

UNITED STATES DISTRICT COURT  
DISTRICT OF SOUTH CAROLINA  
ROCK HILL DIVISION

KENNY N. WHITE; TRACIE NICKELL;  
AMANDA SWAGGER; and JOHN HOLLIS, )  
on behalf of themselves and all others similarly )  
situated, )

Plaintiffs, )

vs. )

NEW-INDY CATAWBA LLC *d/b/a* )  
NEW INDY CONTAINERBOARD; *and* )  
NEW-INDY CONTAINERBOARD, LLC, )

Defendants.

Case No.: 21-cv-1480-SAL

**ORAL ARGUMENT  
REQUESTED**

**DEFENDANTS NEW-INDY CATAWBA LLC &  
NEW-INDY CONTAINERBOARD, LLC'S  
MOTION TO DISMISS AMENDED COMPLAINT OR,  
IN THE ALTERNATIVE, TO STRIKE PLAINTIFFS' CLASS ALLEGATIONS**

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Pursuant to Federal Rules of Civil Procedure 8(a), 12(b)(2), 12(b)(6), 12(e), 12(f), and 23(d)(1)(D), Defendants New-Indy Catawba LLC (“New-Indy Catawba”) and New-Indy Containerboard, LLC (“New-Indy Containerboard”) (sometimes collectively referred to as “New-Indy”), by and through their attorneys, hereby submit this Motion to Dismiss Plaintiffs’ Amended Complaint or, in the Alternative, to Strike Plaintiffs’ Class Allegations.

## **I. INTRODUCTION**

In their putative class action alleging New-Indy Catawba’s paper mill to be the source of a purported release of hydrogen sulfide, Plaintiffs Kenny White, Tracie Nickell, Amanda Swagger, and John Hollis (“Plaintiffs”) drum up a false narrative to paint New-Indy as a profit-hungry business with little regard for the environment or citizens’ well-being. They fail to reconcile this contrived theme, however, with their acknowledgement that New-Indy obtained state authorizations and permits for its activities and allege no violations of these permits. Because Plaintiffs have not pled (and cannot plead) that New-Indy violated the air quality permits under which it legally operates, Plaintiffs’ claims are barred by South Carolina statutory and regulatory law.

Their claims also fail for three other reasons. **First**, Plaintiffs have not met their burden of demonstrating that this Court has personal jurisdiction over New-Indy Containerboard. **Second**, even if this Court had personal jurisdiction, Plaintiffs fail to plead an actionable injury, an essential element of their private nuisance claim. Although Plaintiffs allege personal injuries, only property damage is actionable under South Carolina nuisance law. **Third**, in the alternative, the Court should strike Plaintiffs’ grossly overbroad class definition, defined by a 30-mile radius with no relation to New-Indy’s purported conduct. Moreover, on the face of Plaintiffs’ Amended Complaint, they cannot satisfy Rule 23’s certification requirements of numerosity, commonality, typicality, and predominance.

For all these reasons, the Court should grant New-Indy’s motion to dismiss or, in the alternative, strike Plaintiffs’ proposed class.

## **II. STATEMENT OF FACTS & PROCEDURAL HISTORY**<sup>1</sup>

In late 2018, New-Indy Catawba purchased a paper mill located in Catawba, South Carolina (the “Mill”).<sup>2</sup> *See* Dkt. 6 ¶ 22; Ex. A, Declaration of Scott Conant ¶ 3 (“Conant Decl.”). New-Indy Catawba operates the Mill under a Title V Operating Permit for air emissions. *See* Dkt. 6-2 at ECF p. 3, ¶ 1. New-Indy Catawba converted the Mill from producing paper to producing virgin containerboard. *See* Dkt. 6 ¶ 2. As part of this conversion, on July 23, 2019, New-Indy Catawba received a state construction permit authorizing manufacturing conversions. *Id.* ¶ 23. Prior to the conversion, New-Indy Catawba sent the majority of its condensate stream to a steam stripper, which removed hydrogen sulfide and other chemicals from Mill air emissions. *Id.* ¶ 24. The Mill piped the remainder of its condensate to an Aeration Stabilization Basin (“ASB”), which passively strips hydrogen sulfide. *Id.* ¶¶ 24-25. After New-Indy Catawba converted the Mill and resumed operations in November 2020, it began sending all of its condensate stream to the ASB. *Id.* ¶ 25.

In February 2021, Plaintiffs allege that people within a 30-mile radius of the Mill began complaining of odors characteristic of hydrogen sulfide. *Id.* ¶¶ 3-4. Hydrogen sulfide purportedly smells like rotten eggs and, if inhaled, allegedly can have various health effects, including headache, nausea, difficulty breathing, and irritation of the eyes, nose, and throat. *Id.* ¶¶ 27-28. In

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<sup>1</sup> The Statement of Facts is taken from the allegations in the Amended Complaint and the documents referenced and incorporated in the Amended Complaint. *See* Dkt. 6. New-Indy accepts the facts alleged in the Amended Complaint as true solely for the purpose of this Motion.

<sup>2</sup> Both the Complaint (at ¶ 2), and the Amended Complaint (at ¶ 2), allege that New-Indy Containerboard purchased the Mill. That is factually incorrect. *See* Ex. B, Declaration of Thomas E. Bennett ¶ 4 (“Bennett Decl.”).

late February, the South Carolina Department of Health and Environmental Control (“DHEC”) began investigating the odors. *Id.* ¶ 30. In April, the United States Environmental Protection Agency (“EPA”) also began an investigation. *Id.* ¶ 37. On May 7, DHEC ordered New-Indy Catawba to take actions to remedy air pollution purportedly being released from the Mill. *Id.* ¶¶ 6, 29; Dkt. 6-2. On May 13, EPA also ordered New-Indy Catawba to take actions to remedy the Mill’s purported air pollution. Dkt. 6 ¶ 7; Dkt. 6-1.

On May 18, 2021, Plaintiff Kenny White (“White”) filed his Class Action Complaint against New-Indy Catawba. *See* Dkt. 1. On May 25, White filed an Amended Class Action Complaint (“Amended Complaint”), adding Plaintiffs Tracie Nickell, Amanda Swagger, and John Hollis as named plaintiffs. *See* Dkt. 6. The Amended Complaint also added New-Indy Containerboard as a defendant. *Id.* The Amended Complaint alleges (incorrectly), *see* Ex. B, Bennett Decl. ¶ 4, that New-Indy Containerboard purchased the Mill, and that New-Indy Containerboard is New-Indy Catawba’s parent and purportedly “exercises total control over all aspects of New-Indy Catawba LLC’s operation of the Mill.” Dkt. 6 ¶ 16. The Amended Complaint offers no facts as to how this purported “total control” is accomplished. The Amended Complaint correctly alleges that New-Indy Catawba operates the Mill. *See id.* ¶ 16 (referencing “New-Indy Catawba LLC’s operation of the Mill”); *see also* Ex. A, Conant Decl. ¶ 4.

Against both defendants, Plaintiffs seek to represent a class of all “persons or entities who have or had any beneficial interest in any real property located within 30 miles of the” Mill from February 1, 2021 through the present. Dkt. 6 ¶ 48. As demonstrated by the below chart, all named Plaintiffs live within fifteen miles to the north of the Mill:

<u>Plaintiff</u>	<u>Address</u>	<u>Distance to Mill (Miles)</u>	<u>Direction from Mill</u>
Kenny White	9932 Mitchell Glen Drive Charlotte, North Carolina	14.3	Northeast
Tracie Nickell	114 Lesslie Highway Catawba, South Carolina	2.5	Northwest
Amanda Swagger	3176 Greenwood Road Rock Hill, South Carolina	5.6	North
John Hollis	200 Halifax Drive Indian Land, South Carolina	7.5	Northeast

*See id.* ¶¶ 11-14. None of the named Plaintiffs reside south of the Mill.

All named Plaintiffs allege solely personal injuries. *See id.* ¶¶ 44-47. For instance, White alleges eye irritation and headaches, Nickell alleges migraines and nausea, Swagger alleges eye and throat irritation, and Hollis alleges coughing, nausea, headaches, and eye irritation. *Id.* For these personal injuries, Plaintiffs bring a sole claim of private nuisance. *Id.* ¶¶ 60-70.

### III. LEGAL STANDARDS

#### A. **Standard for Rule 12(b)(2) Motion**

“A federal district court may only exercise personal jurisdiction over a foreign corporation if such jurisdiction is authorized by the long-arm statute of the state in which it sits and application of the long-arm statute is consistent with the due process clause of the Fourteenth Amendment.” *Consulting Eng’rs Corp. v. Geometric Ltd.*, 561 F.3d 273, 277 (4th Cir. 2009) (citations omitted).<sup>3</sup> To satisfy the Fourteenth Amendment’s Due Process Clause, defendants must have “‘minimum contacts’ with the forum so that the exercise of jurisdiction ‘does not offend traditional notions of fair play and substantial justice.’” *Fidrych v. Marriott Int’l, Inc.*, 952 F.3d 124, 131 (4th Cir. 2020)

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<sup>3</sup> Because the “Supreme Court of South Carolina has interpreted South Carolina’s long-arm statute, S.C. Code Ann. § 36–2–803, to extend to the outer limits of Fourteenth Amendment due process,” the “sole question becomes whether the exercise of personal jurisdiction would violate due process.” *Sonoco Prods. Co. v. ACE INA Ins.*, 877 F. Supp. 2d 398, 405 (D.S.C. 2012) (citations omitted) (finding court lacked personal jurisdiction).

(citation omitted). Forum-specific contacts can give rise to either general or specific jurisdiction. *Id.* For a court to exercise general jurisdiction, the defendant’s contacts must be “so constant and pervasive as to render it essentially at home in the forum State.” *Id.* at 132 (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 122 (2014)). For a corporation, the paradigm forum for general jurisdiction is “one in which the corporation is fairly regarded as at home”; namely, “where it is incorporated and where it has its principal place of business.” *Id.* (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011)). For a court to exercise specific jurisdiction, (1) the defendant must “purposefully avail[] itself of the privilege of conducting activities in the State”; (2) “the plaintiffs’ claims [must] arise out of those activities directed at the State”; and (3) “the exercise of personal jurisdiction [must] be constitutionally reasonable.” *Id.* at 138 (citation omitted).

“When a court’s personal jurisdiction is properly challenged by motion under Federal Rule of Civil Procedure 12(b)(2), the jurisdictional question thereby raised is one for the judge, with the burden on the plaintiff ultimately to prove grounds for jurisdiction by a preponderance of the evidence.” *Sonoco Prods.*, 877 F. Supp. 2d at 404 (citations omitted). However, when “the district court decides a pretrial personal jurisdiction dismissal motion without an evidentiary hearing, the plaintiff need prove only a *prima facie* case of personal jurisdiction.” *Id.*

#### **B. Standard for Rule 12(b)(6) Motion**

A motion to dismiss under Rule 12(b)(6) should be granted where the complaint fails to allege facts sufficient to establish each element of the claims. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678-80 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007). To survive a motion to dismiss, the complaint’s allegations must rise above the “speculative,” “conceivable,” or “possible,” and instead must “state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 545, 547, 555, 563, 570; *see also Iqbal*, 556 U.S. at 678 (explaining that the plausibility

standard “asks for more than a sheer possibility that a defendant has acted unlawfully”). A complaint must include ““more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”” *McCleary-Evans v. Md. Dep’t of Transp.*, 780 F.3d 582, 585 (4th Cir. 2015) (quoting *Twombly*, 550 U.S. at 555); see *Martineau v. Wier*, 485 F. Supp. 3d 637, 643 (D.S.C. 2020) (noting that a “Court need not, however, accept the plaintiff’s legal conclusions” and that a “formulaic recitation of the elements of a cause of action will not do” (citations omitted)) (Lydon, J.). Thus, although well-pleaded allegations of fact are accepted as true, legal conclusions and “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,” are not. *Iqbal*, 556 U.S. at 678.

#### **IV. THE COURT SHOULD DISMISS PLAINTIFFS’ CLAIM FOR LACK OF PERSONAL JURISDICTION AND FAILURE TO STATE A CLAIM**

##### **A. This Court Lacks Personal Jurisdiction Over New-Indy Containerboard**

Plaintiffs have not met their burden to prove that this Court has personal jurisdiction over New-Indy Containerboard. A court has general jurisdiction over a corporation in a state ““in which the corporation is fairly regarded as at home””; namely, ““where it is incorporated and where it has its principal place of business.”” *Fidrych*, 952 F.3d at 132 (quoting *Goodyear*, 564 U.S. 924) (affirming grant of motion to dismiss “because Marriott’s contacts with South Carolina are not sufficient to render it ‘at home’ in South Carolina”). This Court lacks general jurisdiction over New-Indy Containerboard because it “is a limited liability company organized under the laws of Delaware with its main office in Ontario, California.” Dkt. 6 ¶ 16; see Ex. B, Bennett Decl. ¶ 3 (declaring that New-Indy Containerboard is a Delaware LLC with its principal place of business in California).<sup>4</sup>

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<sup>4</sup> ““In deciding whether a plaintiff has proven a *prima facie* case of personal jurisdiction, a court may consider all parties’ pleadings, affidavits, and other supporting documents presented to the

Nor can Plaintiffs prove that this Court has specific jurisdiction over New-Indy Containerboard, having failed to demonstrate that New-Indy Containerboard “purposefully availed itself of the privilege of conducting activities in” South Carolina. *Fidrych*, 952 F.3d at 138 (citation omitted). Although Plaintiffs allege that, in 2018, “the Mill was purchased by New-Indy Containerboard, LLC,” Dkt. 6 ¶ 2, this allegation is incorrect because New-Indy Catawba, not New-Indy Containerboard, purchased the Mill. *See* Ex. A, Conant Decl. ¶ 3 (declaring that New-Indy Catawba purchased the Mill); Ex. B, Bennett Decl. ¶ 4 (declaring that New-Indy Containerboard has never owned the Mill). Indeed, Plaintiffs’ decision to incorporate by reference EPA’s and DHEC’s orders warrants rejection of Plaintiffs’ effort to lump Defendants together because both orders were issued to only New-Indy Catawba. *See* Dkt. 6-1 at ECF p. 4 (“This emergency order (‘Order’) is issued to New-Indy Catawba, LLC . . . .”); Dkt. 6-2 at ECF p. 3 (“New-Indy Catawba, LLC, (‘New-Indy’) operates a kraft pulp and paper mill . . . .”). Because New-Indy Containerboard never purposefully availed itself of the privilege of doing business in South Carolina, it necessarily follows that Plaintiffs’ claims do not “arise out of those activities directed at the State,” and, thus, there is no specific jurisdiction. *Fidrych*, 952 F.3d at 138 (citation omitted) (finding no specific jurisdiction over defendant); *see also Consulting Eng’rs*, 561 F.3d at 279-80 (no specific jurisdiction over foreign LLC that “did not have offices or employees in Virginia,” did not “own property there,” and “had no on-going business activity in Virginia”).

New-Indy Containerboard anticipates that Plaintiffs may raise the following two arguments, both of which fail.

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court” without converting a Rule 12(b)(2) motion to a motion for summary judgment. *Sonoco Prods.*, 877 F. Supp. 2d at 404 (citations omitted).

First, Plaintiffs’ conclusory allegation that “New-Indy Containerboard, LLC is the parent of New-Indy Catawba LLC, and it exercises total control over all aspects of New-Indy Catawba LLC’s operation of the Mill,” Dkt. 6 ¶ 16, does not establish personal jurisdiction because it does “not plead[] or demonstrate[] an adequate basis to pierce the corporate veil between the companies.” *Dtex, LLC v. BBVA Bancomer, S.A.*, 405 F. Supp. 2d 639, 647 (D.S.C. 2005). *Dtex* is instructive because there, the plaintiff asserted the court had jurisdiction over the parent through its wholly owned subsidiary. *Id.* And just like Plaintiffs’ conclusory allegation that New-Indy Containerboard “exercises total control” over New-Indy Catawba, the *Dtex* plaintiff made an unsupported argument that the subsidiary was the parent’s “‘alter ego’ or de facto ‘agent or department.’” *Id.* This Court rejected these theories because to establish personal jurisdiction through veil piercing, a plaintiff “must show that [the parent] exerts undue control over [the subsidiary] or otherwise circumvents corporate formalities.” *Id.* Because the *Dtex* plaintiff did “not produce any evidence of impermissible domination, control, or abuse of the corporate form,” this Court granted the 12(b)(2) motion to dismiss. *Id.*

Second, Plaintiffs’ decision to collectively define New-Indy Containerboard and New-Indy Catawba as “New Indy,” see Dkt. 6 ¶ 1, and employ this term throughout the Amended Complaint when alleging conduct that purportedly occurred at the Mill, *id.* ¶¶ 2-3, 6-9, 22-24, 26, 39, 51-52, 56, 58-59, 62-64, 66-70, does not establish personal jurisdiction because this is impermissible “group pleading.” This tactic is impermissible under Rule 8(a) because it “amounts to speculation and . . . is deficient under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).” *Borkowski v. Balt. Cty.*, 414 F. Supp. 3d 788, 803 (D. Md. 2019) (citation omitted); see also *In re Zinc Antitrust Litig.*, 155 F. Supp. 3d 337, 384 (S.D.N.Y. 2016) (holding that “grouping multiple defendants who are affiliated together with a single name . . . for pleading purposes” does not satisfy Rule 8 because

“Plaintiffs must be able to separately state a claim against each and every defendant joined in this lawsuit”); *Sheeran v. Blyth Shipholding S.A.*, No. 14-cv-5482, 2015 WL 9048979, at \*3-4 (D.N.J. Dec. 16, 2015) (“lumping all defendants together for different misconduct fails to demonstrate each defendant’s individual liability,” as “this type of ‘group pleading’ does not satisfy Rule 8, because it does not place Defendants on notice of the claims against each of them” (citations omitted)). Plaintiffs’ use of group pleading warrants dismissal under Rule 8 and underscores that Plaintiffs have not proven this Court has personal jurisdiction over New-Indy Containerboard.<sup>5</sup>

For these reasons, pursuant to Rule 12(b)(2), the Court should grant New-Indy Containerboard’s motion to dismiss for lack of personal jurisdiction.<sup>6</sup>

**B. Plaintiffs Fail to State a Private Nuisance Claim**

Even if this Court had jurisdiction over New-Indy Containerboard, Plaintiffs’ private nuisance claim against both defendants fails because they have not pled facts that would establish an actionable injury. “[T]he traditional concept of private nuisance requires the landowners to demonstrate that the respondents unreasonably interfered with their ownership or possession of the land.” *Ravan v. Greenville Cty.*, 315 S.C. 447, 464 (S.C. Ct. App. 1993). Answering a certified question from this Court, the South Carolina Supreme Court made clear that private nuisance actions are “limited to one’s interest in property, rather than providing any protection to one’s person.” *Babb v. Lee Cty. Landfill SC, LLC*, 405 S.C. 129, 137 (2013); *see id.* at 141 (“From their earliest inception through the present day, the actions of trespass and nuisance have been limited to one’s interest in property, rather than providing any protection to one’s person.”). Given this

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<sup>5</sup> At the very least, pursuant to Rule 12(e), Plaintiffs should be made to plead a more definite statement to give each defendant proper notice regarding the claims against it. *See Breunig v. Town of Atl. Beach*, No. 4:09-cv-2712, 2010 WL 1433429, at \*4-7 (D.S.C Apr. 8, 2010).

<sup>6</sup> To be clear, Defendants are not alleging that Plaintiffs do not have a potential remedy against any Defendant, as New-Indy Catawba does not contest jurisdiction.

limitation on nuisance actions, Plaintiffs' claim fails because they have alleged only injuries to their persons.

For example, White alleges eye irritation and headaches. Dkt. 6 ¶ 44. Nickell alleges migraines and nausea. *Id.* ¶ 45. Swagger purportedly has "suffered burning eyes and sore throats." *Id.* ¶ 46. Finally, Hollis purportedly "suffers chronic coughing, nausea, headaches, and burning eyes." *Id.* ¶ 47. These injuries, however, are not recoverable through private nuisance, as allowing recovery "under the guise of . . . nuisance would be the stealth recognition of an entirely new tort." *Babb*, 405 S.C. at 141; *see also Sanders v. Norfolk S. Ry. Co.*, 400 F. App'x 726, 729 (4th Cir. 2010) (affirming dismissal of public nuisance claim because "Appellants did not allege in district court that their real or personal property was damaged"); *Chestnut v. AVX Corp.*, 413 S.C. 224, 230 (2015) (Toal, C.J., concurring) ("I agree with the majority's decision to affirm the dismissal of Appellants' nuisance claim, because Appellants failed to allege actual injury which interfered with the ownership of their properties." (footnote omitted) (citing *Babb*, 405 S.C. at 153)).

For this reason alone, Plaintiffs' private nuisance claim fails.

### **C. Plaintiffs' Claim Is Barred by South Carolina Statutory and Regulatory Law**

Although dismissal for failure to state a claim is normally without prejudice, here, dismissal should be with prejudice because Plaintiffs' claim is barred by South Carolina statutory and regulatory law pertaining to air permits.

DHEC has promulgated regulations for its Title V Operating Permit Program, *see* S.C. Code Ann. Regs. 61-62.70, and, as the DHEC order that Plaintiffs' incorporate by reference indicates, the Mill operates under a Title V Permit. Dkt. 6-2 at ECF p. 3, ¶ 1 ("The Facility operates under Title V Operating Permit #2440-0005 that was issued on May 7, 2019, became effective on July 1, 2019, and expires on June 30, 2024."). These regulations allow DHEC to "expressly include in a Part 70 permit" a "permit shield," which is a "provision stating that compliance with

the conditions of the permit shall be deemed compliance with any applicable requirements as of the date of permit issuance.” S.C. Code Ann. Regs. 61-62.70.6(f). New-Indy Catawba’s permit (the “Title V Permit”) contains a permit shield. *See* Ex. C, Declaration of Peter McCoy (“McCoy Decl.”) at Attachment 1, Title V Operating Permit, at pp. 114-15. Because Plaintiffs have not alleged that New-Indy Catawba is violating any terms or conditions of the Title V Permit, and publicly available documents indicate DHEC has never issued a notice of violation to New-Indy Catawba, *see id.* Ex. C, McCoy Decl., at Attachments 2-7, Board of Health and Environmental Control Enforcement Reports,<sup>7</sup> this permit shield bars Plaintiffs’ suit. *See S. Appalachian Mountain Stewards v. Red River Coal Co.*, 992 F.3d 306, 309 (4th Cir. 2021) (holding that Clean Water Act permit shield barred suits by EPA and citizen groups); *North Carolina v. Tenn. Valley Auth.*, 615 F.3d 291, 300, 310 (4th Cir. 2010) (noting that each Clean Air Act “permit is intended to be a ‘source-specific bible for Clean Air Act compliance’” and holding that plants cannot be public nuisances where they are “in compliance with EPA NAAQS, the corresponding state SIPs, and the permits that implement them”).

As a separate but related basis for dismissal, Plaintiffs’ claim is barred by South Carolina’s nuisance statute, which grants protection to manufacturers in compliance with permits. This statute provides:

(A) A manufacturing or industrial facility, or expansion of such a facility, may not be found to be a public or private nuisance by reason of the operation of that facility if the manufacturing or industrial facility:

(1) is operating pursuant to and in compliance with the requisite licenses, permits, certifications, or authorizations under the applicable federal and state environmental laws and county and municipal zoning and nuisance ordinances; and

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<sup>7</sup> For the reasons discussed in footnote 8 *infra*, the Court can consider these documents without converting this motion into one for summary judgment.

(2) commenced operations before the landowner alleging the nuisance acquired, moved onto, or improved the affected property.

S.C. Code Ann. § 31-24-120(A)(1)-(2). As discussed above, publicly available documents show that New-Indy Catawba is not violating its Title V Permit.

Indeed, rather than pleading that New-Indy Catawba violated a permit, Plaintiffs *expressly plead* that all conduct about which they complain was authorized by “a state construction permit authorizing manufacturing conversions on July 23, 2019.” Dkt. 6 ¶ 23. Per the DHEC order that Plaintiffs’ incorporate by reference, this Construction Permit #2440-0005-DE (the “Construction Permit”) was issued “*in accordance with state and federal air quality regulations and standards*, to allow the Facility to modify its processes to convert from bleached paper production to brown paper production.” Dkt. 6-2 at ECF p. 3, ¶ 1 (emphasis added); *see also* Ex. C, McCoy Decl. at Attachment 8, Construction Permit. Although Plaintiffs complain that New-Indy “decided to maximize its profits . . . by changing the production process to send all pollutants to open-air lagoons,” Dkt. 6 ¶ 9, they ignore that the Construction Permit’s purpose was “to allow the Facility to hard pipe its condensates to the wastewater treatment plant.” Dkt. 6-2 at ECF p. 3, ¶ 1. Moreover, DHEC expressly recognized that “40 CFR 63, Subpart S, allows this hard piping as a compliance option.” *Id.* Because both the Amended Complaint and DHEC Order acknowledge that New-Indy’s actions were pursuant to state authorizations and federal regulations, there can be no common law liability. *See* Restatement (Second) of Torts § 821B cmt. f (“Although it would be a nuisance at common law, conduct that is fully authorized by statute, ordinance or administrative regulation does not subject the actor to tort liability.”) (public nuisance). Additional public documents show that Plaintiffs acquired their properties after 1957, *see* Ex. C, McCoy Decl.

at Attachments 9-12, Plaintiff Deeds,<sup>8</sup> which is when Plaintiffs allege the Mill commenced operations. *See* Dkt. 6 ¶ 2. Thus, the requirements for subsection 2 of the nuisance statute are met. *See* S.C. Code Ann. § 31-24-120(A)(2) (providing protection to facilities that “commenced operations before the landowner alleging the nuisance acquired, moved onto, or improved the affected property”).

For these reasons, too, Plaintiffs’ claim is barred and should be dismissed with prejudice.

**V. IN THE ALTERNATIVE, THE COURT SHOULD STRIKE PLAINTIFFS’ CLASS ALLEGATIONS**

In the alternative, if the Court does not grant New-Indy’s motion to dismiss, it should still strike Plaintiffs’ overbroad class allegations pursuant to Rules 12(f) and 23(d)(1)(D).

**A. Motion to Strike Class Allegations Legal Standard**

Courts may “strike from a pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). Courts also may “require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly.” Fed. R. Civ. P. 23(d)(1)(D). A motion to strike class allegations is judged “solely on the basis of what is alleged in the complaint.” *Cty. of Dorchester v. AT & T Corp.*, 407 F. Supp. 3d 561, 565 (D.S.C. 2019) (quoting *Bryant v. Food Lion, Inc.*, 774 F. Supp. 1484, 1495 (D.S.C. 1991)) (granting motion to strike class allegations under Rule 12(f)). The “defendants have the burden of demonstrating from the face of the plaintiffs’ complaint that it

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<sup>8</sup> When “analyzing a Rule 12(b)(6) motion to dismiss, a court may consider ‘documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.’” *Belton v. W. Marine, Inc.*, No. 0:15-cv-167, 2015 WL 7180519, at \*2 (D.S.C. Nov. 13, 2015) (citation omitted). This Court may consider New-Indy Catawba’s Title V Permit and Construction Permit because they are incorporated into the Amended Complaint by reference. *See* Dkt. 6 ¶¶ 21, 23; Dkt. 6-2 at ECF p. 3, ¶ 1. This Court may consider the monthly DHEC notices of violation and Plaintiffs’ property deeds because they are facts that “can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b)(2).

will be impossible to certify the classes alleged by the plaintiffs regardless of the facts the plaintiffs may be able to prove, analogous to the standard of review for motions brought pursuant to Rule 12(b)(6).” *Whitt v. Seterus, Inc.*, No. 3:16-cv-2422, 2017 WL 1020883, at \*2 (D.S.C. Mar. 16, 2017) (citation omitted) (discussing standard under Rule 12(f) and 23(d)(1)(D)); *see also Dorchester*, 407 F. Supp. 3d at 565 (citation omitted) (This standard is “analogous to the standard of review for motions [to dismiss] pursuant to Rule 12(b)(6).”). Class certification requires that Rule 23(a)’s numerosity, commonality, typicality, and adequate representation factors be met, as well as “at least one of the three requirements listed in Rule 23(b).” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345 (2011). As a threshold matter, the court must also determine that the class is sufficiently defined. *See Rosedale v. CarChex, LLC*, No. 19-cv-2780, 2020 WL 998740, at \*4 (D. Md. Mar. 2, 2020) (denying motion to certify “grossly overbroad” class).

#### **B. Plaintiffs’ Proposed Geographic Class Area Is Overbroad**

Plaintiffs’ proposed class of “[a]ll persons or entities who have or had any beneficial interest in any real property located within 30 miles of the” Mill from “February 1, 2021 through the present,” Dkt. 6 ¶ 48, is grossly overbroad. In environmental tort cases, courts routinely find such definitions to be overbroad. For instance, in *Kemblesville HHMO Center, LLC v. Landhope Realty Co.*, the plaintiffs sought to represent a class of “all owners and residents of real property within a 2,500 foot radius of” a gas station that purportedly caused methyl tertiary butyl ether (“MTBE”) contamination. No. 08-cv-2405, 2011 WL 3240779, at \*3 (E.D. Pa. July 28, 2011). Before examining the Rule 23 factors, the court noted that it “first must determine whether a precisely and appropriately defined class exists,” as “[o]verbroad class descriptions violate the definiteness requirement because they ‘include individuals who are without standing to maintain the action on their own behalf.’” *Id.* at \*4 (quoting *Oshana v. Coca-Cola Bottling Co.*, 225 F.R.D. 575, 580 (N.D. Ill. 2005)). This analysis requires “a reasonable relationship between Plaintiffs’

proposed geographical boundary and the Defendants' allegedly harmful activities." *Id.* at \*5 (citations omitted). Applying this standard, the court found that "Plaintiffs' proposed class is, on its face, unrelated to the detection of MTBE in properties' water." *Id.* This was because the proposed class included "properties simply because they exist, irrespective of any actual connection to Defendants' activities." *Id.* (footnote omitted). The court rejected the proposed class because it was "simply far too broad," "arbitrary," and "likely that the vast majority of putative class members would be property owners who have never encountered any exposure whatsoever to MTBE." *Id.* at \*6.

Likewise, in *Duffin v. Exelon Corp.*, the court found a class area defined by reference to three roads and a river to be overbroad because it was not "defined by the defendants' activities" and "unrelated to evidence of actual tritium contamination." No. 06-cv-1382, 2007 WL 845336, at \*2-3 (N.D. Ill. Mar. 19, 2007) (citing *Daigle v. Shell Oil Co.*, 133 F.R.D. 600, 602 (D. Colo. 1990)). The court found the class overbroad because there was "no correlation between plaintiffs' evidence concerning the location of contaminated air and groundwater, and the "arbitrarily drawn lines on a map." *Id.* at \*4 (quoting *Daigle*, 133 F.R.D. at 602-03).

With these cases in mind, Plaintiffs' class of all property owners within thirty miles of the Mill – which they acknowledge could total 1,696,019 people – is overbroad because it "includes properties simply because they exist, irrespective of any actual connection to Defendants' activities." *Kemblesville*, 2011 WL 3240779, at \*5; Dkt. 6 ¶¶ 48, 50. Moreover, Plaintiffs have not pled facts that plausibly establish odors spread from the Mill *in all directions* for thirty miles. *See Dorchester*, 407 F. Supp. 3d at 565 (noting that the Rule 12(b)(6) plausibility standard applies). Instead, Plaintiffs live 2.5 (Nickell), 5.6 (Swagger), 7.5 (Hollis), and 14.3 (White) miles *north* of Mill. Dkt. 6 ¶¶ 11-14. In other words, Plaintiffs seek to extend the class radius to *more than twice*

*the distance* that the farthest named plaintiff lives from the Mill. Further, all named Plaintiffs reside north of the Mill; none reside south of the Mill. In a similar case involving hydrogen sulfide odors, the Georgia Supreme Court – drawing on U.S. Supreme Court precedent – reversed class certification because the locations at which the plaintiffs had encountered hydrogen sulfide “do not seem to coincide with the full extent of the class area.” *Georgia-Pacific Consumer Prods., LP v. Ratner*, 295 Ga. 524, 530 (2014). Thus, Plaintiffs’ definition is “grossly overbroad,” *Rosedale*, 2020 WL 998740, at \*4, and the Court can strike the class allegations without considering whether the Amended Complaint fails Rule 23 on its face.

### **C. Plaintiffs’ Proposed Class Cannot Be Certified Under Rule 23**

Regardless, the class also fails under Rule 23 for lack of numerosity, commonality, typicality, and predominance. **First**, overbroad class definitions do not satisfy the numerosity requirement. *See Kemblesville*, 2011 WL 3240779, at \*7 (“However, because this class definition is too overbroad, I cannot accept Plaintiffs’ numerosity argument.”); *Duffin*, 2007 WL 845336, at \*5 (“Given the overbroad class definition, the court cannot accept plaintiffs’ numerosity argument.”).

**Second**, Plaintiffs have not pled facts that plausibly establish “there are questions of law or fact common to the class.” Fed. R. Civ. P. 23(a)(2). Although Plaintiffs recite a laundry list of purported common questions of law and fact, *see* Dkt. 6 ¶ 51, “[r]eciting these questions is not sufficient to obtain class certification.” *Dukes*, 564 U.S. at 349. Rather, “[c]ommonality requires the plaintiff to demonstrate that the class members ‘have suffered the same injury.’” *Id.* at 349-590 (citation omitted). The Amended Complaint demonstrates that commonality is lacking because class members have suffered numerous different purported injuries, including headaches, burning eyes, nausea, and throat irritation. Dkt. 6 ¶ 36; *see Gentry v. Hyundai Motors Am., Inc.*, No. 3:13-cv-30, 2017 WL 354251, at \*8 (W.D. Va. Jan. 23, 2017) (dismissing class allegations

because “the diversity of the class representatives undercuts the allegations” of commonality and typicality); *Martin v. JTH Tax, Inc.*, No. 9:10-cv-3016, 2013 WL 442425, at \*7 (D.S.C. Feb. 5, 2013) (finding commonality lacking because certification “would still require the court to engage in a case-by-case analysis” of injury and damages); *Wu v. MAMSI Life & Health Ins. Co.*, 269 F.R.D. 554, 562 (D. Md. 2010) (“Finally, lack of commonality among the class members is also evidenced by the extent to which individualized inquiries would be necessary to determine the extent of damages in this case.”). The putative class’s differences in injuries, which would entail individualized damages determinations, make clear that Plaintiffs’ class is “no more than ‘a hodgepodge of factually as well as legally different plaintiffs,’ that should not . . . be[] cobbled together for trial.” *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 343 (4th Cir. 1998) (quoting *Georgine v. Amchem Prods., Inc.*, 83 F.3d 620, 632 (3d Cir. 1996)) (finding no commonality and typicality and reversing class certification).<sup>9</sup>

**Third**, Plaintiffs’ claims are not “typical of the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(3). To establish typicality, “‘a class representative must be a part of the class and possess the same interest and suffer the same injury as the class members.’” *Waters v. Electrolux Home Prods., Inc.*, No. 5:13-cv-151, 2016 WL 3926431, at \*5 (N.D. W. Va. July 18, 2016) (quoting *Leinhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 146 (4th Cir. 2001)). “‘The fact that the named plaintiffs have the same general complaint against the defendant does not render their claims typical.’” *Id.* (quoting *Jones v. Allercare, Inc.*, 203 F.R.D. 290, 300 (N.D. Ohio 2001)). Plaintiffs’ claims are not typical because each “must individually prove that he or she experiences

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<sup>9</sup> Because “predominance” under Rule 23(b)(3) “requires ‘the same analytical principles’ governing Rule 23(a)’s commonality analysis [and] the predominance requirement is more demanding,” *Waters*, 2016 WL 3926431, at \*5 (quoting *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013)), Plaintiffs’ inability to plead commonality necessarily means they cannot plead predominance.

personal injuries and/or property damage,” and thus “whether each class member suffered damages . . . will depend upon individual factors.” *Id.* (granting motion to strike class allegations under Rules 12(f) and 23(d)(1)(D)); *see also Flint v. Ally Fin. Inc.*, No. 3:19-cv-189, 2020 WL 1492701, at \*5 (W.D.N.C. Mar. 27, 2020) (striking class allegations pursuant to Rule 23(d)(1)(D) and finding no commonality or typicality due to “individualized inquiry central to Plaintiff’s allegations”). Additionally, Plaintiffs’ claims are not typical because the named plaintiffs bring this action as homeowners but seek to represent any “entity” within the class area. *See Georgia-Pacific*, 295 Ga. at 532 (Melton, J., concurring) (“The named plaintiffs in this case have not been shown to be typical of the claims or defenses of the proposed class, as its members own different tracts of land subjected to varying uses (some residential, some agricultural, some commercial and/or industrial, some vacant and unused) and located at different distances and directions from the sludge fields in question.”).

**Finally**, Plaintiffs’ request for a Rule 23(b)(3) class should be stricken because – based on the allegations in the Amended Complaint – individual issues predominate over any classwide issues. Rule 23(b)(3) classes can only be certified if the Court finds “that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). Here, each Plaintiff complains of personal injuries, each of which differ from the other. *See* Dkt. 6 ¶¶ 44-47. Of course, this problem would be exponentially compounded by a class consisting of more than 1.6 million people, as alleged by Plaintiffs. The fact and extent of injury are individual issues that would predominate – indeed, overwhelm – any common issues. *See Waters*, 2016 WL 3926431, at \*6 (striking class allegations for lack of Rule 23(b)(3) predominance and superiority because “damages to each class members’

person or property will not be uniform in this litigation, increasing the complexity and burden of calculating damages” as each “class member would need to present individualized evidence regarding particular damages they suffered”); *Duffin*, 2007 WL 845336, at \*6 (denying certification for lack of Rule 23(b)(3) predominance and superiority because “Plaintiffs’ evidence shows substantial factual differences between class members whose properties touch the plume and those that do not” and, thus, “[s]ignificant trial time would be devoted to determining separate issues of liability regarding individual properties” (citation omitted)).

For these reasons, because the face of the Amended Complaint demonstrates that Plaintiffs cannot meet the Rule 23 certification factors, the Court should strike their class allegations.

## **VI. CONCLUSION**

As set forth above, New-Indy Containerboard respectfully requests that the Court grant its motion to dismiss for lack of personal jurisdiction. Because Plaintiffs fail to state a claim for private nuisance and South Carolina statutory and regulatory law bar their claim, the Court should dismiss Plaintiffs’ claim with prejudice. Alternatively, the Court should strike the class allegations because the proposed class is overbroad and Plaintiffs have not pled facts that plausibly establish numerosity, commonality, typicality, and predominance.

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Charleston, South Carolina  
June 30, 2021

**CERTIFICATE OF SERVICE**

I, Peter M. McCoy, Jr., an attorney, certify that I filed the foregoing using the Court's ECF system, which will cause a true and correct copy of the same to be served electronically on all ECF-registered counsel of record on this 30th day of June 2021.

s/ Peter M. McCoy, Jr.  
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Peter M. McCoy, Jr.