourth Am. Compl. ¶¶ 31, 33–34, 148–54.) Although not necessary to the Court's reasoning at this stage, Dalton Utilities has conceded its status as a public utility and even compared itself to utility providers that have historically been subjected to punitive damages awards. (See Dalton Utilities' Mem. of Law in Spt. of Mot. Dismiss at 3, 8–12.) Moreover, the Charter for the City of Dalton provides that "the board of water, light and sinking fund Commissioners of said city shall have entire control of the public utilities of the City of Dalton..." [(1913 Ga. Laws, page 766, § 1) City of Dalton Code of Ordinances, Article VIII, Division 2 (Charter) Municode]. Because the question of whether Dalton Utilities' status as a public utility provider opens it up to an award of punitive damages would require that the Court wade into facts not contained in Rome's Fourth Amended Complaint, Dalton Utilities' request that Rome's punitive damages claim be dismissed is premature at this time.

VI. Primary Jurisdiction

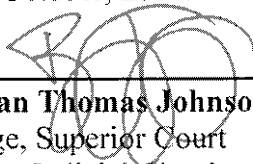
Finally, Dalton Utilities requests that the Court defer jurisdiction to the Georgia Environmental Protection Division (EPD) under the doctrine of primary jurisdiction. (Dalton Utilities' Mem. of Law in Spt. of Mot. Dismiss at 24.)

"Primary jurisdiction is a judicially created doctrine whereby a court of competent jurisdiction may dismiss or stay an action pending a resolution of some portion of the actions by an administrative agency." *Smith v. Hi-Tech Pharms., Inc.*, 875 S.E.2d 454, 462 (Ga. Ct. App. 2022). A similar request to defer questions of PFAS regulation to the EPD was denied by the

district court in *Parris v. 3M Company, et al.*, No. 4:21-CV-40-TWT, 2022 WL 976007 (N.D. Ga. Mar. 30, 2022). The Court finds that, like in *Parris*, the primary jurisdiction doctrine is not applicable in this case. The Court therefore declines to defer jurisdiction to the EPD.

IT IS THEREFORE ORDERED that Dalton Utilities' Motion to Dismiss Plaintiff's Fourth Amended Complaint or, in the alternative, to Transfer Venue is hereby **DENIED**.

IT IS SO ORDERED, this 25th day of October, 2022.



Bryan Thomas Johnson
Judge, Superior Court
Rome Judicial Circuit

{Signatures Continued on Following Page}

Prepared and presented by:

**BRINSON, ASKEW, BERRY, SEIGLER,
RICHARDSON & DAVIS, LLP**

/s/ J. Anderson Davis

J. ANDERSON DAVIS
Georgia Bar No. 211077
A. FRANKLIN BEACHAM III
Georgia Bar No. 043743
SAMUEL L. LUCAS
Georgia Bar No. 142305
LEE B. CARTER
Georgia Bar No. 595903
SARAH C. MARTIN
Georgia Bar No. 440539
P.O. Box 5007
Rome, GA 30162-5007
Phone: 706.291.8853
Fax: 706.234.3574
adavis@brinson-askew.com
fbeacham@brinson-askew.com
slucas@brinson-askew.com
lcarter@brinson-askew.com
smartin@brinson-askew.com
*Attorneys for Plaintiff The
City of Rome, Georgia*

FRIEDMAN, DAZZIO & ZULANAS, P.C.

/s/ Jeffrey E. Friedman
JEFFREY E. FRIEDMAN
LEE T. PATTERSON
MATT D. CONN
Admitted Pro Hac Vice
3800 Corporate Woods Drive
Birmingham, AL 35242
Phone: 205.278.7000
Fax: 205.278.7001

*Attorneys for Plaintiff The
City of Rome, Georgia*

THE CITY OF ROME, GEORGIA,

CIVIL ACTION FILE

NO.: 19CV02405JFL003

Defendants.

The undersigned hereby certifies that I have served the foregoing proposed ***Order on Plaintiff's Motion for Leave to Amend Complaint*** via eService using the Odyssey eFileGA system and to all parties at interest.

**BRINSON, ASKEW, BERRY, SEIGLER,
RICHARDSON & DAVIS, LLP**

By: /s/ J. Anderson Davis
J. ANDERSON DAVIS
Georgia Bar No. 211077
Attorney for City of Rome

Post Office Box 5007
Rome, GA 30162-5007
706-291-8853
706-234-3574 (fax)
adavis@brinson-askew.com

Appendix D

IN THE SUPERIOR COURT OF FLOYD COUNTY
STATE OF GEORGIA

BARBARA H. PENSION
CLERK OF SUPERIOR COURT
FLOYD COUNTY, GA

2022 APR -5 PM 1: 25

CITY OF ROME, GEORGIA

Plaintiff,

v.

3M COMPANY, et al.,

Defendant.

)
)
)
)
)
)
)
)
)
)

CIVIL ACTION FILE
NO. 19-CV-02405-JFL003

FILED IN OFFICE
Michael J. Gamm
CLERK

ORDER ON DEFENDANT DAIKIN AMERICA, INC'S MOTION TO DISMISS

On September 22, 2021, Defendant Daikin America, Inc. ("Daikin") filed a motion to dismiss the claims made by the City of Rome ("Rome") against it. Daikin arguing that Rome's Complaint, as amended, (the "Complaint") fails to state a claim upon which relief can be granted against Daikin, in that the complaint allegedly gives Daikin no notice of what it supposedly did wrong and that the complaint alleges no set of facts or legal theories on which Rome could state a claim against Daikin; and that the public services doctrine precludes Rome's complaint.

For the reasons set out below, Daikin's motion to dismiss is DENIED.

Standard of Review

"A motion to dismiss for failure to state a claim upon which relief may be granted should not be sustained unless (1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof, and (2) the movant establishes that the

claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought. In deciding a motion to dismiss, all pleadings are to be construed most favorably to the party who filed them, and all doubts regarding such pleadings must be resolved in the filing party's favor.” PV Holding Co. v. Poe, 360 Ga. App. 381, 382 (2021)(quoting Hendon Properties, LLC v. Cinema Dev., LLC, 275 Ga.App. 434, 435 (2005).

Rome's Complaint State's a Viable Claim

Daikin argues Rome's complaint must be dismissed in part because while Rome complains Daikin “is causing a trespass, nuisance, and injury,” Rome supposedly fails to allege how, where, and when Daikin did so. This argument seems to ignore pretty straight forward notice pleading in the Complaint: Daikin is alleged to be causing a nuisance, trespass, and injury in Floyd County, beginning some forty years ago and continuing through present day. See the Complaint, ¶¶ 20, 57, 102, 124, and 127. Daikin, along with other Defendants, is alleged to have caused injury by collectively manufacturing precursor materials to carpets containing PFC's and manufacturing carpets in a method discharges those chemicals into waterways, despite knowing those chemicals cause injury. See for example the Complaint, ¶¶ 40, 70-71, 73, 90, 115, 126.

Daikin, in its briefing, essentially ignores certain paragraphs of the Complaint by explaining that *it* is not a carpet manufacturer and thus did not participate in any activity that would directly place PFC's in the waterways in

question. That may prove to be so, but at this point there is no evidence before the Court to support that conclusion. If there were, the Court would find itself ruling on a motion for summary judgment, rather than a motion to dismiss. Under the standard of review appropriate the motion Daikin made, Daikin's proffer of its own role in the manufacturing process is irrelevant and not proper for consideration.

Likewise, Daikin's arguments regarding legal theories under which it could not be held liable and lack of duty similarly fail at this stage. All Daikin's arguments are premised on the presumption that Daikin did not discharge or control any discharges of any substances into the watersheds at issue. Daikin claims Rome has failed to even make this allegation. Yet, the Complaint states "*Defendants'* intentional acts in manufacturing, supplying, and discharging PFCs..." The Complaint, ¶ 122. Rome alleged all Defendants manufactured, supplied, and *discharged* PFCs, not all Defendants except Daikin. Again, while Daikin may possess evidence which would support the conclusion that they were not a discharger, that is not what was alleged. And the allegation is all that matters at this stage. Rome has sufficiently plead several theories of recovery under which the Defendants collectively owed it a duty.¹

The Action is Not Barred by the Public Services Doctrine

First, Rome's providing of water to its inhabitants for a fee and the whole selling of water to Floyd County is not a free public service as would trigger the

¹ At summary judgment, perhaps individual defendants will find that the evidence does not support recovery from that particular defendant. Only time will tell.

doctrine. See McCrary Eng'g Corp. v. City of Bowdon, 170 Ga. App. 462, 465 (1984).

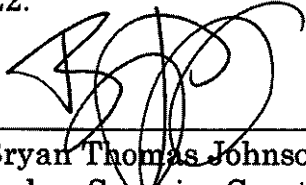
Secondly, even if it were a free public service that would implicate the doctrine, the doctrine permits recovery of the costs of carrying out public services from a tortfeasor when government owned property is damaged. See Walker Cty. v. Tri-State Crematory, 284 Ga. App. 34, 37 (2007). Here, the water Daikin is alleged to have polluted is collected by Rome on property it has an interest in. Plaintiffs correctly point out that "Running water belongs to the owner of the land on which it runs." See O.C.G.A. § 44-8-1. The Complaint clearly alleges that "Rome owns and occupies property used to serve its water customers, including a water intake site..."

Finally, both an action under the Georgia Water Quality Act and the abatement of a public nuisance under O.C.G.A. § 41-2-1 *et seq.* were pled by Plaintiffs in the Complaint. Those statutes specifically authorize this type of action, thus removing it from the bar of the Public Services Doctrine. See Walker at 37.

Conclusion

For the foregoing reasons, Daikin's motion to dismiss is DENIED.

SO ORDERED this 4th day of April, 2022.



Bryan Thomas Johnson,
Judge, Superior Court,
Rome Judicial Circuit

IN THE SUPERIOR COURT OF FLOYD COUNTY
STATE OF GEORGIA

CITY OF ROME,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION FILE
v.	)	NO. 19CV02405-JFL003
	)	
3M COMPANY, et. al,	)	
	)	
Defendant.	)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that I have served the foregoing *ORDER*
ON DEFENDANT DAIKIN AMERICA, INC'S MOTION TO DISMISS to the
following parties via electronic mail as follows:

William E. Underwood
wunderwood@joneswalker.com

Steven F. Casey
scasey@joneswalker.com

Kary Bryant Wolfe
kwolfe@joneswalker.com

J. Anderson Davis
adavis@brinson-askew.com

Franklin Beacham
fbeacham@brinson-askew.com

Samuel L. Lucas
slucas@brinson-askew.com

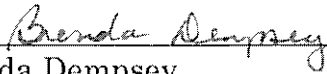
Sarah C. Martin
smartin@brinson-askew.com

Jeffrey E. Friedman
jfriedman@friedman-lawyers.com

Lee T. Patterson
lpatterson@friedman-lawyers.com

Matt D. Conn
mconn@griedman-lawyers.com

This 5th day of APRIL, 2022.



Brenda Dempsey
Assistant to Judge Bryan Thomas Johnson
Superior Courts
Rome Judicial Circuit

Appendix E



ELECTRONICALLY FILED
8/13/2018 2:31 PM
31-CV-2016-900676.00
CIRCUIT COURT OF
ETOWAH COUNTY, ALABAMA
CASSANDRA JOINSON, CLERK

IN THE CIRCUIT COURT OF ETOWAH COUNTY, ALABAMA

THE WATER WORKS AND SEWER	)	
BOARD OF THE CITY OF GADSDEN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO:
	)	31-CV-2016-900676.00
3M COMPANY, INC., et al.,	)	
	)	
Defendants.	)	

**ORDER ON DEFENDANTS' DISPOSITIVE MOTIONS
AND MOTIONS FOR PROTECTIVE ORDER**

Before the Court are motions to dismiss, motions for summary judgment, and motions for a protective order to stay discovery filed by various Defendants. The Court will address each motion separately.

FACTS

Plaintiff, the Water Works and Sewer Board of the City of Gadsden ("Plaintiff"), provides residential and commercial customers in Etowah County with drinking water. Plaintiff utilizes the Coosa River as its raw water source, specifically drawing its source water from Lake Neely Henry in the Middle Coosa Basin. Coosa River tributaries above Plaintiff's water intake point includes the Conasauga River which is located just to the east of Dalton, Georgia. Dalton is home to over 150 carpet manufacturing plants, and more than 90% of the world's carpet is produced within a 65-mile radius of the city.

Defendants are owners and operators of, or the chemical suppliers to, manufacturing facilities in and around Dalton, Georgia. Plaintiff alleges that these manufacturing facilities apply perfluorinated chemicals ("PFCs") including, but not limited to, perfluorooctanoic acid ("PFOA"), perfluorooctane sulfonate ("POSE"), and related chemicals in the manufacturing process to impart stain resistance to their carpet. Plaintiff further states that these chemicals pose certain health risks to individuals who drink water contaminated with PFCs and its related chemicals. Because of these health risks, the United States Environmental Protection Agency ("EPA") issued a new drinking water health advisory for PFOA and PFOS, stating that the combined concentration of these chemicals in drinking water pose a lifetime health risk when they reach concentration that levels of greater than 70 parts per trillion.

Plaintiff alleges the Defendant chemical suppliers and carpet manufacturers caused PFCs and their related chemicals to enter the Conasauga River that contaminated Plaintiff's water source from the Coosa River. As a result, Plaintiff claims it must expend resources to remove these chemicals from the source water to ensure it can deliver safe drinking water to its customers.

ANALYSIS

The motions filed by the Defendants can mostly be placed into three different categories. First, most of the Defendants seek dismissal or summary judgment for lack of personal jurisdiction either because they claim they did not supply or use the chemicals at issue in the complaint or did not engage in any activities in the State of Alabama to warrant this court's jurisdiction. Second, some Defendants attack the sufficiency of the allegations in Plaintiff's complaint and move to dismiss for failure to state a claim upon which relief can be granted pursuant to ALA. R. Civ. P. 12(b)(6). Finally, several Defendants also moved for a protective order staying discovery pursuant to ALA. R. Civ. P. 26(c) until this Court rules on the accompanying dispositive motion seeking dismissal from the case.

For ease of review, the Court will discuss the governing law for each of these issues, then will address the Defendants' motions separately.

I. Personal Jurisdiction

Alabama courts may exercise personal jurisdiction over an out-of-state defendant as permitted by Alabama's long-arm provision, Ala. R. Civ. Pro. 4.2(b). "This rule extends the personal jurisdiction of Alabama courts to the limit of due process under the United States and Alabama Constitutions." *Ex parte City Boy's Tire*, 87 So. 3d 521, 528 (Ala. 2011). Alabama Courts do not look to statutes or rules, but instead look to the essence of due process. *Id.* Stated another way, instead of simply applying formulas, the court relies on principles of fairness and justice. *Id.* There are two types of jurisdiction a court may exercise over a defendant: general and specific.

a. General Jurisdiction

General jurisdiction exists when a defendant's "continuous ...operations within a state [are] so substantial and of such a nature as to justify suit against [the defendant] on causes of actions arising from dealings entirely distinct from those activities" *Hinrichs v. General Motors of Canada, Ltd.*, 222 So. 3d 1114, 1121 (Ala. 2016) *cert. denied*, 137 S. Ct. 2291(2017) (quoting *Goodyear*, 564 U.S. at 924). It requires "continuous and systematic" contacts with the forum state so as to render the defendant essentially at home there. *Id.* (quoting *Goodyear*, 564 U.S. at 919 (2011)). A corporation's home may include its state of incorporation, its principal place of business, or wherever it has "some other comparable level of intensity of contact." *Hinrichs*, 222 So. 3d at 112. Notably, "*Goodyear* did not hold that a corporation may be subject to general jurisdiction only in a forum where it is incorporated or has its principal place of business; it simply typed those places paradigm all-purpose forums." *Id.* (quoting *Daimler AG v. Bauman*, 134 S.Ct. 746, 760-62 (2014) (emphasis original)). The *Hinrichs* court interpreted *Daimler* to hold that the key inquiry is whether a defendant's contacts with Alabama are "so 'continuous and systematic' that it is essentially 'at home' there." *Hinrichs*, 222 So. 3d at 1125. Therefore, the court may still analyze the extent of a defendant's contacts with the forum state to determine whether it is "essentially" at home there.

b. Specific Jurisdiction

Three elements must be satisfied for Alabama courts to have specific personal jurisdiction:

First, the defendant must have ‘purposefully avail[ed] itself of the privilege of conducting activities within the forum State.’ *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). The requirement that a defendant purposefully direct activity to the forum state precludes the exercise of jurisdiction over a defendant whose affiliation with the forum state is ‘random,’ ‘fortuitous,’ or ‘attenuated,’ or the ‘unilateral activity of another party or a third person.’ *Burger King v. Rudzewicz*, 471 U.S. 462, 475 (internal citation marks omitted) ...

Second, the action must ‘arise out of or relate to’ the foreign defendant’s ‘activities in the forum State.’ *Helicopteros Nacionales de Colombia, S.A., v. Hall*, 466 U.S. 408, 414 (1984); *Burger King*, 471 U.S. at 472...

Finally, a court must examine whether the exercise of jurisdiction over a foreign defendant comports with fair play and substantial justice, taking into account various factors deemed relevant, including an evaluation of the burden on a defendant, the forum state’s interest in obtaining convenient and effective relief, the interstate judicial system’s interest in efficient resolution of the controversies, and furthering fundamental social policies. *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 113 (1987); *Burger King*, 471 U.S. at 476-77.

Hinrichs, 222 So. 3d at 1121-22.

Where the plaintiff alleges that the defendant committed an intentional tort, the effects test may be applied to determine whether the defendant has the requisite contacts with the forum state. The effects test requires a Plaintiff to show “that the defendant (1) committed an intentional tort (2) that was directly aimed at the forum, (3) causing an injury within the forum that the defendant should have reasonably anticipated.” *Oldfield v. Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210, 1220 (11th Cir. 2009). Importantly, physical presence in the forum state is not necessary for jurisdiction as a physical entry into the forum state through “some other means” is a relevant contact. *Walden v. Fiore*, 134 S.Ct. 1115, 1122 (2014) (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 773-74 (1984)).

These cases establish that a defendant must direct some act towards a particular state to warrant personal jurisdiction and being hauled into court there. However, this reasoning, and the cases that established the current jurisdictional analysis, are factually distinguishable from the matter before this Court and other environmental contamination cases involving a continuous tort that occurs over time and migrates from one state into another. Indeed, the United States Supreme Court has recognized that “even the simplest sort of interstate pollution case [is] an awkward vehicle to manage.” *Ohio v. Wyandotte Chemicals Corp.*, 401 US 493, 504 (1971). Thus, any jurisdictional analysis must consider the more complex nature of interstate environmental pollution cases such as that before this Court.

In similar water pollution cases, courts have not dismissed lawsuits for lack of personal jurisdiction when a resident plaintiff sued a non-resident defendant that discharged pollution into water or released water that ultimately caused damage to the plaintiff in the forum state. See, e.g. *People of State of Illinois v. City of Milwaukee*, 599 F.2d 151 (7th Cir. 1979) (water pollution originating in Wisconsin causing injury in Illinois), *aff'd*, 451 U.S. 304 (1981); *International Paper Co. v. Ouellette*, 479 US 481 (1987) (water pollution originating in New York causing injury in Vermont); *Ohio v. Wyandotte Chemicals Corp.*, 401 US 493, 500-501 (1971) (water pollution from Canada causing damage in the U.S.); *Pakootas v. Teck Cominco Metals, Ltd.*, No. CV-04-256-AAM, 2004 WL 2578982 (E.D. Wash. Nov. 8, 2004), *aff'd* 452 F.3d 1066 (9th Cir. 2006) (water pollution from Canada causing damage in U.S.); and *Horne v. Mobile Area Water & Sewer System*, 897 So.2d 972 (Miss. 2004) (release of water in Alabama causing property damage in Mississippi). Indeed, the Supreme Court specifically rejected one defendant's argument that "all state-law suits must be brought in [the] source-state courts." *Ouellette*, 479 U.S. at 499 (emphasis original). Thus, jurisdiction was deemed proper where the injury occurred.

This Court finds the *Horne* and *Pakootas* cases particularly instructive. In both cases, there was a question of whether the plaintiffs satisfied the issue of whether the out-of-state defendants had engaged in "express aiming" or "purposefully directing" activities toward the forum state. In both cases, the court held that the plaintiffs had satisfied their burdens on this issue.

In *Horne*, property owners in Mississippi sued various defendants, including the Water and Sewer System of Mobile, Alabama, ("The System") in state court in Mississippi. The System had, in Alabama, released a significant amount of water in anticipation of an oncoming hurricane. The water that was released damaged and/or destroyed real and personal property downstream in Mississippi. The Supreme Court of Mississippi held that "[t]here is no question that [the defendants] knew the water would flow into Mississippi..." *Horne* 897 So.2d at 979. This act and this knowledge was sufficient for the court to determine that the System in Alabama had "minimum contacts" with Mississippi such that the exercise of personal jurisdiction was appropriate.

In *Pakootas*, the plaintiffs were citizens of the State of Washington that filed suit under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) against a Canadian corporation that operated a smelter ten miles north of the U.S. – Canada border. The plaintiffs alleged that the defendants discharged harmful substances into the waters that flowed downstream to the plaintiffs' location and caused damage. The court found personal jurisdiction existed under these facts.

Thus, a defendant who engaged in conduct that foreseeably impacted a plaintiff in another state was sufficient to confer personal jurisdiction in the state where the plaintiff was injured. This finding comports with the due process requirement that it be fair to force a defendant to litigate in the selected forum. *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). This ultimately turns on foreseeability and whether a defendant's conduct could have predictably caused an injury in the forum state. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981). If so, then the defendant could reasonably anticipate being hauled into court there.

II. Failure to State a Claim

Under ALA. R. CIV. P. 8(a), a complaint must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” This pleading standard does not require that a plaintiff show that it will “ultimately prevail, but only whether the plaintiff may possibly prevail.” *Liberty Nat’l Life Ins. Co. v. University of Alabama Health Servs. Found., P.C.* 881 So.2d 1013, 1017 (Ala. 2003). Dismissal under ALA. R. CIV. P. 12(b)(6) is only proper if “it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief.” *Id.*

Pleadings are construed liberally in favor of the plaintiff. *Adkison v. Thompson*, 650 So. 2d 859, 862 (Ala. 1994). A well-pleaded complaint may proceed even if it appears “that a recovery is very remote and unlikely.” *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). “Generally, the pleadings, in and of themselves, are considered relatively unimportant because cases are to be decided on the merits.” *Johnson v. City of Mobile*, 475 So.2d 517, 519 (Ala. 1985). “The purpose of the Alabama Rules of Civil Procedure is to effect justice upon the merits of the claim and to renounce the technicality of procedure.” *Crawford v. Crawford*, 349 So. 2d 65, 66 (Ala. Civ. App. 1977). Further, the court must accept all allegations of the plaintiff’s complaint as true unless they are controverted by the defendant’s affidavits. *Corporate Waste Alternatives, Inc. v. McLane Cumberland, Inc.*, 896 So. 2d 410, 413 (Ala. 2004).

Plaintiff asserts the following claims against all defendants: negligence, nuisance, trespass, wantonness/punitive damages, and injunctive relief. A handful of Defendants argue these claims are not sufficiently plead under ALA. R. CIV. P. 12(b)(6) and, as a result, seek dismissal.

III. Standard Governing Granting a Protective Order

Several Defendants seek a halt of discovery until this Court determines whether it has jurisdiction over them. There is no law or mandate to stay discovery while a dispositive motion is pending before a court. Instead, this Court retains discretion to grant a stay only if the moving party establishes “good cause” to protect a party “from annoyance, embarrassment, oppression, or undue burden or expense.” ALA. R. CIV. P. 26(c). Courts have imposed various limitations when determining whether there is good cause to grant a protective order staying discovery. The Alabama Supreme Court recognized that limiting discovery should occur “sparingly and with real discretion rather than as an absolute rule.” *Ex parte Windom*, 776 So. 2d 799, 803 (Ala. 2000) (quoting 8 Wright & Miller, *Federal Practice and Procedure*, § 2040 (1994)). “[T]he movant must meet this burden with a ‘particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements.’” *Smith v. Life Ins. Co. of North America*, 33 F.Supp.3d 1324, 1326 (N.D. Ala. July 30, 2014) (quoting *United States v. Garrett*, 571 F.2d 1323, 1326 n. 3 (5th Cir. 1978)).¹ Thus, mere conclusory statements about discovery creating an undue burden or expense are insufficient.

¹ Federal courts’ analyses of the analogous Federal Rule of Civil Procedure 26 are “authority for construction of the Alabama Rules.” *Ex parte Scott*, 414 So.2d 939, 941 (Ala. 1982); see also *Baldwin v. Baldwin*, 160 So. 3d 34, 40 (Ala. Civ. App. 2014) (citing *Ex parte Novartis Pharms. Corp.*, 975 So. 2d 297, 300 n.2 (Ala. 2007)) (“the opinions of federal courts construing the federal rule are persuasive authority as to the proper construction of” Rule 26(c)).

Rule 26(c) also requires the moving attorney to submit a statement along with the motion for protective order confirming that attorney met and conferred with opposing counsel to attempt to resolve the dispute:

“A motion for a protective order shall be accompanied by a statement of the attorney for the moving party stating that the attorney, before filing the motion, has endeavored to resolve the subject of the discovery motion through correspondence or discussion with opposing counsel...” (emphases added).

The supplied emphases clearly establish this meet and confer requirement is mandatory prior to counsel moving this Court for a protective order. Indeed, the committee comments elaborating on this requirement confirm its desire that parties resolve a discovery dispute before involving the Court. Failure to submit the meet and conferral statement is a ground for denying a motion for protective order. *See Smith v. Savage*, 655 So.2d 1022, 1025 (Ala. Civ. App. 1995) (stating that the trial court should reconsider the granting of a protective order when the moving party failed to file the conferral statement).

APPLICATION

The Court will now analyze each Defendant’s motion.

I. Defendant MFG Chemical, Inc.

a. Motion to Dismiss for Lack of Personal Jurisdiction

MFG Chemical, Inc. (“MFG”) argues this Court lacks sufficient contacts with Alabama to warrant this Court exercising specific jurisdiction. In support, it relies upon the affidavit of Chairman and CEO Charles E. Gavin, III who states that MFG is incorporated in Georgia, maintains no manufacturing or office locations in Alabama, and does not discharge anything directly into the Conasauga River but, instead, discharges its wastewater to the wastewater treatment facility owned and operated by Dalton Utilities. Doc. 218, Ex. A. MFG also points out that, even if its discharges had contained PFCs, it did not pollute Plaintiff’s waters because it transferred its discharges to Dalton Utilities for treatment and Dalton Utilities’ alleged failure to decontaminate is an intervening act directed at Alabama which breaks the chain of causation.

Plaintiff responds that Mr. Gavin’s affidavit does not sufficiently controvert its allegations that MFG manufactured and discharged wastewater containing PFCs to Dalton Utilities. Plaintiff also highlights that Mr. Gavin’s affidavit fails to state that MFG “never” manufactured or discharged PFCs, inferring that MFG could have manufactured and sold PFCs in previous years which is pertinent because these chemicals persist in the environment for years and can bioaccumulate in humans, causing a variety of illnesses. Doc. 498, pgs. 9-11. Plaintiff also emphasizes that MFG’s discharge of pollutants to Dalton Utilities is not an intervening act breaking the chain of causation because MFG was aware of the PFC contamination issues involving Dalton Utilities and the Conasauga River for several years yet continued to contribute to the pollution with its manufacture and discharge of PFCs. In support, Plaintiff cited to

publicly available studies which examined the toxicity of PFCs dating back to 1999 and one report released by the EPA in 2008 revealing high levels of PFCs in the Conasauga River downstream of Dalton, Georgia. *Id.* at pgs. 7-9.

Considering the facts in the light most favorable to the Plaintiff and in construing all reasonable inferences in favor of the Plaintiff where the Complaint and the MFG's evidentiary submissions conflict, the Court finds that the Plaintiff has demonstrated that the Defendants have conducted activity directed at Alabama and that that activity is not "random," "fortuitous," or "attenuated," or the "unilateral activity of another party or a third person."

As shown in the *Horne* and *Pakootas* cases, the actions of an entity that result in harmful substances being placed into a water source can result in harm downstream in a foreign jurisdiction and it is reasonable for the entity causing those substances to be placed into the water to expect that their downstream harm could cause them to be brought into court in that foreign jurisdiction. Thus, an entity causing chemicals to enter the Conasauga River should expect that since that river is a tributary of the Coosa River, then the chemicals can enter the Coosa River. That entity should further expect that those chemicals will flow downstream and reach Alabama once the Coosa River crosses the Georgia/Alabama state line. Therefore, the act of causing the chemicals to enter the Conasauga River is an act directed at Alabama.

MFG argues that Dalton Utilities' treatment, or alleged failure thereof, is an intervening cause which breaks the chain of causation and, consequently, any claim that MFG purposefully directed activities at Alabama cannot stand. This does not occur, however, if the intervening cause was foreseeable. Foreseeability is the cornerstone of proximate cause. *Alabama Power Company v. Taylor*, 306 So.2d 236 (Ala. 1975). A defendant is held legally responsible for all consequences which a prudent and experienced person, fully acquainted with all the circumstances, at the time of his negligent act, would have thought reasonably possible to follow that act. *Prescott v. Martin*, 331 So.2d 240 (Ala. 1976). This includes the negligence of others. *Williams v. Woodman*, 424 So.2d 611 (Ala. 1982).

A cause is considered the proximate cause of an injury if, in the natural and probable sequence of events, and without intervention of any new or independent cause, the injury flows from the act. *City of Mobile v. Havard*, 268 So.2d 805 (Ala. 1972). To be an intervening cause, a subsequent cause also must have been unforeseeable and must have been sufficient in and of itself to have been the sole "cause in fact" of the injury. *Vines v. Plantation Motor Lodge*, 336 So.2d 1338, 1339 (Ala. 1976). If an intervening cause could have reasonably been foreseen at the time the tortfeasor acted, it does not break the chain of causation between his act and the injury. *Id.*

MFG's supposed lack of control over its wastewater discharge from Dalton Utilities is not the pertinent issue, and Dalton Utilities' own control over its treatment and discharge of MFG's PFC-laden wastewater does not break the causal chain. Any supposed inability of Dalton Utilities to sufficiently treat and remove PFCs from its wastewater was certainly foreseeable based on publicly available documents. As discussed above, the Dalton carpet industry and their chemical suppliers have been on notice for nearly a decade that the industrial wastewater discharged from their operations have introduced PFC contamination into the Coosa River

Watershed after passing through Dalton Utilities. MFG's argument that it could not foresee its wastewater discharge would ultimately pollute Plaintiff's drinking water source, and that its actions were not aimed at Alabama residents, is unavailing.

MFG cannot, at this stage in the litigation, avail itself of the defense that Dalton Utilities is the entity responsible and that its actions constitute the "unilateral activity of another party or a third person." As alleged by Plaintiff, and, again considering the facts in the light most favorable to the Plaintiff and resolving factual disputes in its favor, the chemicals at issue "resist degradation during the treatment process utilized by Dalton Utilities and increase in concentration as waste accumulates in the [Land Application System]." Compl. at ¶ 48. In other words, the chemicals treated by Dalton Utilities by the Defendants cannot be treated and removed from the environment by Dalton Utilities. Therefore, Plaintiff alleges the Defendants have not properly disposed of the chemicals by sending them to Dalton Utilities. Thus, the actions complained of are not the "unilateral activity of another party or a third person." Given this finding, the Court also finds that: (1) there is "a 'relationship among the defendant, the forum, and the litigation'" and (2) the exercise of personal jurisdiction would "comport with fair play and substantial justice."

Therefore, the Court finds in favor of the Plaintiff on the issue of specific personal jurisdiction and denies MFG's Motion to Dismiss.

b. Motion for Protective Order to Stay Discovery

Because the Court denies MFG's Motion to Dismiss, its Motion for Protective Order to Stay Discovery is also denied.

II. The Dixie Group, Inc.

a. Motion to Dismiss for Lack of Personal Jurisdiction

Defendant The Dixie Group, Inc. ("Dixie Group") makes similar arguments regarding personal jurisdiction as asserted by MFG and, for the same reasoning as set out above, its motion is to be denied.

It is also worth noting one additional argument made by Dixie Group. Dixie Group also argues that "foreseeability alone is insufficient as a matter of law to trigger personal jurisdiction in the forum state." *Thompson v. Taracorp, Inc.*, 684 So. 2d 152, 156-57 (Ala. Civ. App. 1996). Dixie Group claims the court in *Taracorp* found that, even though the improper disposal of a battery by an Alabama company or use of those batteries in a manner harming the Alabama company was foreseeable, it declined to find personal jurisdiction. In actuality, the court held it was not foreseeable to Taracorp that its conduct would pollute the plaintiff's property and be sued in Alabama. *Id.* at 156. The *Taracorp* court dismissed the Georgia-based defendant because Taracorp's only contacts with Alabama involved two transactions with the resident defendant. The court determined that Taracorp had no knowledge of how the defendant disposed of the batteries or information concerning environmental problems caused by the batteries' disposal. *Id.* at 156.

Unlike Taracorp, Dixie Group and other Defendants here applied PFCs and PFC-related chemicals in its manufacturing process and discharged contaminated water for an unknown time. Based on publicly available information discussed below, Dixie Group was well aware of the environmental harm incurred by those downstream in Alabama due to this ongoing conduct. Dixie Group's statement that the winding and attenuated path of these chemicals down 150 river miles of waterways is unavailing for reasons discussed above in Section I(a).

Therefore, the Court finds in favor of the Plaintiff on the issue of specific personal jurisdiction and denies Dixie Groups Motion to Dismiss.

b. Motion for Protective Order to Stay Discovery

Because the Court denies Dixie Group's Motion to Dismiss, its Motion for Protective Order to Stay Discovery is also denied.

III. J&J Industries, Inc.

a. Motion to Dismiss for Lack of Personal Jurisdiction

Defendant J&J Industries, Inc. makes similar arguments regarding personal jurisdiction as asserted by Dixie Group and, for the same reasoning as set out above, its motion is denied.

b. Motion for Protective Order to Stay Discovery

Because the Court denies J&J's Motion to Dismiss, its Motion for Protective Order to Stay Discovery is also denied.

IV. Dorsett Industries, Inc.

a. Motion to Dismiss for Lack of Personal Jurisdiction

Defendant Dorsett Industries, Inc. makes similar arguments regarding personal jurisdiction as asserted by Dixie Group and, for the same reasoning as set out above, its motion is to be denied.

b. Motion for Protective Order to Stay Discovery

Because the Court denies Dorsett's Motion to Dismiss, its Motion for Protective Order to Stay Discovery is also denied.

V. Shaw Industries, Inc.

a. Motion to Dismiss for Lack of Personal Jurisdiction and, Alternatively, Under the Doctrine of Forum Non-Conveniens.

i. This Court has Specific and General Personal Jurisdiction over Shaw

1. General Jurisdiction Exists

Defendant Shaw Industries, Inc. (“Shaw”) is the only defendant against which Plaintiff contends this Court has general jurisdiction. Although Shaw is incorporated in Georgia and states its principal place of business in Dalton, it can still be subject to general jurisdiction if its contacts with Alabama arise to “some other comparable level of intensity of contact” and is essentially “at home” in Alabama. *Hinrichs*, 222 So.3d at 1122, 1125.

Shaw is the world’s largest carpet manufacturer with more than \$4 billion in revenue and approximately 25,000 employees worldwide.² It has manufacturing and distribution facilities in twenty-nine (29) states and other manufacturing facilities in Australia, Belgium, Brazil, Canada, Chile, China, India, Mexico, Singapore, the United Arab Emirates, and the United Kingdom.³ It operates thirty-one (31) distribution centers and twenty-seven (27) redistribution centers across the United States.⁴ According to the Department of Transportation, Shaw’s transportation subsidiary has over 1,000 drivers⁵ while Shaw employs 400 drivers operating out of its 29 distribution centers who make 4,200 deliveries per day.⁶ Since 2013, Shaw has hosted tradeshow throughout the southeast, including Atlanta and Dallas.⁷ Tradeshow are also scheduled in these cities for 2018.⁸

Shaw’s contacts with Alabama are extensive. Shaw has had a manufacturing facility in Andalusia, Alabama since 1992 and announced in April that it would spend an additional \$184 million on new machinery.⁹ Until July 2017, Shaw also operated a plant in Valley Head, Alabama which opened in 1971.¹⁰ In addition to its manufacturing operations, Shaw also specifically marketed to Alabama customers. It advertises its Alabama dealers on its website and, in turn, its dealers advertise Shaw products in Alabama.¹¹ Shaw’s presence in Alabama is further bolstered by the eleven (11) “network” retailers here, an additional twenty-nine (29) retailers outside the network¹², and the three full time sales representatives that market to all types of customers throughout the state.¹³ Shaw’s carpet is sold by Lowe’s which, as of January

² <https://shawfloors.com/why-shaw/about-us/shaw-history>.

³ <https://www.linkedin.com/company/shaw-industries/>.

⁴ <http://www.shawtransport.com/Driver-Opportunities/Regional-Operations.aspx>.

⁵ https://safer.finesa.dot.gov/query.asp?query_type=queryCarrierSnapshot&query_param=USDOT&query_string=188556.

⁶ <http://www.shawtransport.com/Driver-Opportunities/Regional-Operations.aspx>.

⁷ Plaintiff’s counsel used an internet archive database called the Wayback Machine which allows a user to interact with certain websites as they appeared in the past. Defendant’s website only provided upcoming tradeshow in 2018, so this tool was utilized to show past shows.

<https://web.archive.org/web/20111204223851/http://www.shawshows.com/80/>.

⁸ <http://www.shawshows.com/>.

⁹ <http://www.andalusiannews.com/2017/04/05/shaw-plans-184m-project/>.

¹⁰ http://www.al.com/business/index.ssf/2016/05/shaw_industries_closing_in_val.html.

¹¹ <https://shawfloors.com/stores/storelist>.

¹² <https://shawfloors.com/stores>.

¹³ Carmen Preston, Jim Estes, and Justin Bixeman market to business engaged in the following fields: education, healthcare, hospitality, schools and government, retirement homes, and retail.

29, 2016, has thirty-seven locations throughout Alabama.¹⁴ Shaw provides marketing materials for Lowe's and other retailers.

These contacts are sufficiently substantial, continuous, and systematic to essentially render Shaw at home in Alabama. Therefore, it is subject to general jurisdiction in Alabama.

1. Specific Jurisdiction Exists

Although the Court need not rule on the issue of specific jurisdiction because it holds Shaw is subject to general personal jurisdiction, it will nonetheless address the issue. Shaw makes similar arguments regarding personal jurisdiction as asserted by MFG and Dixie Group and, for the same reasoning as set out above, its motion is to be denied.

Shaw relies upon the affidavit of its Vice President, Karen Tallon, in support of its argument it lacks sufficient contacts with Alabama because it is incorporated in Georgia and maintains its principal place of business in Dalton. *See* Doc. 182. Importantly, it does not refute that Defendant manufactures carpet using PFCs at its locations in Alabama, markets that carpet to customers in Alabama, ships to those Alabama, or sells its products at many retailers in Alabama. In other words, Shaw does not deny it engaged in the activity giving rise to this suit in Alabama but, instead, merely seeks to downplay its connections with Alabama by stating its presence in Georgia. As discussed above, this is unavailing in cases where polluting activities occurred across state lines.

Simply stated, Ms. Tallon's affidavit does not constitute convincing evidence contradicting Plaintiff's assertion that it has been, and continues to be, damaged because of Shaw's use and discharge of PFCs, including PFOA, PFOS, and their precursors. To the extent any conflict exists between Plaintiff's allegations and Shaw's proffered affidavit, such conflict must be resolved in Plaintiff's favor. *See Corporate Waste Alternatives, Inc.*, 896 So. 2d at 412. Moreover, discovery is in its infancy in this case and must be conducted before this Court agrees to dismiss Shaw.

ii. Alabama is the Proper Forum to Adjudicate this Lawsuit

Shaw also seeks dismissal under Ala. Code. § 6-5-430 on forum non conveniens grounds and suggests that Dalton is the more appropriate venue. The burden is on the party seeking dismissal to prove a more appropriate forum outside the state exists, based on the location of acts giving rise to the lawsuit occurred, the convenience of parties and witnesses, and the interests of justice. Ala. Code. § 6-5-430; *Malsch v. Bell Helicopter Textron, Inc.*, 916 So. 2d 600 (Ala. 2005). All these factors must be positively found to justify dismissal. *Donald v. Transport Life Ins. Co.*, 595 So. 2d 865 (Ala. 1992).

A court is less likely to find it inconvenient for a corporation to litigate a case in a foreign state. *See Ex parte Integon Corp.*, 672 So.2d 497 (Ala. 1995) (holding trial court did not abuse its discretion in denying motion to dismiss based on forum non conveniens despite the corporate

¹⁴<https://www.lowes.com/pl/Carpet-Carpet-carpet-tile-Flooring/4294825283?refinement=4294942374>; https://www.mystore411.com/store/list_state/12/alabama/Lowes-store-locations.

defendant's principal place of business was located in North Carolina, its president was resident of North Carolina, and many acts giving rise to claims in North Carolina). This makes sense given that corporations can easily arrange for its witnesses and documents to appear in another state. In *Ex parte Integon Corp.*, the court determined that the plaintiff's principal place of business in Birmingham meant that Alabama was the appropriate forum. *Id.* Unlike the parties in that case that were states apart, Gadsden is only 90 miles from Dalton. Shaw's expenses to litigate this action in Gadsden are minimal for a \$4 billion corporation such as itself. Consequently, Alabama is the most appropriate forum, and so the Court denies Shaw's request to dismiss the action under forum non conveniens grounds.

VI. Kaleen Rugs, Inc.

a. Motion to Dismiss or, in the Alternative, Motion for Summary Judgment

Defendant Kaleen Rugs, Inc. ("Kaleen") bases its dispositive motion on the statement that it did not engage in the complained of conduct. In support, it submitted two affidavits – one from Senior Vice President Blake Dennard and another from Chief Operating Officer Monty Rath. *See* Docs. 106 and 818. Mr. Dennard's affidavit states that Kaleen does not manufacture carpet, use any of the chemicals set forth in the complaint, or discharge any chemicals into any water supply. Mr. Rath states that Kaleen has "never ordered, requested, directed or specified" for any treatment to be applied to its carpet and has no knowledge that PFCs were used on the rugs it received or sold.

Although informative, these affidavits fail to conclusively establish that Kaleen did not previously engage in the conduct giving rise to this lawsuit. Mr. Dennard's affidavit states that Kaleen does not presently manufacture rugs or carpet, utilize or supply chemicals related to the carpet manufacturing process or discharge these chemicals into any water supply. Doc. 106 at ¶¶ 2, 4, 5. Importantly, the affidavit does not say that Defendant never engaged in these activities. As stated in Plaintiff's complaint, PFCs and related chemicals persist in the environment for years making any past application and discharge of these chemicals pertinent to this action. Compl. ¶ 50. Tellingly, Mr. Rath's affidavit did not shore up this deficiency which Plaintiff mentioned in its Response to Kaleen's Motion to Dismiss. *See* Doc. 774, pg. 6. Consequently, at this stage in the litigation, Plaintiff's allegations against Kaleen are uncontroverted and prevent the Court from dismissing this Plaintiff. Therefore, Kaleen's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment is denied.

b. Motion for Protective Order to Stay Discovery

Because the Court denies Kaleen's Motion to Dismiss, its Motion for Protective Order to Stay Discovery is also denied.

VII. 3M Company

a. Motion to Dismiss for Failure to State a Claim

Defendant 3M Company argues that each of Plaintiff's causes of action must be dismissed because Plaintiff failed to sufficiently allege each cause of action it asserts. Alabama, however, is a notice pleading state which merely requires that a complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief." ALA. R. CIV. P. 8(a). Rule 8(a) is complied with as long as the opponent is given "fair notice of the pleader's claim and the grounds upon which it rests." *Carter v. Calhoun County Board of Education*, 345 So.2d 1351 (Ala. 1997). "The discovery process bears the burdens in the factual details." *McKelvin v. Smith*, 85 So. 3d 386, 688-89 (Ala. Civ. App. 2010). For reasons stated below, Plaintiff has met its pleading burden under Rule 8, and 3M's Motion to Dismiss is denied.

3M also argues it cannot be liable for Plaintiff's damages because, as a chemical supplier, it had no control over how its PFCs and related chemicals were used or disposed of, nor could it foresee that these products would impact Plaintiff and other entities downstream of its customers. Plaintiff's Complaint, however, alleges that 3M has known for 14 years that PFCs and related chemicals survive treatment at conventional wastewater treatment plants as evidenced by its finding of high concentrations of PFCs and related chemicals in a wastewater treatment plant a few miles downstream from one of its production facilities. Compl. at ¶ 53. Plaintiff's Response in Opposition states that 3M was aware of the contamination of public water supplies near its PFC manufacturing facility in Minnesota in the early 2000s which resulted in 3M's funding of a carbon filtration system to remove PFCs from public water systems as well as using carbon filtration to prevent further release of PFCs from its Cottage Grove, Minnesota PFC manufacturing plant through its wastewater discharge system. *See* Doc. 524, Exhibit B. Therefore, it was foreseeable to 3M that, based on its own release of PFCs through its facility's wastewater system in Oak Grove that contaminated public water systems, that other public water systems using water from areas where 3M's PFC compounds were used in large quantities could be contaminated. Not only was it foreseeable to 3M that its PFCs used in Dalton would find their way into drinking water supplies, 3M *knew* that it was likely. *See id.* Exhibit C.

i. Plaintiff Sufficiently Pled its Negligence Claim

3M argues that Plaintiff's negligence claim fails because the complaint did not sufficiently allege that 3M owed Plaintiff a duty, that 3M's conduct was the proximate cause of Plaintiff's harm, and that no damages are recoverable. Under Alabama law, the elements of a claim for negligence are: (1) duty; (2) breach of duty; (3) proximate cause; and (4) damages. *Glass v. Birmingham Southern R.R.*, 905 So.2d 789, 794 (Ala.2004). "In determining whether a duty exists in a given situation, however, courts should consider a number of factors, including public policy, social considerations, and foreseeability. The key factor is whether the injury was foreseeable by the defendant." *Patrick v. Union State Bank*, 681 So.2d 1364, 1368 (Ala. 1996).

Foreseeability is also the cornerstone of proximate cause. *Alabama Power Company v. Taylor*, 306 So.2d 236 (1975). A defendant is held legally responsible for all consequences which a prudent and experienced person, fully acquainted with all the circumstances, at the time of his negligent act, would have thought reasonably possible to follow that act. *Prescott v. Martin*, 331 So.2d 240 (Ala.1976). This includes the negligence of others. *Williams v. Woodman*, 424 So.2d 611 (Ala. 1982).

A cause is considered the proximate cause of an injury if, in the natural and probable sequence of events, and without intervention of any new or independent cause, the injury flows from the act. *City of Mobile v. Havard*, 268 So.2d 805 (Ala. 1972). To be an intervening cause, a subsequent cause also must have been unforeseeable and must have been sufficient in and of itself to have been the sole "cause in fact" of the injury. *Vines v. Plantation Motor Lodge*, 336 So.2d 1338, 1339 (Ala.1976). If an intervening cause could have reasonably been foreseen at the time the tortfeasor acted, it does not break the chain of causation between his act and the injury. *Id.*

The complaint contains numerous allegations satisfying all elements. *See* Compl. at ¶¶ 3-5, 52, 53 and 64-66. It is clear from these complaint excerpts that Plaintiff has pled each element of a negligence claim against 3M under Alabama law. Moreover, these allegations are sufficient to notify 3M of the claim of negligence against which it must defend: manufacturing and supplying chemicals to carpet manufacturing customers located in the Dalton, Georgia to impart stain resistance to carpet that would likely result in contamination of drinking water supplies. Similarly, these allegations, if proven, leave little doubt that Plaintiff would be entitled to relief under its negligence claim. As such, it does not appear beyond a doubt that Plaintiff cannot prove any set of facts which would entitle it to relief under ALA. R. Civ. P. 12.

Finally, the Complaint sufficiently alleges recoverable damages. *See* Compl. at ¶¶ 4, 5, 62, 66, 69, 71, 76, and 78. 3M contends that Gadsden "cannot recover under its negligence claim because Plaintiff has suffered no actual loss or damage to its property." Doc. 258 at 9. 3M, however, is incorrect. The water Plaintiff draws from the Coosa River and treats to sell to its customers unquestionably is "property" as the word is commonly understood and defined. *Merriam-Webster* defines "property" as "something owned or possessed"; "the exclusive right to possess, enjoy, and dispose of a thing"; or "something to which a person or business has a legal title". Once drawn, Plaintiff owns or possesses the water that it draws and is permitted by governmental entities to treat and distribute the treated water to its customers for a fee.

ii. Plaintiff Sufficiently Pled its Nuisance Claim

3M challenges the adequacy of Plaintiff's nuisance claim because the complaint failed to allege either a private or public nuisance and, in either event, believes that Plaintiff fail to sufficiently allege either claim.

1. Plaintiff's Allegations Sufficiently Provided Fair Notice.

Plaintiff's nuisance allegations sufficiently stated that Plaintiff's property was damaged by the Defendant's discharge of PFCs and ultimate contamination of its water source, thereby causing it "hurt, inconvenience, and harm." Compl. at ¶¶ 67-69. The levels of these toxic chemicals in Plaintiff's water caused by 3M's conduct created a condition that threatens Plaintiff's operations, and it was foreseeable that its actions would cause, and continue to cause, substantial damages. *Id.* at ¶¶ 70-71. These allegations sufficiently state a claim for nuisance. *See, e.g. City of Birmingham v. City of Fairfield*, 375 So.2d 438, 441 (Ala. 1979) (holding that nuisance allegation is sufficient if it gives defendant notice of what plaintiff's claim is and the grounds upon which it is based). 3M contends that Plaintiff failed to give fair notice of its

nuisance claim against it, but then argues extensively why Plaintiff's nuisance count fails to state claims for both public and private nuisance. Therefore, 3M's arguments belie its contention that Plaintiff has failed to give it fair notice of the grounds for its nuisance claim and fall short of warranting dismissal of Plaintiff's nuisance claim.

2. Plaintiff Suffered "Special Damages" Compared to the General Public.

3M then argues that Plaintiff has not stated a claim for public nuisance because it has not suffered "special damages" different in kind and degree from the damage to the general public. *See Russell Corp. v. Sullivan*, 790 So. 2d 940, 951 (Ala. 2001); Ala. Code § 6-5-123. Plaintiff has pled damages that are different, if not unique. Plaintiff is the sole supplier of public drinking water to the citizens of the City of Gadsden. Plaintiff must treat the water that it provides to comply with water quality standards through that treatment. The presence of pollutants in Plaintiff's water source dictates the nature and extent of treatment that is required. Plaintiff has alleged that, due to the presence of 3M's PFCs, it has incurred monitoring and testing costs associated with determining contaminant levels and has lost revenues and profits as a result. Compl. ¶¶ 5, 62. These damages are not suffered by the public at large, are unique to Plaintiff, and thus establish the requisite special damages required to assert a claim for public nuisance. Similar allegations were sufficient in an analogous case. *See West Morgan-East Lawrence Water and Sewer Authority v. 3M Company*, 208 F.Supp.3d 1227, 1236 (N.D. Ala. Sept. 20, 2016). Clearly, Plaintiff's damages significantly differ in kind and degree from any damages to the public generally.

Additionally, Alabama law incorporates a much broader definition of the public for purposes of a special damages inquiry, *i.e.*, "the public", the "general public," or the "public in general." *See, e.g.*, Ala. Code § 6-5-123 (1975); *City of Birmingham*, 375 So.2d at 441; *Benefield v. Int'l Paper Co.*, 2009 WL 2601425 at *3 (M.D. Ala. 2009); *Russell*, 790 So.2d at 951. Accordingly, the *Russell* court held:

...the use and enjoyment of a public area is a public right. The alleged nuisance in this case affects anyone who would want to use and enjoy Lake Martin, not just those who live on its banks.

790 So.2d at 953 (emphasis added).

Applying this analysis in this case, the public is "anyone who would want to use and enjoy" the Coosa River, whether it be for recreation, transportation, industrial, or other uses. In contrast, as alleged in the complaint, Plaintiff's "special damages" are the contamination of its drinking water source, increased monitoring and testing costs associated with determining contaminant levels, lost revenues and profits, and other remediation costs to decontaminate its water. Compl. ¶¶ 5, 62. These damages are unique and different from those who merely "use and enjoy" the Coosa River.

3. Plaintiff Sufficiently Pled a Private Nuisance.

3M argues that any private nuisance claim must also fail because Plaintiff does not allege that it owns the Coosa River tributaries, and the effect of 3M's contamination of the Coosa River is not limited to one or a few individuals.

Plaintiff is not required to allege that it "owns" the Coosa River tributaries. As discussed above, Plaintiff has the right to remove water from the Coosa River and the water that is removed becomes the property of Plaintiff for treatment, distribution and sell to its customers. This right is unique to Plaintiff alone and is not open for the public. Based on the information currently before the court, it appears that the effect of 3M's nuisance on public water supplies is limited to the few water systems that draw water from the Coosa River downstream of Dalton, Georgia. Therefore, 3M's nuisance is sufficiently limited to support a private nuisance claim by Plaintiff.

iii. **Plaintiff Sufficiently Pled its Trespass Claim**

3M states that Plaintiff's trespass claim is due to be dismissed because Plaintiff consented to the invasion of PFCs into its water system; there was no intentional invasion on Plaintiff's property; and the complaint fails to allege substantial damage to the *res*.

Plaintiff alleged its property, including a water treatment plant, water distribution system, and offices were invaded by 3M's PFC's discharged upstream in Dalton. Compl. at ¶¶ 73-74. However, Plaintiff clearly states that it **did not** consent to this foreseeable invasion from 3M's chemicals which affected its interest in the exclusive possession of its property. *Id.* at ¶¶ 74-75. As a result, 3M should have known that the discharges upstream from Plaintiff would damage and impair Plaintiff's use of its property, including the operation of its water treatment system, until the trespass is abated. *Id.* at ¶¶ 76-78. These allegations are sufficient to notify 3M that Plaintiff seeks damages caused by PFCs in and on its property, including the finished water provided to the public and its water processing and distribution system.

Alabama has long recognized that the discharge of pollutants at one location that then migrate onto the property of another can constitute actionable trespass. *See Borland v. Sanders Lead Co.*, 369 So.2d 523, 530 (Ala.1979) (recognizing that pollutants discharged onto a plaintiff's land causing damages constituted a trespass); *Rushing v. Hooper-McDonald, Inc.*, 300 So.2d 94, 97-98 (Ala. 1974) (upholding trespass claim when defendant dumped asphalt on own land but eventually slid downhill onto plaintiff's land killing fish in his pond). It is not necessary that 3M intended that its pollutants be placed on and in Plaintiff's property despite 3M's intimation to the contrary. 3M is intentionally providing PFC-containing products which it knew would likely contaminate area waters which is sufficient to sustain Plaintiff's claims for nuisance and trespass claims under *Borland* and *Rushing*. This is distinguishable from the case cited by 3M, *Antoine v. Oxmoor Preservation/One, LLC*, 130 So. 3d 1204 (Ala. Civ. App. 2012), because the defendant in *Antoine* committed no act that contributed to the alleged trespass asserted by plaintiff.

3M argues that Plaintiff consented to its causing the deposit of PFCs on and in Plaintiff's property which defeats its trespass claim and cites *Evans v. Walter Industries, Inc.*, 579 F. Supp. 2d 1349, 1370 (N.D. Ala. 2008) in support of this contention. 3M's argument is untenable

considering Plaintiff's specific allegation that it "did not consent" to the trespass (Compl. at ¶¶ 74, 75) and the fact that the plaintiffs in *Evans* failed to allege that they had not consented to defendant's trespass. Plaintiff never agreed to allow 3M to place anything on or in its property, much less harmful contaminants. This fact also distinguishes this case from *Evans* wherein it was undisputed that the plaintiffs agreed to allow the defendant to place the offending materials on plaintiffs' property. Plaintiff has never consented to 3M's trespasses as it has plainly stated in its complaint.

Finally, 3M contends that Plaintiff's trespass claims should be dismissed because Plaintiff failed to allege that "3M caused substantial damage to its property." Doc 258 at 18. Plaintiff's alleged damages include the contamination of its entire public water system with chemicals known to cause a wide range of serious human disease, including cancers. *See* Compl. at ¶¶ 51-58. Plaintiff states the extent of the contamination will require the installation and operation of an expensive filtration system to remove Defendant's chemicals. *Id.* at ¶5. Viewing these allegations in a light most favorable to the Plaintiff, the claimed damages constitute substantial damage to Plaintiff's property.

iv. Plaintiff Sufficiently Pled its Wantonness/Punitive Damages

3M contends that Plaintiff's claim for punitive damages must also be dismissed because the complaint did not sufficiently allege that 3M consciously committed a wrongful act that caused Plaintiff's injuries. Alabama law defines wantonness as "the conscious doing of some act or the omission of some duty while knowing of the existing conditions and being conscious that, from doing or omitting to do an act, injury will likely or probably result." *Ex parte Essary*, 992 So. 2d 5, 9 (Ala. 2007). "[I]t is not necessary that the actor know that a person is within the zone made dangerous by his conduct; it is enough that he knows that a strong possibility exists that others may rightfully come within that zone." *Id.* (quoting *Joseph v. Staggs*, 519 So.2d 952, 954 (Ala. 1988)).

Plaintiff's allegations specifically describe 3M's conscious misconduct. Compl. at ¶¶ 80-84. As a notice pleading state, this is sufficient at this stage in the litigation. Whether 3M's conduct arises to the standard to warrant punitive damages need not be decided now but is proper after discovery.

v. Plaintiff Sufficiently Pled its Claim for Injunctive Relief

Injunctive relief is a prime remedy for claims of nuisance and trespass. *See Water Works and Sewer Bd. of the City of Birmingham v. Inland Lake Investments, LLC*, 31 So.3d 686, 691-692 (Ala. 2009). The elements required for a preliminary injunction are mostly the same as those for a permanent injunction, except the movant must only show a likelihood of success on the merits compared to actual success on the merits required for a permanent injunction. *Classroomdirect.com, LLC v. Draphix, LLC*, 992 So. 3d 692, 702 (Ala. 2008) (quoting *TFT, Inc. v. Warning Sys., Inc.*, 751 So.3d 1238, 1242 (Ala. 1999)). A preliminary injunction is warranted if a plaintiff demonstrates (1) the moving party would suffer irreparable injury without the injunction; (2) the moving party has no adequate remedy at law; (3) it has at least a reasonable chance of success on the ultimate merits of the case; and (4) the hardship imposed on the non-

movant would not unreasonably outweigh the benefit to the movant. *Holiday Isle, LLC v. Adkins*, 12 So. 3d 1173, 1176 (Ala. 2008). 3M challenges whether Plaintiff's complaint satisfies only the first three elements.

3M states the complaint does not identify the "type of irreparable injury [Plaintiff] would suffer in the absence of injunctive relief" or state facts showing that Plaintiff will likely prevail. Doc. 258 at 20. The complaint, however, states that Plaintiff seeks an injunction requiring all defendants, including 3M, to remove its chemicals from Plaintiff's water supplies and property and, if none is granted, these chemicals will pose a continuing threat to Plaintiff's property. Compl. at ¶¶ 86-87. The irreparable injury is the consistent contamination of the Coosa River posed by 3M's continual sale of PFCs to carpet manufacturers who apply and discharge contaminated wastewater that foreseeably impacts downstream users such as Plaintiff.

Also, for the reasons discussed above, Plaintiff has sufficiently pled facts supporting its claims for negligence, nuisance, trespass, and wantonness, thus demonstrating it has a reasonable chance of success on the merits of the case. As a result, Defendant's Motion to Dismiss this claim and all Plaintiff's claims is denied.

VIII. Lexmark Carpet Mills, Inc.

a. Motion to Dismiss for Lack of Personal Jurisdiction and Failure to State a Claim.

Defendant Lexmark Carpet Mills, Inc. ("Lexmark") premises its Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim on the same arguments made by 3M. For reasons discussed above, its Motion is denied. The Court will address Lexmark's argument it lacks personal jurisdiction.

Lexmark relies upon the affidavit of its Chief Financial Officer, James Butler, to support its argument this Court lacks personal jurisdiction. *See* Doc. 247. Mr. Butler claims that he has personal knowledge that Lexmark has never used, manufactured, or discharged PFCs at its Dalton, Georgia, manufacturing facility. *See Id.*

Plaintiff countered that Lexmark's "own product warranty literature establishes that [Lexmark] manufacturers a number of different stain-resistant products... At least some of these products impart stain-resistance through the use of Scotchgard, a 3M product that contained PFOS as a key ingredient until June 2003 when it was reformulated." Doc. 504 at 9-10. Plaintiff also claims Mr. Butler's affidavit only addresses "two of many PFCs (PFOA and PFOS), and as such fails to address whether [Lexmark] used, manufactured, or discharged chemicals that could degrade or decay into PFC-type chemicals such as PFOA or PFOS." *Id.* at 10. Plaintiff emphasizes that its allegations are not limited to PFOA and PFOS but also includes "related chemicals." Compl. ¶ 1.

At this stage in the litigation and viewing the allegations in a light most favorable to Plaintiff, Mr. Butler's affidavit does not conclusively establish that Lexmark did not engage in

the alleged conduct that harmed Plaintiff. Discovery is necessary to determine this issue. Consequently, its Motion to Dismiss is denied.

a. Motion for Protective Order to Stay Discovery

Because the Court denies Lexmark's Motion to Dismiss, its Motion for Protective Order to Stay Discovery is also denied.

IX. Harcros Chemical, Inc.

a. Motion to Dismiss for Failure to State a Claim or, in the Alternative, Motion for a More Definite Statement

Defendant Harcros Chemical, Inc. ("Harcros") incorporates 3M and Lexmark Carpet Mills Inc.'s Motion to Dismiss for Failure to State a Claim. For the same reasons discussed above, Harcros' Motion is denied.

Harcros is the only Defendant to move the court to order Plaintiff to provide a more definite statement of the claims against Harcros pursuant to ALA. R. CIV. P. 12(e). Rule 12(e) provides that a party may move for a more definite statement if a pleading requiring a response "is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading." "The motion shall point out the defects complained of and the details asserted." *Id.*

Plaintiff's complaint satisfies the low notice pleading standard of Rule 8. It alleges that Harcros is an "owner and operator of, or the chemical supplier to, manufacturing facilities in Dalton, Georgia which utilize various PFCs and their precursors in the manufacturing process." Compl. at ¶ 49. These facilities are upstream of Plaintiff's water intake site and foreseeably contaminated Plaintiff's water supply. *Id.* at ¶ 3. Plaintiff further alleges that Harcros continued to sell PFCs and related chemicals to these carpet manufacturers despite knowing of the chemicals' toxicity and ability to resist treatment by Dalton Utilities. Contrary to Harcros' statement, the complaint identifies Defendant's wrongful conduct, specifies to whom it sold its chemicals, and states the chemicals it discharged that injured Plaintiff. These allegations are sufficient at this stage in the litigation under Alabama's notice pleadings standard, so Harcros's motion under Rule 12(e) is also denied.

X. Indian Summer Carpet Mills, Inc.

a. Motion to Dismiss for Lack of Personal Jurisdiction, Failure to State a Claim and Improper Venue or, in the Alternative, Motion for Summary Judgment.

Defendant Indian Summer Carpet Mills, Inc. ("ISCM") seeks dismissal on several grounds. For reasons stated above in 3M's section, its Motion to Dismiss for Failure to State a Claim is denied.

i. Motion to Dismiss for Lack of Personal Jurisdiction and Motion for Summary Judgment.

ISCM bases its Motion to Dismiss for Lack of Personal Jurisdiction and Motion for Summary Judgment on an affidavit submitted by its President Randall Hatch it argues proves it did not engage in any conduct causing Plaintiff's damages. Mr. Hatch states that ISCM "has never used chemicals containing PFOA or PFOS in its manufacturing process" and, since 2004, any "topical stain-resistant chemicals...were applied by mills Indian Summer hired to perform the finishing process on its carpets." Doc. 654 at ¶ 3. The specific chemicals applied are of "C6 chemistry" which allegedly "do not contain or degrade into PFOS or PFOA." *Id.* Mr. Hatch also states the "solution-dyeing" manufacturing process currently used by ISCM generates no wastewater. *Id.* at ¶ 4. Consequently, ISCM argues it is not responsible for Plaintiff's damages.

As Plaintiff points out, however, Mr. Hatch's affidavit fails to conclusively establish that ISCM did not engage in the conduct forming the basis of this lawsuit. First, the affidavit describes ISCM's current manufacturing process involves "solution dyeing" which it claims generates no wastewater. *Id.* Importantly, the affidavit does not state that ISCM has always used this manufacturing process and, as a result, never discharged any wastewater. As stated in the complaint, PFCs and related chemicals persist in the environment for years making any past application and discharge of these chemicals pertinent to this action. Compl. ¶¶ 1, 50.

Also, ISCM can be liable for the acts committed other companies (i.e. finishers) it used to apply PFCs that, although may not degrade into PFOA or PFOS, still have similar stain-resistant qualities. Mr. Hatch specifically states that, since 2004, ISCM has hired finishers to treat its carpets with topical stain-resistant chemicals consisting of "C6 chemistry." *Id.* at ¶ 3. Although Mr. Hatch states that C6 chemicals do not contain or degrade into PFOS or PFOA, Plaintiff states that C6 chemicals have similar stain-resistant qualities and fail to degrade in the environment. *See* Doc. 776, Ex. B. C6 (also known as perfluorohexane sulfonate, Phis or perfluorohexanoic acid, Phal) is one of the PFCs being studied by the National Toxicology Program, *id.* at 2, and was measured in surface waters and sediments below Dalton Utilities' land application site. *See* Doc 776, Ex. D and Ex. E. Therefore, ISCM's statement that its finishers use C6 instead of PFOS or PFOA does not necessarily rule out that it used any of the other 146 PFCs or 469 fluorochemicals that have been identified as potentially able to degrade into other PFCAs. *See* Exhibit A. Plaintiff's complaint states that its injury was caused by water contaminated with PFC, including PFOS, PFOA and related chemicals. Compl. at ¶¶ 1, 46, 47, 50, 51, 64, 69, 76, 80. Mr. Hatch's affidavit fails to state that ISCM was not involved, in any way, in the selection or application of PFC or related chemicals such as C6 in the finishing process or otherwise exercised control over the discharge of those chemicals.

ISCM's use of finishers to apply PFCs such as C6 does not relieve it of liability. A manufacturer's duty is not limited to only those parts of a product that the manufacturer makes itself. It has long been recognized in Alabama that a manufacturer who uses component parts in manufacturing or assembling a product for sale as a complete unit may be liable under appropriate circumstances where the defect is in a component part. *See, Casrell v. Altec Industries, Inc.*, 335 So.2d 128, 134 (Ala. 1976); *Atkins v. American Motors Corp.*, 335 So.2d 134 (Ala. 1976). A manufacturer can also be liable for its negligence in designating the components or providing specifications to be incorporated into its products by third parties. *See*

e.g., *Hicks v. Vulcan Eng. Co.*, 749 So.2d 417 (Ala. 1999). Like these cases, ISCM cannot escape liability even if another entity, such as a finisher, applied the PFCs.

In sum, Mr. Hatch's affidavit does not conclusively establish it did not engage in the activities resulting in Plaintiff's damages, thereby leaving a genuine issue of material fact. Therefore, ISCM's Motions to Dismiss and for Summary Judgment are denied.

ii. Motion to Dismiss for Forum Non Conveniens and Improper Venue.

Finally, ISCM challenges venue and, in the event this Court finds venue is proper, seeks dismissal for forum non conveniens under Ala. Code § 6-3-7(a). Venue is proper under ALA. CODE §§ 6-3-7(a)(3) because Plaintiff's principal office is in Etowah County and, although ISMC states it does not do business by agent in Etowah County, other named Defendants in this action do which is sufficient for venue to be proper. *See Roland Pugh Min. Co. v. Smith*, 388 So.2d 977, 978-89 (Ala. 1980) (holding venue was proper for one defendant and, as a result, was proper to the other defendants which did not do business in the challenged venue). The Court in *Roland Pugh Min. Co.* specifically noted that "[u]nder ARCP 82(c), '(w)henever an action has been commenced in a proper county, additional claims and parties may be joined, ... as ancillary thereto, without regard to whether that county would be proper venue for an independent action on such claims or against such parties.'" *Id.* (emphasis added). Therefore, Etowah County is the proper venue if it is proper regarding one defendant.

Based on available information, venue is, at the very least, proper to Shaw Industries, Inc. and the Mohawk Defendants (Mohawk Industries, Inc. and Mohawk Carpet, LLC). Proof of a registered agent in a county "is not a prerequisite to a finding that the corporation is doing business in that county." *Ex parte Reliance Ins. Co.*, 484 So.2d 414, 418 (Ala. 1986). Instead, venue is proper over a foreign corporation qualified to do business in Alabama if that corporation conducts "some of the business functions for which it was created." *Id.* at 417 (quoting *Ex parte Jim Skimmer Ford, Inc.*, 435 So.2d 1235, 1237 (Ala. 1983)). One of these business functions includes engaging in the sale of its products. *See Ex parte Cavalier Home Builders, LLC*, 920 So.2d 1105, 1109-10 (Ala. 2005). Shaw Industries, Inc.'s website shows four different retailers sell its products within 15 miles¹⁵ of Gadsden while the Mohawk Defendants have one retailer.¹⁶ Therefore, venue is proper to both Shaw Industries, Inc. and the Mohawk Defendants because they do business in Etowah County which, in turn, means venue is proper as to all other Defendants, including ISCM.

The Court finds that, for reasons stated above in Section V(a)(ii), ISMC's motion to dismiss for forum non conveniens is also denied.

¹⁵ See <https://shawfloors.com/stores>. Counsel for Plaintiff used the zip code for the Etowah County Courthouse (35901) in the search. Lowe's Home Improvement, Alley's Floor & Wall Covering, Foote Brothers Carpet One, and Knights Flooring.

¹⁶ <https://www.mohawkflooring.com/tind-mohawk-retail-store?zip=35901>. Alleys Carpet of Gadsden.

b. Motion for Protective Order to Stay Discovery

Because the Court denies ISCM's dispositive motions, its Motion for Protective Order to Stay Discovery is also denied.

XI. ECMH, LLC d/b/a Clayton Miller and Emerald Carpets, Inc.

a. Motion for Summary Judgment

Defendant ECMH, LLC d/b/a Clayton Miller and Emerald Carpets, Inc. (collectively, "ECMH") move for summary judgment on the basis that they did not engage in any conduct that contaminated Plaintiff's drinking water supply. In support ECMH submitted the affidavits of Tom Boykin (Business Unit Manager for Emerald Carpets) and Hugh McCain (President of Clayton Miller) and contend the undisputed facts show that they do not manufacture carpet, have never applied PFCs or related chemicals to their carpets, and have never discharged any chemicals. *See* Docs. 171 and 172.

Plaintiff contends that ECMH does not dispute that carpet it manufactured and sold was treated with PFCs to impart stain resistance – only that *they* did not apply these chemicals. Plaintiff asserts this evidence does not establish that PFCs were not applied by other companies at ECMH's direction, with their knowledge or that they did not specify the type of chemical treatment to be used on its carpets during the finishing process. Both affidavits state that "any chemicals that are applied to carpets sold by Clayton Miller and Emerald Carpets are made and applied by other companies." (Doc. 171 at ¶ 6; Doc. 172 at ¶ 5). In other words, ECMH utilizes other companies known as finishers that could apply PFC and other related chemicals to impart stain-resistance to their carpets.

As explained above in Section X(a)(i) regarding ISCM, this does not necessarily absolve ECMH from liability for Plaintiff's damages because it does not establish the absence of a genuine issue of material fact as to whether they are responsible for causing or allowing the discharge of PFCs into Coosa River tributaries by the entities they retained to apply these chemicals to its carpet in the Dalton, Georgia area. Further discovery on this issue is warranted before this Court can determine no genuine issue of material fact exists. Consequently, ECMH's Motion for Summary Judgment is denied.

XII. Mohawk Industries, Inc. and Mohawk Carpet, LLC (collectively, "Mohawk")

a. Motion for Judgment on the Pleadings

Mohawk's dispositive motion argues this Court does not have personal jurisdiction and, even if it did, the complaint should be dismissed for failure to state a claim. Notably, unlike most of the other Defendants, Mohawk did not submit an affidavit refuting the allegations in the complaint. Therefore, Plaintiff's allegations must be accepted as true. *See Corporate Waste Alternatives, Inc.*, 896 So. 2d at 413. Mohawk utilizes PFC-related chemicals and their precursors in its manufacturing process to impart stain-resistant qualities to their carpet. Compl. at ¶ 47. Because of applying these chemicals, Mohawk discharges industrial wastewater

containing these chemicals to the City of Dalton's wastewater treatment system before it is land-applied to a spray field. *Id.* This spray field is bordered by a tributary of the Coosa River, which allows runoff contaminated with PFCs to pollute Plaintiff's water source upstream of its intake site. *Id.* at ¶¶ 48-49.

Plaintiff states that Mohawk's discovery responses, answered by their affiliate Aladdin Manufacturing Corporation ("AMC")¹⁷, support its allegations in the complaint. Specifically, in response to Plaintiff's First Set of Interrogatories, Mohawk admitted to using "Raw Materials [that] may contain PFCs that may degrade into PFOA and/or PFOS and may have been used in the manufacturing processes for various carpet and flooring products at certain AMC manufacturing facilities in Whitfield County, Georgia." Doc. 762, Ex. C., p. 7. Mohawk then listed eleven different "Raw Materials" (i.e. "material that is used to produce goods or finished products") used in their manufacturing process and identified three manufacturing facilities in Dalton, Georgia that may have used these Raw Materials. *Id.* at 7-9. Mohawk stated that each of these facilities pretreated the wastewater generated at these facilities to remove particulates and adjust the pH level before discharging to the Dalton Utilities. *Id.* at 10-11. Mohawk identified two other manufacturing facilities located outside Whitfield County in Calhoun, Georgia that discharge either directly into the environment or to a wastewater treatment plant that discharges into the Coosa River. *Id.* at 11-12. Now, it is unknown whether these facilities use Raw Materials that may contain PFCs or degrade into such chemicals and discharge wastewater contaminated with these chemicals into the Conasauga or Coosa Rivers. Based on both the uncontroverted allegations in the complaint as well as Mohawk's responses to Plaintiff's discovery, Mohawk engaged in the conduct Plaintiff alleges caused its damages.

Moreover, it is fair for Mohawk to litigate in Alabama because its business activities were purposefully aimed at Alabama residents. "[P]lacement of a product into the stream of commerce 'may bolster an affiliation germane to specific jurisdiction.'" *Daimler AG v. Bauman*, 134 S. Ct. 746, 757 (2014) (quoting *Goodyear* 564 U.S. at 926). Mohawk advertises, markets, distributes, and sells their products throughout the world and Alabama. Although Mohawk considers the applicable fora for each entity are Delaware and Georgia, they have significant connections to the State of Alabama. Mohawk Carpet, LLC is a subsidiary of Mohawk Industries, Inc. Mohawk Industries, Inc. employs 37,800 and maintains manufacturing operations in 15 nations and sales distribution across more than 160 countries. *See* Doc. 762, Ex. G, pg. 6. As of December 31, 2016, it owns a manufacturing and distribution facility in Florence, Alabama and a manufacturing facility in Roanoke, Alabama. *Id.* at Mohawk Form 10-K, p. 13. Mohawk Industries, Inc.'s website currently shows job listings for 22 different positions in Alabama, with 10 positions available at a location in Bridgeport, Alabama.¹⁸ The website also lists retailers selling its carpet and flooring products in more than 70 cities in Alabama.¹⁹ In addition to the foreseeable conduct aimed at Alabama residents discussed above, these purposeful contacts with Alabama bolster Mohawk's affiliations with the State.

¹⁷ Plaintiff notes that Mohawk's affiliate Aladdin Manufacturing Corporation ("AMC") responded to discovery on their behalf. The Court finds that discovery against Mohawk is necessary to determine their association with AMC and their liability in this case and will construe AMC's responses as pertaining to the Mohawk Defendants.

¹⁸ <https://mohawkindustries.jobs/jobs/?location=alabama>.

¹⁹ <https://www.mohawkflooring.com/flooring-carpet-stores/AL>.

Therefore, for these reasons and those stated above in Section I, this Court has personal jurisdiction over Mohawk and its Motion to Dismiss is denied. In addition, Mohawk's Judgment on the Pleadings for failure to state a claim is denied for reasons stated above in Section VII addressing similar arguments raised by 3M.

XIII. Oriental Weavers USA, Inc.

a. Motion to Dismiss for Lack of Personal Jurisdiction, Improper Venue, and Failure to State a Claim.

Defendant Oriental Weavers USA, Inc. ("Oriental Weavers") seeks dismissal for lack of personal jurisdiction, claims Etowah County is an improper venue, and argues the complaint's allegations are insufficient to state a claim. For reasons stated above, Oriental Weaver's Motion to Dismiss for improper venue and failure to state a claim are denied. The court will address Oriental Weaver's argument regarding lack of personal jurisdiction.

Oriental Weaver's submitted three affidavits in support of its argument the Court lacks personal jurisdiction. *See* Doc. 162. Its CFO, Darrel V. McCay, states that Oriental Weavers is incorporated in Georgia and maintains its principal place of business there, including its two manufacturing facilities and distribution facilities. *Id.*, Ex. B at ¶¶ 4-5. David Flood, who holds the position of Masterbatch Manager, states that Oriental Weavers "does not apply any stain-resistant, grease-resistant, or water-resistant chemicals to its area rugs at any point during the manufacturing process" and has not since after January 1, 2009. *Id.*, Ex. A at ¶¶ 5, 7. Mr. Flood then attests that Defendant's chemical supplier, Phoenix Chemical, Inc. does not supply Defendant with products that contain PFCs. *Id.* at ¶ 6. Phoenix Chemical's Vice President, Mr. Todd Mull, also submitted an affidavit stating that the chemicals his company sells to Defendant do not contain PFCs such as PFOA and PFOS. *Id.*, Ex. C at ¶¶ 4-6. Oriental Weavers argues these affidavits conclusively establish that it did not engage in the activities giving rise to this lawsuit and venue is improper in Etowah County.

Plaintiff claims these affidavits collectively do not specifically refute the complaint's allegations that Oriental Weavers is liable for Plaintiff's damages. First, Mr. Flood states that Oriental Weavers does not use, and has not used, any stain-resistant, grease-resistant, or water-resistant chemicals after January 1, 2009. Ex. A at ¶ 7. Importantly, the affidavit does not say that it "never" engaged in these activities prior to January 1, 2009. Mr. Mull's affidavit also fails to confirm that Phoenix Chemical did not supply these chemicals prior to this date, nor can it because his affidavit, which is based on his personal knowledge alone, does not clarify how long he has been with the company. As stated in the complaint, PFCs and related chemicals persist in the environment for years making any past application and discharge of these chemicals pertinent to this action. Compl. ¶ 50.

Plaintiff also claims that Mr. Flood's affidavit fails to definitively state whether it hired other companies to apply PFCs and related chemicals to Oriental Weaver's rugs and discharged contaminated wastewater generated from that application. Although Mr. Flood mentions that he is familiar with all stages of the manufacturing process, *see* Ex. A. at ¶ 4, the following paragraphs pertain only to Oriental Weaver's alleged nonuse of PFCs and related chemicals.

Therefore, the affidavit fails to establish that PFCs were not applied by other companies at Oriental Weaver's direction, with its knowledge, or that it did not specify the type of chemical treatment to be used on its carpets during the finishing process. As explained above, this does not absolve Defendant from liability for Plaintiff's damages. Therefore, Oriental Weaver's Motion to Dismiss for Lack of Personal Jurisdiction is denied.

a. Motion for Protective Order to Stay Discovery

Because the Court denies Oriental Weaver's dispositive motion, its Motion for Protective Order to Stay Discovery is also denied.

XIV. Savannah Mills Group, LLC

a. Motion to Dismiss for Lack of Personal Jurisdiction, Failure to State a Claim, and Summary Judgment.

Defendant Savannah Mills Group, LLC ("SMG") seeks dismissal or, alternatively, summary judgment because it did not contribute to the pollution of Plaintiff's drinking water. In support, it submitted multiple affidavits from its Managing Member B.J. Bandy, III stating that SMG has never manufactured carpets or rugs, purchases only finished products for distribution, has never utilized or supplied PFCs or related chemicals in the carpet manufacturing process, has never discharged any chemicals from the manufacturing process into any water supply, and has never ordered, requested directed, or specified that any particular treatment be applied to rugs it received and sold. *See* Docs. 205 and 738. Mr. Bandy's original affidavit also attests to SMG's lack of contacts with Alabama.

The Court finds that SMG has met its burden that it did not engage in the alleged conduct that contaminated Plaintiff's drinking water. Therefore, its Motion to Dismiss is granted, without prejudice, with each party to bear its own costs. The Court also notes that Plaintiff agreed to dismiss SMG in the companion case *The Water Works and Sewer Board of the Town of Centre v. 3M Company, Inc. et al.*, Case No. 13-CV-2017-900049.00.

b. Motion for Protective Order to Stay Discovery

SMG's Motion for Protective Order is now moot given the Court granted its Motion to Dismiss and, Alternatively, Motion for Summary Judgment.

XV. Tandus Centiva US, LLC

a. Motion for Judgment on the Pleadings or, Alternatively, Motion for Summary Judgment

Defendant Tandus Centiva, US, LLC ("Tandus Centiva") seeks dismissal for lack of personal jurisdiction and failure to state a claim. Like SMG, it submitted an original and supplemental affidavit from its President Leonard F. Ferro stating that Tandus Centiva has never manufactured carpet or flooring products, has never purchased PFCs and related chemicals, has

never utilized or supplied these chemicals, has never discharge wastewater containing these chemicals, and has never directed any other entity to use or apply these chemicals to flooring materials it markets and distributes. *See* Docs. 283 and 688.

A motion for summary judgment will be granted if the evidence shows “there is no genuine issue as to any material fact” and the movant “is entitled to a judgment as a matter of law.” ALA. R. Civ. P. 56(c)(3). The Court finds that Tandus Centiva has met its burden that it did not engage in the alleged conduct that contaminated Plaintiff’s drinking water. Therefore, its Motion to Dismiss is granted, without prejudice, with each party to bear its own costs.

b. Motion for Protective Order to Stay Discovery

Tandus Centiva’s Motion for Protective Order is now moot given the Court granted its Motion for Judgment on the Pleadings or, Alternatively, Motion for Summary Judgment.

XVI. Daltonian Flooring, Inc.

a. Motion for Summary Judgment

Like SMG and Tandus Centiva, Defendant Daltonian Flooring, Inc. (“Daltonian”) moves for summary judgment on the basis that it has not engaged in the conduct alleged by Plaintiff in the complaint. This is based on the affidavits of its Chief Financial Officer and Controller, which made substantially the same statements as those made by the affiants for SMG and Tandus Centiva. *See* Docs. 239 and 725.

As a result, the Court finds that there is no genuine issue of material fact and Daltonian “is entitled to a judgment as a matter of law.” ALA. R. Civ. P. 56(c)(3). Therefore, its Motion for Summary Judgment is granted with each party to bear its own costs.

XVII. Dystar, LP

a. Motion to Dismiss for Lack of Personal and Subject Matter Jurisdiction

Defendant Dystar, LP (“Dystar”) moves to dismiss arguing that it has never manufactured or produced stain, grease, or water-resistant chemicals such as PFCs or related chemicals at its plant in Dalton and has never sold, shipped, delivered, or supplied these chemicals to any facilities in Whitfield County, Georgia. *See* Affidavits of Chief Financial Officer Steve Hennen, Docs. 388 and 662.²⁰

The Court finds that Dystar has met its burden that it did not engage in the alleged conduct that contaminated Plaintiff’s drinking water and its Motion to Dismiss is granted, without prejudice, with each party to bear their own costs.

²⁰ Although Mr. Hennen’s Supplemental Affidavit was filed with its Reply Brief in the similar case filed in Cherokee County (*The Water Works and Sewer Board of the Town of Centre v. 3M Company, Inc. et al.*, Case No. 13-CV-2017-900049.00.) the facts stated therein are applicable to this case.

b. Motion for Protective Order to Stay Discovery

Dystar's Motion for Protective Order is now moot given the Court granted its Motion to Dismiss.

DONE this the 13th day of August 2018.

/s/ William H. Rhea, III
CIRCUIT JUDGE

Processed by: Sue Hall

CERTIFICATE OF SERVICE

The undersigned hereby certifies that I have served the foregoing **NOTICE OF FILING COURTESY COPIES OF PRIOR PFAS ORDERS AND RELATED FILINGS** on all counsel of record via eService using the Peach Court eFiling system.

This 7th day of October, 2024.

DAVIS LUCAS CARTER, LLP

210 East 2nd Ave., Suite 301
Rome, GA 30161
Phone No.: 706-842-7555

/s/ J. Anderson Davis

J. Anderson Davis
Georgia Bar No. 211077