IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

IN RE: NEW INDY EMISSIONS LITIGATION

Case Nos.: 0:21-cv-01480-SAL
0:21-cv-01704-SAL

ORDER

This matter is before the court on Defendants New-Indy Catawba, LLC ("NI Catawba") and New-Indy Containerboard, LLC's ("NI Containerboard") Motions to Dismiss the Consolidated Amended Class Action Complaint or, in the Alternative, to Strike Plaintiffs' Class Allegations.[1] [0:21-cv-1480 docket, ECF Nos. 58, 59; 0:21-cv-1704 docket, ECF Nos. 53, 54.] Through its separate motion, New-Indy Containerboard additionally argues the court should dismiss Plaintiffs' claims against New-Indy Containerboard under Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction. Both motions also maintain the court should dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim or, alternatively, strike Plaintiffs' class allegations under Rules 12(f) and 23(d)(1)(D) of the Federal Rules of Civil Procedure. Fully briefed and argued before the court June 1, 2022, this matter is ripe for review. For the reasons below, the court grants Defendants' motions to dismiss in part with respect to Plaintiffs' negligence

[1] This matter originates from substantively identical complaints on the *White v. New-Indy Catawba*, 0:21-cv-1480 and *Kennedy v. New-Indy Catawba*, 0:21-cv-1704 dockets. On December 8, 2021, the court granted Plaintiffs' Motion to Consolidate Cases, Appoint Interim Counsel, and File Consolidated Amended Complaint. [ECF Nos. 39, 46.] Per the Notice to File Future Filings at ECF No. 73 on the 21-1480 docket, the court references the Consolidated Amended Complaint at ECF No. 49 on the 21-1480 docket (the "Complaint") and otherwise references the docket entries for the motions at hand (ECF Nos. 58 and 59) and related filings on the 21-1480 docket.

per se claim, which the court dismisses without prejudice, and denies the remainder of Defendants' motions.

I. FACTUAL AND PROCEDURAL BACKGROUND[2]

These two consolidated putative class actions seek damages from Defendants based on alleged egregious and wrongful emissions of foul and harmful hydrogen sulfide, methyl mercaptan, methanol, and other pollutants and contaminants from a papermill in Catawba, South Carolina (the "Mill"). In October 2018, Defendants purchased the Mill to convert it from a facility producing bleached paper used in magazines and catalogs to one producing brown paper for containerboard.[3] [Compl., ECF No. 49, ¶¶ 2, 3.] Before the conversion, Defendants sent over half the Mill's foul condensate steam containing hydrogen sulfide, methyl mercaptan, methanol, and other pollutants, to a steam stripper.[4] *Id.* ¶ 65. Pre-conversion, Defendants used the steam stripper and incinerator located inside the Mill to remove hydrogen sulfide and other pollutants and contaminants from the Mill's air emissions. *Id.* Pre-conversion, Defendants piped the remainder of the Mill's foul condensate to the Aeration Stabilization Basin ("ASB") outside the Mill. *Id.*

After receiving a South Carolina Department of Health and Environmental Control ("DHEC") construction permit, Defendants shut down the Mill between September and November

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[2] At this motion to dismiss stage, the Court assumes the Complaint's alleged facts as true. *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 418 (4th Cir. 2015); Fed. R. Civ. P. 10(c).

[3] The court observes the parties' dispute regarding who, between NI Catawba and NI Containerboard, officially and actually "purchased" the Mill under the relevant Asset Purchase Agreement (the "APA"). The court for the sake of the motions at hand accepts Defendants' argument NI Catawba is the "purchaser" under the APA. However, this assumed fact is not dispositive on the court's jurisdictional analysis.

[4] Hydrogen sulfide is a colorless gas and a component of the Total Reduced Sulfur ("TRS") chemical mixture associated with the pulp and paper industry and has a "rotten egg" odor. [Compl. ¶ 68.] Methyl mercaptan is a colorless gas with a rotten cabbage smell. *Id.* ¶ 71.

2020 to convert manufacturing operations from bleached paper to unbleached cardboard or brown paper.[5] *Id.* ¶ 63. Post-conversion, the Mill resumed operations at low production rates. *Id.* ¶ 66. In February 2021, Mill operations increased to higher but not full production rates. *Id.* ¶¶ 7, 66.

In post-conversion operations, the Mill began sending all its foul condensate steam to the ASB in the wastewater treatment facility at almost twice the maximum capacity of the steam stripper. *Id.* (citing ECF No. 49-2, ¶ 10). This foreseeably resulted in an eight- to nine-fold increase in the foul condensate piped to the open-air lagoons, causing hydrogen-sulfide and other dangerous air pollutants and contaminants to evaporate into the air and disperse to surrounding communities. *Id.* ¶ 7. Defendants started up the converted Mill without adequate steam stripper capacity and with a malfunctioning and compromised wastewater treatment plant. *Id.* ¶ 90(a)-(b).

As the Mill began high volume production, people living and working within a 30-mile radius of the Mill experienced and complained of strong, foul odors and physical reactions to exposure to excessive amounts of hydrogen sulfide and other pollutants and contaminants. *Id.* ¶ 10. Residents in Lancaster and York Counties in South Carolina and Union and Mecklenburg Counties in North Carolina complained of strong odors from the Mill and reported health effects to DHEC.[6] *Id.* ¶ 77. DHEC received "'an unprecedented number of complaints . . . related to odor,'" and immediately began investigating the odors. *Id.* ¶ 11. To that end, EPA and DHEC began cataloging and mapping citizen complaints in March 2021. *Id.* ¶¶ 98, 99. Though some of

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[5] The Mill operates pursuant to three permits issued by DHEC: a Title V Operating Permit (air pollution), a National Pollutant Discharge Elimination System ("NPDES") Permit (wastewater discharge), and a Construction Permit (manufacturing conversions). [Compl. ¶¶ 62-64.]

[6] Approximately 625,000 people live within a 20-mile radius of the Mill, which includes York, Lancaster, and Chester Counties in South Carolina, and Union and Mecklenburg Counties in North Carolina. *Id.* ¶ 60.

the complaints are from residents thirty miles away from the Mill, most complaints fall within a twenty-mile radius. *Id*. at 100. On May 7, 2021, after receiving over 17,000 complaints, DHEC issued its Determination of Undesirable Levels and Order to Correct Undesirable Level of Air Contaminants, *In re: New-Indy Catawba, LLC* (the "DHEC Order"). [Compl. ¶¶ 11, 12, 79; ECF No. 49-1.] The DHEC Order finds "'the odor is injurious to the welfare and quality of life and is interfering with use and enjoyment of property'" and orders Defendants to take actions to remedy the air pollution.[7] *Id.* ¶ 12. On May 13, 2021, following its inspections, analysis, and receipt of resident complaints, EPA issued its Clean Air Act Emergency Order, *In re New-Indy Catawba d/b/a New-Indy Containerboard* (EPA Reg'l Dir. May 11, 2021, the "EPA Order"), ordering Defendants to take actions to remedy the air pollution. [Compl. ¶¶ 13, 80—84; ECF No. 49-2.]

These two now-consolidated putative class actions followed. The ten named Plaintiffs live between 2.5 and 14.3 miles of the Mill. *Id.* ¶¶ 25-34. Concerning their damages, Plaintiffs allege:

> The smell of rotten eggs seep into Plaintiffs' homes, often waking them up in the middle of the night. The odor comes in waves, three to five times a week. The awful and unpredictable odor prevents Plaintiffs and their families from the use and enjoyment of their homes and properties. Plaintiffs suffered health effects including, among other things, headaches, bloody noses, sinus issues, and persistent nausea. Plaintiffs have sought or will be seeking medical treatment for these conditions. Plaintiffs' damages include but are not limited to those alleged in CAC Paragraphs 149-171.
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> [Compl. ¶ 35.]

Plaintiffs further assert "they cannot go about their normal lives; and they cannot live on and enjoy

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[7] According to DHEC's online database, the reported health effects as of May 13, 2021 included nausea, headaches, migraines, nose or throat irritation, and eye irritation. [Compl. ¶ 77.] Other reported symptoms include coughing, difficulty breathing, asthma "flare ups," and dizziness. *Id.* Residents have also documented impacts to quality of life, personal comfort, and wellbeing. *Id.* ¶¶ 78, 87. A sampling of specific quality of life impacts include: "It [the odor] is preventing our ability to enjoy our home and community," "We basically cannot enjoy our life," and "We are prisoners in our own smelly home." *Id.* (citing EPA Order ¶ 15).

their homes, property, yards, and the outdoors as a result because they are subject to toxic, noxious odors, and do not have clear, clean air or water." *Id.* ¶ 163.[8] In turn, Plaintiffs assert claims for private nuisance, negligence, gross negligence, recklessness and willful conduct, and negligence per se. Plaintiffs bring the Complaint on behalf of themselves and, under Fed. R. Civ. P. 23(b)(1), 23(b)(2), and 23(b)(3), "all other persons who, from November 1, 2020 to the present (the 'Class Period') owned, leased, resided on property or had a beneficial interest in property up to 20 miles from the Mill (the 'Class Area')." *Id.* ¶¶ 16, 101, 111-113. In response to the Complaint, Defendants filed the motions to dismiss at hand in this Order. Plaintiffs filed briefs opposing the motions, ECF Nos. 61, 62, and Defendants replied, ECF Nos. 65, 66. On June 1, 2022, the court heard oral argument on the motions and took the motions under advisement.

II. NI CONTAINERBOARD'S MOTION TO DISMISS UNDER FED. R. CIV. P. 12(B)(2) FOR LACK OF PERSONAL JURISDICTION

As a threshold matter, NI Containerboard argues the court should dismiss all claims against it because Plaintiffs fail to plead facts establishing personal jurisdiction over the first-tier parent company of NI Catawba.[9] NI Containerboard's argument is two-fold: (1) the Delaware-

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[8] The Complaint contains additional allegations regarding Defendants' alleged discharge of inadequately treated wastewater to the Catawba River. In their Motion to Dismiss, Defendants argued Plaintiffs lack standing to bring such claims. [ECF No. 58, pp. 2, 17-19.] Plaintiffs subsequently withdrew these claims, and the court does not address them. [ECF No. 62, p.5 n.4.]

[9] NI Catawba and NI Containerboard are joint ventures created and controlled by the Kraft Group, LLC, a Delaware limited liability company with its principal place of business located at One Patriot Place, Foxborough, MA 02035 (the "Kraft Group"), and Schwarz Partners LP, an Indiana limited partnership with its principal place of business located at 10 West Carmel Drive, Suite 300, Carmel, IN 46032. [Compl. ¶ 3.] NI Containerboard was formed in Delaware in 2012. [Compl. ¶ 39.] NI Catawba was formed in Delaware on September 11, 2018, less than a month before the APA was signed, and registered to do business in South Carolina on September 27, 2018, days before the APA was signed. *Id.* NI Catawba's application to transact business in South Carolina listed its principal office as One Patriot Place, Foxborough, Massachusetts and was signed by the CFO of the Kraft Group. *Id.* Plaintiffs allege "[t]his shows that NI Catawba was a new, asset-less

incorporated and Ontario, California-based company does not have relevant specific contacts with or in South Carolina sufficient to warrant haling it to court in this case and (2) the court lacks derivative jurisdiction because Plaintiffs have failed to allege facts sufficient to pierce the corporate veil between NI Containerboard and NI Catawba. The theme of NI Containerboard's position is a finding of personal jurisdiction against it in this case will render the corporate form meaningless and subject virtually every parent company to jurisdiction anywhere a subsidiary operates. [Mot. to Dismiss, ECF No. 59, at 6-7; June 1, 2022 Hr'g Tr. 15:13-17, 15:23-16:5.] NI Containerboard has, however, not offered any affidavits or other evidence to support this argument and, as set forth below, the court rejects it and finds NI Containerboard subject to personal jurisdiction in this litigation.

A. Specific Jurisdiction Legal Framework

"When a district court decides a pretrial personal jurisdiction dismissal motion without an evidentiary hearing, plaintiffs must prove a *prima facie* case of personal jurisdiction." *Salley v. Heartland-Charleston of Hanahan, SC, LLC*, No. 2:10-CV-00791, 2010 WL 5136211, at *3 (D.S.C. Dec. 10, 2010) (citing *Mylan Labs., Inc. v. Akzo, N.V.,* 2 F.3d 56, 60 (4th Cir. 1993)). "To determine whether plaintiffs have satisfied this burden, the court may consider both defendant's and plaintiffs' 'pleadings, affidavits, and other supporting documents presented to the court'" and must construe them "in the light most favorable to plaintiff[s], drawing all inferences [,] resolving all factual disputes in [their] favor,' and 'assuming [plaintiffs'] credibility.'" *Id.* (quoting *Masselli & Lane, PC v. Miller & Schuh, PA,* No. 99–2440, 2000 WL 691100, at *1 (4th Cir. May 30, 2000); *Mylan Labs.,* 2 F.3d at 62; *Combs v. Bakker,* 886 F.2d 673, 676 (4th Cir. 1989)). "This court,

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entity set up and funded by NI Containerboard with the sole purpose of serving as the entity to hold title to the Mill." *Id.*

however, need not 'credit conclusory allegations or draw farfetched inferences.'" *Id.* (quoting *Massellli,* 2000 WL 691100, at *1 (citations omitted). "Plaintiffs must also base their claim for personal jurisdiction 'on specific facts set forth in the record.'" *Id.* (quoting *Magic Toyota, Inc. v. Southeast Toyota Distribs.,* Inc., 784 F. Supp. 306, 310 (D.S.C. 1992)).

A district court may exercise personal jurisdiction "if (1) an applicable state long-arm statute confers jurisdiction and (2) the assertion of that jurisdiction is consistent with constitutional due process." *Nichols v. G.D. Searle & Co.,* 991 F.2d 1195, 1199 (4th Cir. 1993). The Supreme Court of South Carolina has interpreted South Carolina's long-arm statute, S.C. Code Ann. § 36–2–803,[10] to extend to the outer limits of Fourteenth Amendment due process. *Foster v. Arletty 3 Sarl,* 278 F.3d 409, 414 (4th Cir. 2002). "Because South Carolina treats its long-arm statute as coextensive with the due process clause, the sole question becomes whether the exercise of personal jurisdiction would violate due process." *Cockrell v. Hillerich & Bradsby Co.,* 611 S.E. 2d 505, 508 (S.C. 2005). "Absent consent, the exercise of personal jurisdiction must comport with the requirements of the Due Process Clause: valid service of process, 'as well as ... '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)

[10] S.C. Code Ann. § 36–2–803: "(A) A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's: (1) transacting any business in this State; (2) contracting to supply services or things in the State; (3) commission of a tortious act in whole or in part in this State; (4) causing tortious injury or death in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State; (5) having an interest in, using, or possessing real property in this State; (6) contracting to insure any person, property, or risk located within this State at the time of contracting; (7) entry into a contract to be performed in whole or in part by either party in this State; or (8) production, manufacture, or distribution of goods with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed.

(citations omitted); *Burger King v. Rudzewicz,* 471 U.S. 462, 475–76 (1985); *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 292 (1980).

"The nature and quantity of forum-state contacts required depends on whether the case involves the exercise of 'specific' or 'general' jurisdiction."[11] *Id.* "If the defendant does not have sufficient contacts to be at home in the forum, the court may exercise specific jurisdiction if the defendant has continuous and systematic contacts with the forum state and the claims at issue arise from those contacts with the forum state." *Id.* at 132 (citations omitted). A defendant has sufficient minimum contacts with a state when "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World–Wide Volkswagen,* 444 U.S. at 297.

Factors courts have considered to resolve whether a defendant has "purposefully availed" itself of the privilege of conducting business in the forum state include, but are not limited to:

> (1) whether defendant maintains offices or agents in the forum state, *see McGee v. Int'l Life Ins. Co.,* 355 U.S. 220, 221 (1957);
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> (2) whether defendant owns property in the forum state, *see Base Metal Trading, Ltd. v. OJSC,* 283 F.3d 208, 213 (4th Cir. 2002);
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> (3) whether defendant reached into the forum state to solicit or initiate business, *see McGee,* 355 U.S. at 221; *Burger King,* 471 U.S. at 475–76;
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> (4) whether defendant deliberately engaged in significant or long-term business activities in the forum state, *see Burger King,* 471 U.S. at 475–76, 481;
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> (5) whether the parties contractually agreed that the law of the forum

[11] "General jurisdiction permits the court to hear any and all claims against the defendant, regardless of where the claims arose or the plaintiff's citizenship." *Id.* "General jurisdiction may be exercised when the defendant has contacts with the forum jurisdiction that are 'so constant and pervasive as to render it essentially at home in the forum State.'" *Id.* at 131-132 (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 122 (2014)) (internal quotation marks and alteration omitted). Plaintiffs do not assert the court has general jurisdiction over NI Containerboard.

> state would govern disputes, *see id.,* 471 U.S. at 481–82;
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> (6) whether defendant made in-person contact with the resident of the forum in the forum state regarding the business relationship, *see Hirschkop & Grad, P.C. v. Robinson,* 757 F.2d 1499, 1503 (4th Cir. 1985);
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> (7) the nature, quality, and extent of the parties' communications about the business being transacted, *see English & Smith v. Metzger,* 901 F.2d 36, 39 (4th Cir.1990); and
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> (8) whether the performance of contractual duties was to occur within the forum, *see Peanut Corp. of Am. v. Hollywood Brands, Inc.,* 696 F.2d 311, 314 (4th Cir. 1982).

Consulting Eng'rs Corp. v. Geometric Ltd., 561 F.3d 273, 278 (4th Cir. 2009).[12]

B. Analysis

NI Containerboard argues Plaintiffs fail to allege facts establishing this court has specific jurisdiction over NI Containerboard first because "Plaintiffs' primary specific jurisdiction argument is that both New-Indy Catawba and New-Indy Containerboard 'purchased the Mill[,]'" the APA defines NI Catawba as the official Mill "Purchaser," and EPA and DHEC acknowledge NI Catawba is the "owner and operator" of the Mill by way of their investigations naming and targeting NI Catawba. [ECF No. 59 at 5-6.] Second, NI Containerboard argues Plaintiffs'

[12] "After addressing the defendant's contacts as set forth above, the court is to then consider whether the exercise of jurisdiction "would comport with 'fair play and substantial justice.'" *Maseng v. Lenox Corp.*, 483 F. Supp. 3d 360, 366 (D.S.C. 2020) (citations omitted). In determining whether the exercise of jurisdiction comports with fair play and substantial justice, the court evaluates the following factors: (1) the burden on the defendant; (2) the forum State's interest in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several States in furthering fundamental substantive social policies. *Christian Science Bd. of Dirs. of the First Church of Christ, Scientist v. Nolan,* 259 F.3d 209, 217 (4th Cir. 2001) (citations omitted). "'More generally, [the Fourth Circuit's] reasonableness analysis is designed to ensure that jurisdictional rules are not exploited in such a way as to make litigation so gravely difficult and inconvenient that a party unfairly is at a severe disadvantage in comparison to his opponent.'" *Id.* (Quotations and citations omitted).

allegations of New-Indy Containerboard's contacts are conclusory and not temporally or substantively related to this litigation. *Id.* at 6. The court is not persuaded by these arguments.

Initially, the court fails to see how Defendants apprehend Plaintiffs' "primary specific jurisdiction argument" as one based on both Defendants allegedly "purchasing" the Mill pursuant to the APA. [ECF No. 59 at 9-10 (citing APA, ECF No. 49-3 at 5) (defining New-Indy Catawba as the Mill's "**Purchaser**").] Reviewing Plaintiffs' Complaint and Opposition, their focus seems much more on NI Containerboard's contacts with and in South Carolina than the APA's definitions. [ECF Nos. 49, 62.] In any event, Plaintiffs contend it is misleading to view in isolation NI Catawba's designation as "Purchaser" under the APA where NI Containerboard and NI Catawba together are the collective "Buyer Parties." [APA, ECF No. 49-3, Preamble.] The APA also gives NI Containerboard rights such as deciding whether to close the deal and indicates the parent was paying most, if not all, of the purchase monies. [ECF Nos. 49, 62.] Reasonable inferences construed in Plaintiffs' favor show NI Containerboard was substantially involved in acquiring the Mill and negotiating the APA.[13] Even assuming for the sake of argument that NI

[13] Specifically, on October 23, 2017, NI Containerboard entered into a Confidentiality Agreement with Resolute FP US Inc. ("Resolute"), the Mill's prior owner, regarding NI Containerboard's interest in acquiring the Mill. [Compl. ¶ 40 (citing ECF No. 49-3, APA, § 11.5.1).] Then, on March 16, 2018, NI Containerboard entered into an Escrow Agreement with the seller (and without NI Catawba) related to the Confidentiality Agreement and initial deposit for acquiring the Mill. *Id.* ¶ 40 (citing ECF No. 49-3, APA, § 10.1). Plaintiffs further allege upon information and belief NI Containerboard conducted all negotiations with Resolute, including negotiations occurring in South Carolina, and conducted due diligence regarding potentially purchasing the Mill. *Id.* Plaintiffs allege upon information and belief NI Containerboard's due diligence efforts involved on-site due diligence of the Mill, contracting with South Carolina engineers and professionals to perform due diligence, hiring legal representation in South Carolina to assist in the negotiation and drafting the APA and lobbying local government officials. *Id.* Ultimately, these efforts culminated in Defendants' entry into the APA with Resolute on or about October 2, 2018. *Id.* ¶ 38. The APA defines NI Catawba as the "Purchaser," NI Containerboard as the "Parent," and both Defendants collectively as the "Buyer Parties." *Id.* (citing ECF No. 49-3, APA, Preamble). Plaintiffs also argue NI Containerboard took credit for purchasing the Mill in its Construction Permit Application to DHEC, stating "[o]n December 31, 2018, New-Indy Containerboard acquired the Mill from

Catawba and not NI Containerboard purchased the Mill, the court finds the Complaint's unrebutted allegations of NI Containerboard's involvement in every aspect of the Mill's purchase, conversion, operations, regulatory investigation, and environmental compliance and remediation efforts sufficient to warrant exercising personal jurisdiction over NI Containerboard in this case.[14]

The court accordingly turns next to Plaintiffs' factual allegations in the Complaint setting forth NI Containerboard's role in selecting, vetting, acquiring, and managing the Mill—the source of the harmful emissions that are the basis of Plaintiffs' claims. [ECF No. 61 at 23; Compl. ¶¶ 43, 44, 51-56; ECF No. 49-4.] Plaintiffs' factual allegations in the Complaint, as further supported through Plaintiffs' Opposition Exhibits here, are extensive and show NI Containerboard has engaged in five-years' worth of intentional acts directed at South Carolina—to vet, acquire, operate, and convert the Mill and then manage its response to the regulatory investigations—which led to the Mill's wrongful emissions that allegedly continue to harm Plaintiffs. [Compl. ¶¶ 20, 40-58; Pl.s' Opp'n Br., ECF Nos. 61-1 to 61-17.] NI Containerboard's alleged conduct includes the following acts purposefully aimed at South Carolina:

- Selecting the Mill for possible acquisition and conducting all related negotiations with the prior owner Resolute, including negotiations in South Carolina. [Compl. ¶¶ 41-44.]
- Conducting intensive due diligence for over a year before acquiring the Mill and before NI Catawba even existed (e.g., NI Containerboard representatives and agents performed on-site due diligence tasks in South Carolina and communicated by phone with individuals in South Carolina such as Resolute representatives, and hired legal professionals in South Carolina). *Id.* ¶¶ 39-40.
- Lobbying local and state government officials. *Id.* ¶¶ 41, 42, 44.

Resolute Forest Products." [Opp., ECF No. 61, Ex. 16, Construction Permit Application, at 1-1.]

[14] The court also finds even if EPA and DHEC are focused on NI Catawba as the technical target of their investigations and efforts, that purported fact is not dispositive on the personal jurisdiction considering the Complaint's unrefuted allegations of NI Containerboard's South Carolina-related contacts relevant to Plaintiffs' substantive claims.

- Paying the initial deposit and all or substantially all the funds to acquire the Mill from Resolute for $260 million dollars and close the transaction. *Id.* ¶¶ 41, 43; ECF No. 61 at 22.

- Deciding whether to proceed to closing under the APA. *Id.* ¶¶ 41, 44.

- Exercising total control over all aspects of NI Catawba's operations of the Mill, including assigning top NI Containerboard officials and its owners to run the Mill's conversion and operations from California, Indiana, and Massachusetts, controlling the hiring of Mill employees, and leaving NI Catawba with no independent management or executives. *Id.* ¶¶ 44-58.

- Flying NI Containerboard's Chief Operating Officer to South Carolina to lobby the York County Council for economic development tax breaks for the Mill. *Id.* ¶ 42; ECF No. 61 at 7 nn.6-8; ECF No. 61-4, at 7.

- Managing the response to the environmental damages caused by the Mill's conversion with top officials from NI Containerboard and its owners in CA, IN, and MA, handling communications with DHEC and EPA officials, and deciding how to attempt to stem the harm the Mill continues to cause the community. *Id.* ¶¶ 44, 46-50.

NI Containerboard does not offer any affidavits or other evidence rebutting or clarifying these factual allegations. [Hr'g Tr. 17:25-20:22, 63:25-64:4.] Consequently, the court is left with the Complaint's unrefuted allegations of NI Containerboard's lead role in vetting, acquiring, operating, and converting the Mill, and then managing Defendants' response to the regulatory investigations underlying Plaintiff's allegations in this case.[15] *Id.*

[15] New-Indy Containerboard relies on four cases in arguing there is no specific jurisdiction for the additional reason that Plaintiffs' claims are unrelated to the alleged contacts. [ECF No. 59 at p.10.] The court finds each of these cases inapposite. *See Salley*, 2010 WL 5136211, at *3 (finding that sixth-tier parent company's alleged mere stock ownership did not warrant veil piercing and parent's alleged control of budget, ownership of nursing home subsidiary's parent's stock, and sending a letter DHEC to fulfill regulatory requirements were insufficient to establish personal jurisdiction); *Fidrych v. Marriott Int'l, Inc.*, 952 F.3d 124, 138 (4th Cir. 2020) (allegations that SC resident may have booked Marriott stay through website and that Marriott engaged in marketing and booking activities directed at SC residents by listing South Carolina along with all fifty states on the website's drop-down menu for hotel booking insufficient to establish minimum contacts); *Consulting Eng'rs Corp.*, 561 F.3d at 279-280 (concluding that four phone conversations and twenty-four emails were insufficient to establish personal jurisdiction where out-of-state defendant and foreign defendant lacked offices, employees, property, ongoing business activity, and/or in-

In sum, the court concludes NI Containerboard's alleged pervasive contacts going to the heart of Plaintiffs' claims are sufficient to warrant exercising personal jurisdiction without any need to consider derivative jurisdiction theories and without any need for jurisdictional discovery. Further, the court finds upon evaluating the factors that exercising jurisdiction over NI Containerboard will comport with and not offend traditional notions of fair play and substantial justice.[16] As such, the court finds Plaintiffs have readily met their burden to prove a prima facie case for the court to exercise specific personal jurisdiction over NI Containerboard. NI Containerboard's arguments concerning its separate motion to dismiss for lack of personal jurisdiction, ECF No. 59, are denied.

III. NI CONTAINERBOARD AND NI CATAWBA'S MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM UNDER FED. R. CIV. P. 12(b)(6)

The court's analysis next focuses on NI Catawba and NI Containerboard's more substantive and at times overlapping arguments in support of dismissal under Rule 12(b)(6) and

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person contact with the Plaintiff in Virginia and "the very activity which [the plaintiff] complain[ed of]. . . took place in India"); *see also* discussion, *infra.* at n.16 regarding *ScanSource, Inc. v. Mitel Networks Corp.*, No. 6:11-cv-382, 2011 WL 2550719, at *5-6 (D.S.C. June 24, 2011).

[16] NI Containerboard fails to make any substantive argument that subjecting it to jurisdiction before this court is unfair or unjust. The court finds NI Containerboard's reliance misplaced on *ScanSource* to argue subjecting NI Containerboard to suit in this court "would do grave injustice to the sacrosanct concept of corporate separateness and the long-established notion that companies are free to structure their business in the way that they see fit." [ECF No. 59 at 10-11 (citing *ScanSource*, 2011 WL 2550719, at *5-6).] *ScanSource* does not support NI Containerboard's position. Unlike in this case, the defendant in *ScanSource* submitted an affidavit from its Vice President of Finance and Corporate Controller to aver it was a Canada corporation with its principal place of business in Ontario, did not do business in SC, and wasn't licensed to do business in SC. *Id.* at *3. Moreover, in *ScanSource* the contract at issue was not alleged to have been made or executed in South Carolina, both parties agreed all acts involved in the underlying suit took place outside of South Carolina, and the only potentially relevant act in support of specific jurisdiction was that the Canadian parent defendant phoned the plaintiff in South Carolina once to discuss settlement. NI Containerboard's citation to *ScanSource* for the warning that, if minimally pled facts conferred jurisdiction over a parent company, "virtually all parent companies could be hauled into every forum in which its subsidiaries did business" is thus unpersuasive. *Id.* at *3-6.

concerning alternatively striking Plaintiffs' class allegations under Rules 12(f) and 23(d)(1)(D) of the Federal Rules of Civil Procedure. The court turns first to Defendants' Rule 12(b)(6) arguments.

A. Legal Standard Under Fed. R. Civ. P. 12(b)(6)

"A motion filed under Rule 12(b)(6) challenges the legal sufficiency of a complaint[.]" *Francis v. Giacomelli*, 588 F.3d 186, 192 (4th Cir. 2009). To survive a Rule 12(b)(6) motion to dismiss, the "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* In reviewing the complaint, the court accepts all well-pleaded allegations as true and construes the facts and reasonable inferences derived therefrom in the light most favorable to the plaintiff. *Venkatraman v. REI Sys., Inc.*, 417 F.3d 418, 420 (4th Cir. 2005); *Ashcroft*, 556 U.S. at 662 ("When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.").

B. Analysis

1. Plaintiffs Have Plausibly Alleged a Private Nuisance Claim.

As set forth in the seminal private nuisance decision under South Carolina law, "the traditional concept of private nuisance requires 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 (Ct. App. 1993). "In addition to being unreasonable, the interference caused by a private nuisance must be substantial." *Sanders v. Norfolk S. Ry. Co.*, 400 F. App'x 726, 729 (4th Cir. 2010). "A private nuisance claim must either allege a continuing event or act, or a single event that 'produces a continuing result' or is 'regularly repeated.'" *Id.* (citing *Gray v. S. Facilities,*

Inc., 256 S.C. 558, 183 S.E.2d 438, 443 (1971); *Green v. Blanton,* 362 S.E.2d 179, 181 (1987)). "If a lawful business is operated in an unlawful or unreasonable manner so as to produce material injury or great annoyance to others or unreasonably interferes with the lawful use and enjoyment of the property of others, it will constitute a nuisance." *Funderburk v. S.C. Elec. & Gas Co.*, 406 F. Supp. 3d 527, n. 11 (D.S.C. 2019) (citing *LeFurgy v. Long Cove Club Owners Ass'n*, 313 S.C. 555, 443 (S.C. Ct. App. 1994)), *aff'd sub nom. Funderburk v. CSX Transp., Inc.*, 834 F. App'x 807 (4th Cir. 2021).

Defendants' arguments regarding why Plaintiffs' private nuisance claim, Compl. ¶¶ 114-125, fails to plead facts sufficient to state a claim under this standard evolved from their initial Motion to their Reply and oral argument. The court rejects each of Defendants' theories and addresses them in turn below.

To start, Defendants assert the court should dismiss Plaintiff's private nuisance claim because "they have not pled facts that would establish an actionable injury" as Plaintiffs "alleged only personal injury, annoyance, and discomfort" and such alleged health effects and personal injury are insufficient to plead an actionable nuisance injury under *Babb v. Lee Cty. Landfill, LLC*. [ECF No. 58 at 7-8 (citing *Babb*, 405 S.C. 129, 137, 141 (2013)); *see also* Defs.' Reply, ECF No. 66 at 1-2.] *Babb's* cited admonition, however, concerns the proper measure of damages for a private nuisance claim. To that end, the *Babb* decision held damages recoverable for a temporary trespass or nuisance are limited to lost rental value and a party may not tack on additional damages for annoyance and discomfort, as lost rental value accounts for such injury. *Babb*, 405 S.C. at 137-44. As such, the cited language from *Babb* does not support or mandate dismissal of Plaintiff's

private nuisance claim here.[17] [Hr'g Tr. 30:5-19, ECF No. 78.]

Relatedly, Defendants initially argued the Complaint fails to allege facts tying the alleged injuries to Plaintiffs' property interests.[18] Paragraph 35 of the Complaint, however, does just that.[19] [Hr'g Tr. 11:7-12; Compl. ¶ 35; *id.* at ¶¶ 119-122.] Defendants' primary remaining point of contention with Plaintiffs' stated private nuisance claim is the Complaint's omission of Plaintiff-by-Plaintiff allegations specifying each named Plaintiff's injuries as tied to their specific use of their individual property. [Hr'g Tr. 10:15-14:5, 32:22-33:11, 52:10-53:17.] To that end, Defendants state Paragraph 35 of the Complaint is the only allegation in the Complaint concerning how the ten named Plaintiffs were specifically affected by the allegedly malodorous and harmful

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[17] The court finds Defendants' other cited cases unpersuasive in terms of dismissing Plaintiffs' private nuisance claim. *See Sanders*, 400 F. App'x at 729 (considering private nuisance claim based on release of chlorine gas pursuant to instructive analysis in *Gray v. S. Facilities, Inc.*, 183 S.E.2d 438, 443 (S.C. 1971) and concluding, as in the *Gray* case, plaintiffs failed to state a private nuisance claim because the alleged negligent act was "a single isolated act of negligence, not continuous or recurrent"); *see also Chestnut v. AVX Corp.*, 776 S.E.2d 82, 83-84 (S.C. 2015) (affirming dismissal of nuisance claim where subclass did not allege any contamination of their land or interference with their use or enjoyment of land, but only pled potential stigma damages due to their real property being next to contaminated real property); *see also id.* at 85 n.5 (Toal, C.J., concurring) ("Appellants do not identify how the contamination has interfered with the use and enjoyment of their properties. . . . *Appellants do not allege, for instance, that the contamination prevents them from using their properties in any particular way, affects their day-to-day enjoyment of their properties, or interferes with their health*. Instead, Appellants merely contend that *because their properties are located in close proximity* to the contamination, TCE has "affected" the enjoyment of their property.") (Emphasis added).

[18] ECF No. 58 at 8 (citing Compl. ¶¶ 25-34) ("Although the ten paragraphs specific to the ten named plaintiffs allege that each 'owns and lives on' certain property, none of these paragraphs allege any facts indicating that odors have interfered with their interest in said property."); ECF No. 66 at 2.

[19] The remainder of Defendants' initial Motion argued South Carolina statutory and regulatory law bar Plaintiffs' private nuisance claim due to Defendants' Title V Permit Shield and South Carolina's relatively new nuisance statute at S.C. Code Ann. § 31-24-120(A)(1)-(2). [ECF No. 58 at 8-12.] However, at the hearing, defense counsel stated Defendants have since withdrawn their permit-shield related arguments for purposes of the pending motions. [Hr'g Tr. 33:21-34:11.]

emissions and assert Paragraph 35 is conclusory and implausible group pleading. [Hr'g Tr. 10:15-14:5, 26:12-27:7; Reply, ECF No. 66 at 2.] Defendants contend it simply is not plausible all ten of the named Plaintiffs experienced the same general injuries. Arguing the allegations are too conclusory to give notice of the claims against them or to put the court on notice of whether the Plaintiffs' claims prove representative or typical of the absent class members, Defendants assert the court should dismiss Plaintiffs' private nuisance claim with prejudice. [Hr'g Tr. 12:3-13:19, 29:5-9.]

Again, the court must disagree. Rule 8(a)(2) of the Federal Rules of Civil Procedure requires Plaintiffs assert "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Accepting at this stage Plaintiffs' well-pled facts as true and in the light most favorable to Plaintiffs, the court finds the Complaint passes the plausible pleading criteria under Fed. R. Civ. P. 8(a) and 12(b)(6) here. [Compl. ¶¶ 35, 114-125.] Thus, the court finds Plaintiffs' private nuisance claim in the Complaint's first cause of action asserts well-pled facts alleging unreasonable interference with their ownership or possession of the land and denies Defendants' motion to dismiss Plaintiffs' private nuisance claim. *Ravan*, 315 S.C. at 464.

2. Plaintiffs Fail to State a Negligence Per Se Claim.

Defendants next contend Plaintiffs' negligence per se claim, Compl. ¶¶ 136-148, fails under Rule 12(b)(6) because Plaintiffs do not identify any statute enacted for their benefit as private parties and their claim is otherwise conclusory under *Twombly*/*Iqbal*. [ECF No. 58 at 12-14, n.10.] "In order to state a claim for negligence per se under South Carolina law, a Plaintiff must establish facts showing two elements: (1) that the defendant owes the Plaintiff a duty of care deriving from a statute and (2) that the defendant violated the statute and therefore failed to exercise due care." *Winley v. Int'l Paper Co.*, No. 2:09-cv-2030, 2012 WL 13047989, at *10

(D.S.C. Oct. 23, 2012) (citing *Whitlaw v. Kroger Co.*, 410 S.E.2d 251, 252-53 (S.C. 1991); *Rayfield v. S.C. Dep't of Corrs.*, 374 S.E.2d 910, 914-15 (S.C. Ct. App. 1988)).

To prove the first element, a plaintiff must show both "(1) that the essential purpose of the statute is to protect the kind of harm the plaintiff has suffered; and (2) that he is a member of the class of persons the statute is intended to protect." *Rayfield*, 374 S.E.2d at 914. "In South Carolina, however, for a statute to support a claim for negligence per se, a plaintiff must show that the statute was 'enacted for the special benefit of a private party.'" *Winley*, 2012 WL 13047989, at *10 (quoting *Doe v. Marion*, 645 S.E.2d 245, 249 (S.C. 2007)). "In contrast, 'if a statute is concerned with the protection of the public and not with the protection of an individual's private right,' it cannot support a cause of action for negligence per se." *Winley*, 2012 WL 13047989, at *10, *aff'd*, 2021 WL 4859603 (4th Cir. Oct. 19, 2021), quoting *Doe v. Marion*, 645 S.E.2d 245, 249 (2007).

In their third cause of action for negligence per se, Plaintiffs allege Defendants negligently violated the Federal Clean Air Act ("CAA"), the Federal Clean Water Act ("CWA"), the Federal Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act ("RCRA"), and "related federal and state regulations, and related federal and state permits." [Compl. ¶ 137.] Paragraph 138 of the Complaint further asserts, "[p]ursuant to S.C. Regulation 61-62.5, Standard 7, Defendants owed a duty to not implement Facility modifications or operational changes at the Mill which would result in a 'significant net increase' of hydrogen sulfide emissions" and, "[p]ursuant to the Mill's National Pollutant Discharge Elimination System (NPDES) Permit No,. [sic] SC0001015, Defendants owed a duty to use best management practices normally associated with the proper operation and maintenance of a sludge wastewater treatment site, any sludge storage or lagoon areas, transportation of sludges, and all other related activities

to ensure that an undesirable level of odor does not exist . . . ." *Id.* ¶ 138.

The Complaint does not specify which sections or provisions of the CAA, CWA, RCRA, S.C. Regulation 61-62.5, Standard 7 (the "DHEC Regulation"), or Defendants' NPDES Permit Plaintiffs contend support their negligence per se claim, however. [Compl. ¶¶ 136-148.] In addition, other than alleging Plaintiffs fall within the class of persons who are members of the public, Compl. ¶ 141, the Complaint does not allege a private class of persons these statutes, the DHEC regulation, or the NPDES Permit are intended to protect or allege Plaintiffs' inclusion within such class. Further, Plaintiffs do not attempt to distinguish the *Winley* case Defendants rely on for the proposition that the RCRA does not support a cause of action for negligence per se under South Carolina law. [ECF No. 66 at 5 (citing ECF No. 58 at 14 (quoting *Winley*, 2012 WL 13047989, at *10)).] The court thus finds Plaintiffs have failed to state a negligence per se claim and dismisses Plaintiff's third cause of action for negligence per se without prejudice. [20]

3. Plaintiffs Have Plausibly Alleged Their Claim for Negligence, Gross Negligence, Recklessness, and Willful Conduct.[21]

In their final Rule 12(b)(6) argument, Defendants argue Plaintiffs' negligence, gross negligence, recklessness and willful conduct claim set forth in the Complaint's second cause of action, Compl. ¶¶ 126-135, fails because Plaintiffs have not pled facts that give rise to a duty of care. [ECF No. 58 at pp. 14-17, 21-24, ECF No. 62 at 5-9; Hr'g Tr. 34:13-51:5.] The court again

[20] "A district court's dismissal under Rule 12(b)(6) is, of course, with prejudice unless it specifically orders dismissal without prejudice." *Carter v. Norfolk Cmty. Hosp. Ass'n, Inc.*, 761 F.2d 970, 974 (4th Cir. 1985). In this case, the court exercises its discretion to dismiss Plaintiffs' negligence per se claim without prejudice. *See id.* ("That determination is within the district court's discretion.")

[21] For simplicity's sake, the court refers to Plaintiff's second cause of action as their "negligence and gross negligence claim."

disagrees.

"In South Carolina, to establish a cause of action for negligence, a plaintiff must plead and prove four elements: (1) a duty of care; (2) breach of the duty by negligent act or omission; (3) resulting damages to the plaintiff; and (4) the damages were the proximate result of the breach."[22] *O'Leary v. TrustedID, Inc.*, No. 3:20-CV-02702, 2021 WL 4129202, at *13 (D.S.C. Sept. 9, 2021) (citing *Thomasko v. Poole*, 561 S.E.2d 597, 599 (S.C. 2002)). "An essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff." *Huggins v. Citibank, N.A.*, 585 S.E.2d 275, 276 (S.C. 2003) (citation omitted). "Duty is generally defined as the obligation to conform to a particular standard of conduct toward another." *Id.* at 277 (internal quotation marks and citations omitted). For a duty to exist, the parties must have a relationship recognized by law. *Id.* "If there is no duty, the defendant is entitled to judgment as a matter of law." *Id.* (citing *Simmons v. Tuomey Reg'l Med. Ctr.*, 533 S.E.2d 312, 316 (S.C. 2000)).

"Generally, '[t]here is no formula for determining duty; a duty is not sacrosanct in itself but only an expression of the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection.'" *Shaw v. Psychemedics Corp.*, 826 S.E.2d 281, 283 (S.C. 2019) (citations omitted). "'An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance." *Williams v. Preiss-Wal Pat III*, 17 F. Supp. 3d 528, 535 (D.S.C. 2014) (citations omitted). "It is the relationship between the parties, not the potential 'foreseeability of injury,' that determines whether the law will recognize duty in a given context." *Id.* (citations omitted). "This ensures that

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[22] "Generally, to state a claim for gross negligence a plaintiff must plead the same elements as a claim for negligence." *In re Blackbaud, Inc., Customer Data Breach Litig.*, 567 F. Supp. 3d 667, 682–83 (D.S.C. 2021) (citations omitted). "However, negligence is the failure to exercise due care, while gross negligence is the failure to exercise slight care." *Id.* (citations omitted).

the concept of duty in tort liability is not extended beyond reasonable limits." *Id.* (citations omitted).

Here, the court finds Plaintiffs sufficiently and plausibly allege the existence of a common law legal duty owed by Defendants to Plaintiffs under South Carolina law based at least on Plaintiffs' property interests and the allegedly tortious creation of the risks and harm to Plaintiffs from the Mill's conversion, operations, and emissions.[23] *See* Compl. ¶¶ 93, 129-133, duplicate ¶ 128 at 41 duplicate ¶ 129 at 41-42, and ¶¶ 130—131 at 42. The court accordingly denies Defendants' Motion to Dismiss Plaintiffs' negligence and gross negligence claim.[24]

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[23] *See, e.g.*, *Green v. Blanton*, 362 S.E.2d 179, 180 (S.C. Ct. App. 1987) (stating "all persons are required to use ordinary care to prevent others from being injured or damaged as a result of their acts" and "[s]uperimposed upon the above elementary law of torts is the rule that if one engages in activity involving peril to others" that is known "to the actor, his negligence while so engaged, whether consisting of acts of commission or omission, which result in damage to another is actionable."); *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 638 S.E.2d 650, 656-57 (S.C. 2006) (legal duty may arise "by statute, a contractual relationship, status, property interest, or some other special circumstance."); *Sanders v. Norfolk S. Corp.*, No. C/A 1:08-2398-MBS, 2010 WL 297813, at *4 (D.S.C. Jan. 20, 2010), *aff'd sub nom. Sanders v. Norfolk S. Ry. Co.*, 400 F. App'x 726 (4th Cir. 2010) ("The duty owed by Defendants at the time of the derailment on January 6, 2005 extended to those persons in Graniteville who resided, worked, or possessed property within the area encroached upon by chlorine gas."); *Lewis v. Norfolk S. Ry. Inc.*, No. 1:07-3231, 2009 WL 10678205, at *2 (D.S.C. Nov. 4, 2009) (analyzing negligence claims arising out of the same incident at issue in *Sanders*, "the duty owed by [the defendant whose actions caused the release of chlorine gas] extended to those persons …who resided, worked, or possessed property within the zone of danger created by the release of chlorine gas.").

[24] The court finds the cases on which Defendants rely prove factually distinguishable and do not draw a line in the sand under South Carolina law regarding a duty owed based strictly on geographic distance regardless of the facts of a case. *See, e.g.*, *Sanders v. Norfolk S. Ry. Co.*, 400 F. App'x 726, 729 (4th Cir. 2010) (affirming dismissal of negligence claim by plaintiffs seeking to recover for purely economic losses arising out of the release of chlorine gas following a single, isolated train collision where plaintiffs lived within two to five miles of the accident site); *J.R. v. Walgreens Boots All., Inc.*, No. 20-1767, 2021 WL 4859603, at *6 (4th Cir. Oct. 19, 2021) (affirming 12(b)(6) dismissal of more sparely-pled negligence claim); *Williams v. Preiss-Wal Pat III*, 17 F. Supp. 3d 528, 535-536 (D.S.C. 2014) (granting motion to dismiss negligence claim for lack of duty brought by personal representatives of estate of individual beaten to death while visiting his cousin in apartment complex as there is no general duty to control conduct of another or warn a potential victim of danger).

C. Conclusion

For the reasons set forth in the preceding sections above, the court finds Plaintiffs have plausibly stated their private nuisance and negligence and gross negligence claims and denies Defendants' motion to the extent it seeks dismissal of those claims. The court agrees with Defendants that Plaintiffs' Complaint as currently pleaded does not state a negligence per se claim under South Carolina law and dismisses that claim without prejudice. Below, the court next turns to Defendants' alternative request to strike Plaintiffs' class allegations, which the court also denies.

IV. NEW-INDY CONTAINERBOARD AND NEW-INDY CATAWBA'S ALTERNATIVE REQUEST TO STRIKE PLAINTIFFS' CLASS ALLEGATIONS

Defendants argue in their Motions that if the Court disinclined to dismiss any or all of the claims in the Complaint, it should strike Plaintiff's class allegations under Fed. R. Civ. P. 12(f) and 23(d)(1)(D). [ECF No. 58 at 19-31.] Defendants' grounds for this request are that Plaintiffs' proposed geographic class is (1) facially "absurdly overbroad" because it includes an "arbitrary and inexplicably perfectly circular area of more than 1,250 square miles" and (2) the proposed class cannot be certified under Fed. R. Civ. P. 23, as Plaintiffs' claims are not typical of the putative class's claims because the proposed class lacks commonality, typicality, and predominance. [ECF No. 58 at 2-3, 19-28.] In opposition, Plaintiffs assert Defendants' request lacks precedent and should be denied based on Plaintiffs' allegations and the need for discovery. [ECF No. 62 at 25-29.] After thoroughly considering the allegations in the Complaint, the Complaint's incorporated DHEC and EPA Orders, and the parties' motions briefing and oral argument, the court finds Plaintiffs' class definition and class allegations plausibly stated at this early, pre-discovery stage in the litigation.

"Rule 12(f) of the Federal Rules of Civil Procedure provides that 'the court may strike from a pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.'" *Cnty. of Dorchester, S.C. v. AT & T Corp.*, 407 F. Supp. 3d 561, 565–66 (D.S.C. 2019) (citing and quoting Fed. R. Civ. P. 12(f)). A motion to strike class allegations "ask[s], in other words, that the Court preemptively terminate the class aspects of this litigation, solely on the basis of what is alleged in the complaint, and before plaintiffs are permitted to complete the discovery to which they would otherwise be entitled on questions relevant to class certification. Defendants' contention is, in effect, that there is no set of facts plaintiffs could adduce under which they could meet the requirements for class certification of Rule 23[.]" *Bryant v. Food Lion, Inc.,* 774 F. Supp. 1484, 1495 (D.S.C. 1991). "Rule 12(f) empowers courts to strike immaterial matter to promote judicial efficiency and avoid needless expenditure of time and money." *Gibson v. Confie Ins. Grp. Holdings, Inc.*, No. 2:16-cv-02872-DCN, 2017 WL 2936219, at *12 (D.S.C. July 10, 2017).

"[S]uch motions are to be granted infrequently" and are reviewed for abuse of discretion: "decisions that are reasonable, that is, not arbitrary, will not be overturned." *Renaissance Greeting Cards, Inc. v. Dollar Tree Stores, Inc.*, 227 Fed. Appx. 239, 246-47 (4th Cir. 2007) (citations omitted); *Waste Mgmt. Holdings, Inc. v. Gilmore*, 252 F.3d 316, 347 (4th Cir. 2001) ("Rule 12(f) motions are generally viewed with disfavor because striking a portion of a pleading is a drastic remedy...."). "It is seldom, if ever, possible to resolve class representation questions from the pleadings." *Dyer v. Air Methods Corps*., 2021 WL 1840833, at *3 (D.S.C. May 7, 2021) (quoting *Int'l Woodworkers of Am., AFL-CIO, CLC v. Chesapeake Bay Plywood Corp.*, 659 F.2d 1259, 1268 (4th Cir. 1981)); *see also Winley v. Int'l Paper Co.*, No.: 2:09-2030, 2013 WL 12377131, at *6 n.4 (D.S.C. May 10, 2013).

"In addition, Rule 23(d)(1)(D) states that the court may issue orders that require that the

pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly." *Whitt v. Seterus, Inc.*, No. CV 3:16-2422-MBS, 2017 WL 1020883, at *2 (D.S.C. Mar. 16, 2017). "In *Bryant v. Food Lion, Inc.,* 774 F. Supp. 1484 (D.S.C. 1991), the United States District Court acknowledged that a motion to dismiss class action allegations is not the typical motion for class certification, in which the proponent of class certification has the burden of establishing that the requirements of Rule 23 are met." *Id.* "The court however, considered the motion and stated that the unusual procedural posture of the motion to dismiss class action allegations, in which the defendants contended certification is precluded as a matter of law, required that the court apply the standard applicable to a motion to dismiss under Rule 12(b)(6)." *Id.* "The court continued, '[t]hus, to prevail, the defendants have the burden of demonstrating from the face of plaintiffs' complaint that it will be impossible to certify the classes alleged by the plaintiffs regardless of the facts the plaintiffs may be able to prove.'" *Id.* (citing *Bryant* at 1495). Defendants' burden is a "heavy" one. *Dyer*, 2021 WL 1840833, at *3 (noting "it is essential that a plaintiff be afforded a full opportunity to develop a record containing all the facts pertaining to the suggested class and its representatives").

A. Defendants' Argument the Proposed Class Facially Precludes Certification

Turning first to Defendants' facial overbreadth argument, the court finds Defendants fail to carry their heavy burden of convincing the court it will be impossible to certify the proposed class regardless of facts Plaintiffs may be able to prove based solely on the face of the Complaint at this early, pre-discovery, pre-motion for class certification stage. Plaintiffs bring the Complaint on behalf of themselves and, under Fed. R. Civ. P. 23(b)(1), 23(b)(2), and 23(b)(3), "all other persons who, from November 1, 2020 to the present (the 'Class Period') owned, leased, resided on property or had a beneficial interest in property up to 20 miles from the Mill (the 'Class Area')."

[Compl. ¶¶ 16, 101, 111-113.]

Plaintiffs assert the 20-mile radius from the Mill class definition is based on their available evidence, bears a strong relationship with the location of resident complaints submitted to DHEC and is consistent with the likely dispersion of pollutants from the Mill. [ECF No. 62 at 24-28; Compl. ¶¶ 77 (citing EPA Order ¶ 14), 98-100 (citing EPA Order ¶ 1), 102.] Indeed, the DHEC odor report maps excerpted in the Complaint show complaints in all directions around the Mill. [Compl. ¶ 99.] Additionally, EPA's Order details its measurement of hydrogen sulfide at locations north, northeast, and southeast of the Mill. [Compl. ¶ 85 (citing EPA Order ¶ 38).] Further, Plaintiffs reserve the right to revise the class definition and Class Area based on facts developed through continued litigation, expert investigation, and discovery from, among other sources, Defendants, DHEC, EPA, and air monitoring and modeling data. In particular, the class definition may be amended, expanded or contracted in certain regions based upon expert evaluation of prevailing wind patterns, emissions factors obtained through discovery, and other relevant considerations, such as Defendants' continued emissions. [Compl. ¶ 103; ECF No. 62 at 25; Hr'g Tr. 65:10-66:25.] Viewing Plaintiffs' allegations against the present record at this pre-discovery and pre-motion for class certification stage, the court is unable to conclude Plaintiffs' proposed class is facially impossible to certify.[25]

B. Defendants' Argument Plaintiffs' Claims are Not Typical of the Putative Class's Claims and the Proposed Class Cannot be Certified for Lack of Commonality and Predominance

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[25] The court finds the non-binding cases Defendants relies on for its facial overbreadth argument unpersuasive as those decisions were on motions for class certification post-discovery. *See Kemblesville HHMO Center, LLC v. Landhope Realty Co.*, No. 08-cv-2405, 2011 WL 3240779, at *3-6 (E.D. Pa. July 28, 2011); *Duffin v. Exelon Corp.*, No. 06–cv–1382, 2007 WL 845336, at *2-3 (N.D. Ill. March 19, 2007); *Daigle v. Shell Oil Co.*, 133 F.R.D. 600, 602-603 (D. Colo. 1990).

The court next considers Defendants' arguments Plaintiffs' class allegations, Compl. ¶¶ 98-113, fall short of Rule 23's typicality (Rule 23(a)(3)), commonality (Rule 23(a)(2)), and predominance (Rule 23(b)(3)) requirements. [ECF No. 58 at 25-31; ECF No. 66 at 9-15.] In opposition, Plaintiffs assert Defendants' arguments are premature, as continued investigation and discovery will clarify the Rule 23 criteria, and, in any event, their class allegations prove sufficient at this stage of the litigation to at least merit the benefit of any needed refinement through discovery, investigation, and expert analysis. [*See, e,g.*, ECF No. 62 at 24-32.][26] The court finds Defendants have not met their heavy burden at this stage in the litigation to show, regardless of the facts Plaintiffs may be able to prove through discovery, the class allegations are facially deficient solely based on the Complaint. As set forth above, the court finds at this juncture the Complaint plausibly pleads Rule 23's typicality, commonality, and predominance requirements. [Compl. ¶¶ 98-113.] Therefore, the court denies Defendants' alternative request to strike Plaintiffs' class allegations under Rules 12(f) and 23.

CONCLUSION

For the reasons outlined herein, NI Containerboard's motion to dismiss for lack of personal jurisdiction in ECF No. 59 on the 21-1480 docket and ECF No. 54 on the 21-1704 docket is **DENIED**. Defendants' motions at ECF Nos. 58 and 59 on the 21-1480 docket and ECF Nos. 53 and 54 on the 21-1704 docket are further **DENIED** regarding Defendants' motions to dismiss

[26] Plaintiffs further distinguish the *Tillman* decision on which Defendants rely heavily to argue Plaintiffs' proposed class as pled is incapable of certification. *Tillman v. Highland Indus., Inc.*, No. 4:19-cv-2563, 2021 WL 4483035, at *15 (D.S.C. Sept. 30, 2021). Among other things, Defendants assert "[i]f class certification were not appropriate in *Tillman*, there is no reason it will be appropriate here, and the Court should strike the class allegations." [ECF No. 58 at 31 (citing *Tillman*, 2021 WL 4483035, at *15).] The court agrees *Tillman* is distinguishable and does not render Plaintiffs' proposed class certification impossible right out of the gate here. The court further does not find persuasive or dispositive Defendants' additionally cited cases.

Plaintiff's nuisance claim, negligence and gross negligence claim, and concerning Defendants' alternative request to strike Plaintiffs' class allegations. Defendants' motions at ECF Nos. 58 and 59 on the 21-1480 docket and ECF Nos. 53 and 54 on the 21-1704 docket are **GRANTED IN PART** regarding Plaintiff's negligence per se claim, which the court dismisses without prejudice.

IT IS SO ORDERED.

/s/ Sherri A. Lydon
United States District Judge

August 5, 2022
Columbia, South Carolina