UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

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Kenny N. White; Tracie Nickell; Amanda Swagger; *and* John Hollis, *on behalf of themselves and all others similarly situated*,

Plaintiffs,

v.

New-Indy Catawba LLC
*d/b/a* New Indy Containerboard; *and*
New-Indy Containerboard, LLC,

Defendants.

Case No. 0:21-cv-01480-SAL

HON. SHERRI A. LYDON

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Terri Kennedy, *on behalf of herself and all others similarly situated*,
Plaintiffs

v.

New-Indy Catawba LLC and
New-Indy Containerboard, LLC
Defendants.

Case No. 0:21-cv-01704-SAL

HON. SHERRI A. LYDON

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**PLAINTIFFS' MOTION TO CONSOLIDATE CASES, APPOINT INTERIM COUNSEL, AND FOR LEAVE TO FILE CONSOLIDATED AMENDED COMPLAINT AND INCORPORATED MEMORANDUM OF LAW**

NOW COME Plaintiffs, Kenny N. White, *et al.*[1], and Terri Kennedy, *et al.*[2], and move for an order from the Court (1) to consolidate the two putative class actions, *White, et al. v. New Indy Catawba LLC d/b/a New Indy Containerboard*, No. 021-cv-01480-SAL and *Kennedy, et al. v. New-Indy Catawba LLC and New- Indy Containerboard, LLC, et al.*, No. 0:21-cv-01704-SAL, pursuant to Federal Rule of Civil Procedure 42(a), and to amend the caption of the resulting consolidated matter; (2) appoint T. David Hoyle, Richard A. Harpootlian, Philip C. Federico, and Chase T. Brockstedt as Interim Co-Lead Counsel, pursuant to Federal Rule of Civil Procedure 23(g)(3); and (3) move for leave to file a Consolidated Amended Complaint pursuant to Federal Rule of Civil Procedure 15(a)(2).

For the reasons set forth below, this Honorable Court should grant this Motion.

## I. Introduction

Before this Court are two putative class actions seeking damages from Defendants New-Indy Catawba LLC, d/b/a New-Indy Containerboard and New-Indy Containerboard, LLC (collectively, "New Indy") for the egregious and wrongful emission of foul and harmful hydrogen sulfide, methyl mercaptan, methanol, and other contaminants into the air from New Indy's paper mill located in Catawba, South Carolina (the "Mill"). New Indy purchased the Mill in December 2018 and shut down production between September 2020 and November 2020 to convert its manufacturing operations from producing white paper to producing containerboard grade paper. New Indy completed the conversion in November 2020.

[1] Plaintiffs Kenny N. White, Tracie Nickell, Amanda Swagger, and John Hollis are the named Plaintiffs in the *White* action.

[2] Plaintiffs Terri Kennedy, Enrique Lizano, Melda Gain, Krista Manus-Cook, Jean Hivanec, and Kathleen Moran are the named Plaintiffs in the *Kennedy* action.

Following the conversion, the Mill ceased sending foul condensate to a steam stripper and incinerator, which were used to control hazardous air emissions, and instead sent all foul condensate to open-air lagoons, allowing hydrogen sulfide and other dangerous air pollutants to evaporate into the air. On January 19, 2021, the South Carolina Department of Health and Environmental Control ("DHEC") began receiving odor complaints from citizens in York and Lancaster counties described as paper mill, rotten egg, chemical, and sewage odors.

On May 7, 2021, DHEC determined "the odor is injurious to the welfare and quality of life and is interfering with use and enjoyment of property" and ordered New Indy to take actions to remedy the unlawful air pollution released from the Mill. On May 13, 2021, the U.S. Environmental Protection Agency ("EPA") issued an emergency order under the Clean Air Act, stating that an emergency order was needed because New Indy's actions were so harmful to public health and welfare.

On May 18, 2021, the first putative class action, *White v. New-Indy*, Case No. 0:21-cv-014480-SAL, was filed in the United States District Court for the District of South Carolina. In *White*, Plaintiffs allege a private nuisance cause of action against New Indy, based on the Mill's conversion, which caused dangerous air pollutants to formulate in the surrounding area, causing strong, foul odors characteristic of hydrogen sulfide.

On June 8, 2021, a second putative class action, *Kennedy v. New Indy*, Case No. 0:21-cv-014490-SAL, was filed in the United States District Court for the District of South Carolina. The *Kennedy* complaint similarly alleges that the Mill created a strong and egregious odor, which DHEC has determined is injurious to the welfare and quality of life and is interfering with use and enjoyment of property in the area. In *Kennedy*, the Plaintiffs pled causes of action for negligence per se, negligence, trespass, nuisance and preliminary and permanent injunctions.

Plaintiffs *Kennedy* and *White* now seek consolidation of their respective putative class action cases because they share common questions of law and fact. The factual allegations in each complaint are founded upon the same or similar allegations based upon Defendants' wrongful conduct arising out of the unlawful release of hydrogen sulfide and other toxic chemicals from the Mill, which has resulted in similar damage(s) to the Plaintiffs and the putative classes in each case.

The consolidation of these cases will allow the Court to hear all motions in conjunction, expediting their resolution, will not prejudice any party, will ensure efficiency during all stages of this litigation, and will help foster consistency in the findings and the conclusions of the Court.

## II. Argument

### A. Consolidation of *White* and *Kennedy* Promotes the Interests of Judicial Efficiency.

"Under Rule 42 of the Federal Rules of Civil Procedure, a court may consolidate cases for trial or other purposes when the actions 'involve a common question of law or fact.'" *Pennington v. Fluor Corp.*, No. 0:17-cv-02094-JMC, No. 0:17-cv-02201-JMC, 2018 U.S. Dist. LEXIS 239174, at *14, 2018 WL 8693533, at *4 (D.S.C. Jul. 18, 2018) (*quoting* Fed. R. Civ. P. 42(a)). Consolidation "is permitted as a matter of convenience and economy in administration." *Intown Props. Mgmt., Inc. v. Wheaton Van Lines, Inc.*, 271 F.3d 164, 168 (4th Cir. 2001) (*quoting Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97, 53 S.Ct. 721 (1933)). Therefore, the Fourth Circuit has held that the "critical question" in determining whether consolidation should be allowed is:

> (1) whether the specific risks of prejudice and possible confusion [are] overborne by the risk of inconsistent adjudications of common factual and legal issues; (2) the burden on the parties, witnesses and available judicial resources posed by multiple lawsuits; (3) the length of time required to conclude multiple suits as against a single one; and (4) the relative expense to all concerned of the single-trial, multiple-trial alternatives.

*In re Pella Corp. Architect & Designer Series Windows Mktg.*, No. 2:14-MN-00001-DCN, 2015 U.S. Dist. LEXIS 185312, at *5-6, 2015 WL 4162442, at *2–3 (D.S.C. July 9, 2015) (*quoting*

*Arnold v. Eastern Air Lines, Inc.*, 681 F.2d 186, 193 (4th Cir. 1982)). The Court "also weighs the risks of prejudice to the parties and possible juror confusion." *Davenport v. Goodyear Dunlop Tires N.A., Ltd.*, No. 1:15-cv-03751-JMC, 1:15-cv-03752-JMC, 2016 U.S. Dist. LEXIS 147225, 2016 WL 6216200, at *2 (D.S.C. Oct. 25, 2016).

Consolidation is appropriate in this instance because Plaintiffs' cases share common questions of law and fact. Regarding the common question of law, in each case Plaintiffs bring claims for nuisance. The Defendants in each case are the same, they assert the same defenses and are represented by the same counsel. Regarding the common question of fact, in both cases Plaintiffs' claims arise out of the same unlawful emissions of hydrogen sulfide and other pollutants and contaminants to the air, from the same paper mill impacting the same putative class of plaintiffs with the same class definition – all persons or entities who, from November 1, 2020 to the present (*Kennedy*) and February 1, 2021 to the present (*White*), owned, leased, resided on property or have any beneficial interest in any real property located within 30 miles of the Mill. *See, e.g.*, *Asher v. Duke Energy Carolinas, LLC*, No. 6:12-cv-02787-JMC, 6:12-cv-02788-JMC, 6:12-cv-02789-JMC, 2013 U.S. Dist. LEXIS 68836, 2013 WL 2109558, at *1 (D.S.C. May 15, 2013) ("[T]he Actions here stem from the same incident . . . [t]hus, the factual predicates for each Action are the same.").

As a result, consolidation will promote judicial economy and the efficient use of the parties' and potential witnesses' resources and does not identify a countervailing risk of undue burden on or prejudice to the parties.

Plaintiffs respectfully move for an order consolidating *Kennedy* into *White* and propose that these consolidated matters proceed under the caption *In re New Indy Emissions Litigation.*

### B. The appointment of interim class counsel is necessary to protect the interests of the putative class, to avoid confusion and delay, to ensure the efficient prosecution of the case, and to conserve the resources of both the Court and the parties.

Federal Rule of Civil Procedure 23(g)(3) provides "[t]he court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action." Fed. R. Civ. P. 23(g)(3). *The Manual for Complex Litigation* (Fourth) (2007) ("Manual") recommends that early in complex litigation the court select and authorize one or more attorneys to act on behalf of other counsel and their clients. Counsel so designated "assume a responsibility to the court and an obligation to act fairly, efficiently, and economically in the interests of all parties and parties' counsel." Manual §10.22. "When appointing interim class counsel, courts generally look to the same factors used in determining the adequacy of class counsel under Rule 23(g)(1)(A)." *In re: Int. Rate Swaps Antitrust Litig.*, No. 16-MC-2704 (PAE), 2016 U.S. Dist. LEXIS 101959, at *26, 2016 WL 4131846, at *2 (S.D.N.Y. Aug. 3, 2016).

Appointment of interim class counsel is appropriate at this time because it will define the roles and responsibilities of the different plaintiffs' law firms presently in this case, will encourage those so appointed to zealously invest their time and financial resources in the litigation, will eliminate doubt about their role in the litigation should additional related cases be filed, as is anticipated, and will avoid distracting and protracted leadership contests if other related cases are later filed by other law firms.

Although neither Rule 23(g) nor the Advisory Committee Notes define standards for appointing interim class counsel, courts have held that the same standards apply as when selecting class counsel at the class certification stage. The court is, therefore, required to consider:

> (i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii)

> counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class[.]

Fed. R. Civ. P. 23(g)(1)(A). The moving law firms have all spent significant amounts of time and energy identifying, investigating, and litigating the claims in the *White* and *Kennedy* cases. Moreover, as detailed below, the Moving Firms all have ample experience handling class actions and complex litigation, including environmental cases. Additionally, each of these firms is knowledgeable about the applicable federal and state laws and will appropriately dedicate their resources to representing the putative class. Because this is a high-stakes litigation involving complex claims, Plaintiffs expect that it will be hard fought and require the investment of very substantial resources. Under these circumstances, the appointment of four firms to lead this litigation is appropriate. Moving Firms have a history of effectively working collaboratively with one another[3] and with other firms in complex litigation and have spent substantial time and effort strategizing and delegating roles and responsibilities with respect to this litigation. Appointment of these four firms as interim class counsel will also ensure that sufficient resources will be available to handle the anticipated immense burdens of this litigation on behalf of the putative class.

#### 1) Motley Rice is Well Qualified to Serve as Interim Co-Lead Class Counsel

Motley Rice LLC ("Motley Rice") is one of the nation's largest plaintiffs' litigation firms. With more than 100 attorneys and 11 offices, the firm represents clients against wrongdoing and negligence through consolidated trials, multidistrict litigation, and class actions. The firm's co-founder, Joe Rice, has served as the lead negotiator in some of the largest civil actions our courts

[3] By way of example, Motley Rice and SFS are currently working collaboratively in MDL 2804 and MDL 2873. Motley Rice and Harpootlian also have a history of working with each other. In addition, SFS and BMB frequently co-counsel with each other.

have seen in the last 20 years and currently serves as co-lead counsel in the *In re National Prescription Opiate Litigation*, MDL 2804, No. 17-md-02804 (N.D. Ohio). From its headquarters in Mount Pleasant, Motley Rice attorneys currently hold leadership appointments in two MDLs assigned to judges in the District of South Carolina: as Co-Lead Counsel for *In re Blackbaud, Inc., Customer Data Breach Litigation*, MDL No. 2972, No. 3:20-mn-02972-JCM and as Liaison Counsel for *In re Aqueous Film-Forming Foams Prods. Liab. Litig.*, MDL No. 2873, No. 2:18-mn-2873-RMG. Motley Rice also has substantial experience with environmental and toxic exposure cases including as lead settlement negotiators of the two class action settlements reached with BP in connection with *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico on April 20, 2010*, MDL 2179, (E.D. La.), one of which is the largest civil class action settlement in U.S. history. Motley Rice also represents residents of Kent County, Michigan in a class action involving per- and polyfluoroalkyl substances, or PFAS, which are "forever chemicals" that do not biodegrade and contaminate groundwater. Motley Rice's resume is attached hereto as Exhibit 1.

T. David Hoyle, a Motley Rice member, has litigated environmental contamination cases for more than a decade. He represented governments and businesses affected by the Deepwater Horizon oil spill. Today, Mr. Hoyle plays a leading role in PFAS litigation, and has taken dozens of liability depositions concerning the alleged concealment of the hazards associated with these chemicals. He leads the 3M Discovery Team for the Plaintiffs' Executive Committee in MDL 2873 and negotiated the search terms which resulted in 17 defendants producing more than 3.5 million documents. In addition, Mr. Hoyle represents governmental entities and water providers in MDL 2873. He is also co-lead counsel for a test case, with water contamination levels more than 1,000 times the regulatory limit, set for a bellwether trial on October 18, 2021, in Kent County,

Michigan Circuit Court involving alleged PFAS contamination from the operation and disposal practices of the former Wolverine World Wide tannery in Rockford, Michigan. Mr. Hoyle began his career at Motley Rice representing victims of asbestos exposure and has built a complex litigation practice with an emphasis on prosecuting significant damage cases. This includes litigating chemical exposure cases involving benzene, methylene chloride, and more than a dozen other chemicals, including of importance to this case, hydrogen sulfide, as a leader of Motley Rice's toxic tort practice. His experience includes working closely with experts in the fields of epidemiology, toxicology, soil agronomy, hydrogeology, and property valuation among other disciplines. Mr. Hoyle's resume is attached hereto as Exhibit 2.

**2) Harpootlian is Well Qualified to Serve as Interim Co-Lead Class Counsel**

Richard A. Harpootlian, P.A. (Harpootlian firm) is a boutique litigation practice that consists of three full-time attorneys devoted primarily to representing plaintiffs in complex civil matters. The firm's work routinely results in multi-million-dollar recoveries for individuals and families in personal injury and death cases and has brought hundreds of millions of dollars back to the U.S. Treasury through the representation of whistleblowers in False Claims Act (FCA) litigations, including one of the largest FCA settlements in South Carolina ($95 million) and the third-largest non-intervened FCA recovery in the Nation's history ($280 million). Harpootlian's class-action work has resulted in $68 million in foreclosure benefits to U.S. servicemembers, *Rowles v. Chase Home Fin., LLC*, C/A No. 9:10-cv-01756-MBS, 2012 WL 80570 (D.S.C. Jan. 10, 2012); $7.9 million paid to cancer insurance policyholders, *Ward v. Dixie Nat. Life Ins. Co.*, 595 F.3d 164 (4th Cir. 2010); and a $31.8 million recovery for a class of retirees, *Layman v. State*, 368 S.C. 631, 630 S.E.2d 265 (2006), among others. *See also*, *Kirven v. Cent. States Health & Life Co. of Omaha*, No. C/A 3:11-cv-2149-MBS, 2015 WL 1314086 (D.S.C. Mar. 23, 2015) (lead

counsel in settlement class); *Wray v. CitiMortgage, Inc.*, No. C/A No. 3:12-cv-3628-CMC, Dkt. No. 208 (D.S.C. July 8, 2015) (same).

For more than 40 years, Dick Harpootlian has practiced at all levels of state and federal courts. As a former prosecutor and civil litigator for the last 26 years, Mr. Harpootlian has tried hundreds of cases to a jury verdict and has been involved in some of South Carolina's most high-profile matters. Mr. Harpootlian's resume is attached hereto as Exhibit 3.

**3) Schochor, Federico & Staton is Well Qualified to Serve as Interim Co-Lead Counsel**

Schochor, Federico & Staton, P.A. ("SFS"), consisting of 14 full time attorneys, devotes its practice to the investigation and litigation of complex civil matters. In the past 10 years alone, the firm has led recoveries totaling over $500 million, including $205 million in settlements in the related air pollution and groundwater contamination matters of *Cuppels v. Mountaire Corporation, et al.*, C.A. No. S18C-06-009 (CAK); and *State of Delaware Department of Natural Resources & Environmental Control v. Mountaire Farms of Delaware, Inc.*, C.A. No. 18-838 (MN); a $190 million class settlement in *Doe v. The Johns Hopkins Hospital* (Circuit Court for Baltimore City, Maryland, Case No.: 24-C-13-001041); and a $123 million class settlement *Jane Doe 30 v. Bradley et al.*, Superior Court of Delaware, New Castle Co., C.A. No. N10C-05-023 (JRS). SFS has extensive experience in class action litigation, complex litigation discovery, and a long track record of significant jury verdicts in a variety of tort matters. Since 1984, SFS has recovered over one billion dollars on behalf of its clients. SFS's resume is attached hereto as Exhibit 4.

Philip C. Federico, a founding and senior partner with SFS, currently manages the Mass Tort/Environmental Law section of the firm. Mr. Federico has been involved in historic and groundbreaking litigation, including environmental cases involving contaminated groundwater and air pollution, with verdicts and settlements totaling hundreds of millions of dollars.

Mr. Federico recently served as co-lead and class counsel in the landmark environmental case against chicken processing giant Mountaire in *Cuppels v. Mountaire Corporation, et al.*, C.A. No. S18C-06-009 (CAK); and *State of Delaware Department of Natural Resources & Environmental Control v. Mountaire Farms of Delaware, Inc.*, C.A. No. 18-838 (MN). For close to two decades, the company violated its permits by disposing of wastewater containing excessive nitrates, and engaging in conduct which resulted in substantial emissions of hydrogen sulfide, causing health problems and property damage for the community of Millsboro, Delaware. Characterized as "likely the most intensely litigated in the Superior Court in and for Sussex County," this matter resulted in the nation's largest settlement concerning nitrate contamination. Mr. Federico is also counsel to the Charleston Airport Authority in connection with *In re Aqueous Film-Forming Foams Prods. Liab. Litig.*, MDL No. 2873, No. 2:18-mn-2873-RMG.

Mr. Federico formed a consortium of attorneys representing more than 40 cities and counties in the *In re National Prescription Opiate Litigation*, MDL 2804, No. 17-md-02804 (N.D. Ohio). SFS also serves as counsel on behalf of more than three dozen school boards located across the country related to *In re Juul Labs, Inc., Marketing, Sales, Practices, and Products Liability Litigation*, MDL No. 2913, No. 19-md-02913-WHO (N.D. Cal.).

Mr. Federico also has experience in personal injury, sexual abuse and misconduct, and healthcare litigation. He co-led recoveries in *Doe 30 v. Bradley et al.* (Superior Court of Delaware, New Castle Co., C.A. No. N10C-05-023 (JRS)), a sexual assault, personal injury class action involving the conduct of a Delaware pediatrician resulting in a settlement of $123 million, and served as counsel in *Jane Doe. No. 1 et al.* v. *The Johns Hopkins Hospital* (Circuit Court for Baltimore City, Maryland, Case No.: 24-C-13-001041), a case arising out of the conduct of an obstetrician gynecologist who surreptitiously videotaped his patients during gynecologic

examinations, resulting in a settlement of $190 million. Mr. Federico has extensive trial experience, have tried in excess of 50 cases to verdict, resulting in verdicts of over $100 million. Mr. Federico's experience includes leadership and management of complex class action litigation, including personal injury matters, and extensive work with experts in a variety of fields relevant to this litigation, including environmental engineering, air emissions, air modeling, toxicology, epidemiology, and property diminution. Mr. Federico's resume is attached hereto within Exhibit 4.

**4) Baird Mandalas Brockstedt is Well Qualified to Serve as Interim Co-Lead Class Counsel**

Baird Mandalas Brockstedt, LLC ("BMB") is a full-service law firm providing legal services throughout the state of Delaware and beyond with four offices located in Wilmington, Dover, Lewes and Georgetown, Delaware. BMB has eight partners and 11 associates, along with over 50 support staff. BMB's litigation department is a core of the firm's focus and over the last decade it has spearheaded complex litigation in several practice areas including personal injury, nursing home neglect, medical malpractice, sexual abuse and premises liability. In particular, the firm has taken a lead role in mass tort and class actions, with specific focus on environmental cases involving contaminated groundwater and air pollution. BMB's track record of success against large corporations through consolidated trials, multi-district litigation, and complex class actions speaks for itself as demonstrated by the firm's resume attached hereto as Exhibit 5.

Chase T. Brockstedt, founding partner of BMB, leads the Mass Tort/Environmental Law/Injury Litigation section of the firm. Mr. Brockstedt has served as lead counsel, a steering committee member, and class counsel in some of the largest mass tort class action cases in Delaware.

Mr. Brockstedt served as co-lead counsel and class counsel in *Cuppels v. Mountaire Corporation, et al.*, C.A. No. S18C-06-008 (CAK), a complex environmental class action against one of the nation's largest poultry processors. The case involved pollution through excessive nitrates in the groundwater and unlawful air emissions from the plant. BMB also intervened in a companion enforcement action brought by the regulator in the United States District Court for the District of Delaware in *State of Delaware Department of Natural Resources & Environmental Control v. Mountaire Farms of Delaware, Inc.*, C.A. No. 18-838 (MN) to protect the rights of its clients. The litigation in both courts, which lasted nearly four years, resulted in a landmark $205 million settlement that included remediation, compensatory damages for diminution of property value and personal injuries.

Mr. Brockstedt was a member of the steering committee and class counsel in *Doe v. Bradley*, C.A. No. N10C-05-023 (JRS), another class action case involving a pediatrician that abuses scores of young children resulting in a settlement of $123.5 million. Mr. Brockstedt represented the plaintiff class in *Crowhorn v. Nationwide Mut. Ins. Co.*, 836 A.2d 558 (Del. 2003) a bad faith and deceptive trade practices matter prosecuted against an auto insurer. This case was litigated in the complex commercial division of the Delaware Superior Court and, after class certification, was resolved.

Mr. Brockstedt was co-lead counsel in *Bailey v. Beebe Medical Center, et al.*, 913 A.2d 543 (Del. 2006) a nursing home neglect case involving the wrongful death of a patient suffering from dementia. The trial in this matter was conducted over three weeks and resulted in a $13 million compensatory damages award. The verdict was upheld by the Delaware Supreme Court and remains the largest verdict in an individual tort case in the Delaware Superior Court in and for Sussex County.

BMB currently represents 18 of the 19 public school districts in the State of Delaware in the *In re Juul Labs, Inc., Marketing, Sales, Practices, and Products Liability Litigation*, MDL No. 2913, No. 19-md-02913-WHO (N.D. Cal.) and is currently investigating other environmental contamination cases in Maryland.

Mr. Brockstedt has substantial experience leading teams of multiple law firms, numerous experts and consultants, and prosecuting and administering complex matters with a unified approach. His experience working closely with interdisciplinary teams has garnered him substantial expertise in the fields of hydrogeology, air modeling, toxicology, epidemiology, the health effects caused by pollutants and toxic exposure, and the diminution of property value. Mr. Brockstedt's resume is attached hereto within Exhibit 5.

### C. Leave of Court should be Granted for a Consolidated Amended Complaint.

Finally, Plaintiffs seek leave to file a consolidated amended complaint to serve as the operative complaint in this putative class action litigation. Pursuant to Federal Rule of Civil Procedure 15(a)(2), a party may amend its pleading with leave of court, which a court "should freely give leave" to amend pleadings "when justice so requires." Indeed, a motion to amend should be denied only where it would be prejudicial, there has been bad faith, or the amendment would be futile. *Laber v. Harvey*, 438 F.3d 404, 426 (4th Cir. 2006). Absent prejudice or bad faith, a party "ought to be afforded an opportunity to test his claim on the merits." *Foman v. Davis*, 371 U.S. 178, 182, (1962).

Here, the Plaintiffs should be granted leave to file an amended consolidated complaint as this litigation is in its infancy. The *White* and *Kennedy* cases were filed in May and June of this

year, respectively, and Defendants will not be prejudiced by the timing of the proposed amendment.[4]

Moreover, the proposed amendment does not raise new legal theories that would require additional facts or analysis that have not already been considered by the parties. *See e.g.*, *Davis v. Piper Aircraft Co.*, 615 F.2d 606, 613 (4th Cir. 1980) ("Because defendant was from the outset made fully aware of the events giving rise to the action, an allowance of the amendment could not in any way prejudice the preparation of the defendant's case."). The proposed amended consolidated complaint is based on facts pled similarly in *Kennedy* and *White*, and is intended only to protect the interests of the putative class, to avoid confusion, and ensure the efficient prosecution of the case. A copy of Plaintiffs' Proposed Consolidated Amended Complaint is attached hereto as Exhibit 6.

## III. Conclusion

Plaintiffs respectfully request that this Honorable Court enter an order granting Plaintiffs' motion to consolidate these two civil actions, *White* and *Kennedy*, under the proposed caption *In re New Indy Emissions Litigation*, pursuant to Federal Rule of Civil Procedure 42(a); to appoint T. David Hoyle, Richard A. Harpootlian, Philip C. Federico, and Chase T. Brockstedt as Interim Co-Lead Counsel pursuant to Federal Rule of Civil Procedure 23(g)(3); and for leave to file a Consolidated Amended Complaint pursuant to Federal Rule of Civil Procedure 15(a)(2).

DATED: September 23, 2021

Respectfully submitted,

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[4] Defendants' pending motions to dismiss in *White* has been fully briefed and motions practice in *Kennedy* has been partially briefed. Any complaints by Defendants about having to refile motions to dismiss would simply be form over substance as the proposed amended complaint seeks to streamline this litigation.

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PLAINTIFFS IN PROPOSED
CONSOLIDATED ACTION

HIVANEC, AND KATHLEEN MORAN,
ON BEHALF OF THEMSELVES AND ALL
OTHERS SIMILARLY SITUATED, AND
PLAINTIFFS IN PROPOSED
CONSOLIDATED ACTION

**LR 7.02 Statement**

The undersigned affirm that, prior to filing the instant motion, they conferred with Counsel for Defendants New-Indy Catawba LLC and New-Indy Containerboard LLC (collectively, "New-Indy") in good faith to resolve the matter contained herein. On September 10, 2021, New-Indy stated the following in the JOINT MOTION TO STAY PROCEEDINGS PENDING MOTION TO CONSOLIDATE filed in both *White* and *Kennedy*: "New-Indy plans to file a response to the Motion to Consolidate within seven days after it is filed to note New-Indy's opposition to the filing of yet another amended complaint. New-Indy will not oppose the request to consolidate or for appointment of interim class counsel."

/s/ T. David Hoyle

/s/ Thomas E. Pope

**CERTIFICATE OF SERVICE**

I, Ben P. Leader, 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 23rd day of September 2021.

*/s/Ben P. Leader*
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