UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SHEILA GUIDRY, individually and on behalf of all others similarly situated,
Plaintiffs

CIVIL ACTION

VERSUS

NO. 19-12233

THE DOW CHEMICAL COMPANY, ET AL.,
Defendants

SECTION: "E" (4)

ORDER AND REASONS

Before the Court is a Motion to Decertify the Class filed by defendants Dow Chemical and Union Carbide Co.[1] Plaintiffs oppose,[2] and defendants have filed a reply brief to that opposition.[3] For the reasons that follow, the motion is **GRANTED**.

BACKGROUND

A. Brief History

In 2009, a tank at a Union Carbide facility in Taft, Louisiana unexpectedly released a quantity of a chemical known as ethyl acrylate. A class action suit was filed for damages relating to harms allegedly suffered as a result of that release. Almost 13 years later, that case has yet to reach any sort of conclusion, and in fact the parties are still engaged in what may fairly be termed preliminary matters. A class was certified in state court in December of 2011 and upheld by the Louisiana Fourth Circuit, with writs thereafter denied by the Louisiana Supreme Court. In 2015, defendants sought decertification and were denied by the trial court, the Louisiana Fourth Circuit, and again the Louisiana

[1] R. Doc. 200.
[2] R. Doc. 235.
[3] R. Doc. 257.

Supreme Court (by way of denial of writs). Defendants now seek another review of class certification, this time in the federal system.

This case has a long and complicated procedural history. It was originally filed in state court, then removed to federal court, then remanded back to state court. It was nearing trial in state court when plaintiffs sent a settlement demand letter in which they "mused" that "the parameters of a possible settlement can be safely couched in terms of a range of $60 M[illion] to $275 M[illion]."[4] On the basis of this and other information, defendants removed to federal court a second time, and this Court denied two motions to remand.[5]

B. Class Certification

At issue in this motion is whether or not the Court should decertify the class under federal procedural rules. As currently certified, the class definition is as follows:

> The class consists of those persons living or located in the following described geographic areas: starting at the northwest corner of the class boundary, included in postal zip code 70068 in St. John the Baptist Parish, proceeding eastward along Lake Pontchartrain to postal zip code 70065, located in Jefferson Parish, and further eastward to postal zip code 70117, located in Orleans Parish; and proceeding from the southwest corner of the class boundary, included in postal zip code 70057 in St. Charles Parish, then proceeding further southeast to postal zip code 70031, then proceeding further eastward to postal zip code 70094 in Jefferson Parish, and then east/northeast to postal zip code 70117 in Orleans Parish, and all areas included in between those points; and who were present in these locations for some time, from 4:30 a.m. on July 7, 2009 until 3:30 p.m. on July 8, 2009, and who experienced the physical symptoms which include any or all of the following – eyes, nose, or throat irritation, coughing, choking or gagging, or nausea, or headaches, dizziness, trouble breathing or other respiratory issues, as a result of their exposure to Ethyl Acrylate or other chemical substance released from tank 2310 at Union Carbide Corporation's Taft, Louisiana Facility. Those persons living or located in those geographic areas and who experienced any of these physical symptoms will constitute the class and will be bound by the decision in this case.[6]

[4] *Guidry v. Dow Chem. Co.*, 2020 U.S. Dist. LEXIS 202274, *8 (E.D. La. 2020).
[5] *See Id.* The Fifth Circuit denied Plaintiffs' request to appeal the second denial without opening a docket.
[6] R. Doc. 200-3 at 17. Explicitly excluded from this class are: "defendants Dow and DEQ and any of their officers, directors, or employees, the presiding Judge, and any member of their immediate families." R. Doc. 200-3 at 17.

The class was certified with this definition by Judge Herbert Cade in the Orleans Civil District Court in December of 2011.[7] The class certification hearing from which this definition comes was held in May of 2011 and is perhaps best characterized as chaotic.[8] It appears that the parties had no more than five days – and possibly only a weekend – to prepare for the hearing, and Judge Cade suggests that he resolved (with the parties) to "muddle through this," in part because certification "can always be modified."[9] In fact, he issued frequent reminders to the parties that "we could at a later date modify this,"[10] stated that "I may at some later point think that this was not the right process,"[11] and at one point mused that "in an effort to move this matter forward, I may have created more problems for the Court than I anticipated."[12] The hearing, which Judge Cade was apparently led to believe could be done within an hour, took two days,[13] but because of the compressed timeline the record remained incomplete for some unknown amount of time thereafter.[14]

In a judgment issued more than seven months after the hearing, Judge Cade granted certification and defined the class as written above.[15] Judge Cade explained how plaintiffs had met their burden under Louisiana class certification law. While doing so, he crafted a definition which sought to create an objective standard by which an individual

---

[7] R. Doc. 200-3 at 3.
[8] R. Doc. 235-2 at 74.
[9] *Id.* at 100.
[10] *Id.* at 111.
[11] *Id.* at 112.
[12] *Id.* at 124.
[13] R. Doc. 235-3 at 258.
[14] As an example, plaintiffs presented certain files in unauthenticated or partially authenticated form because "we usually have more time to get ready for a class certification hearing than this and more time to get a subpoena issued between two parishes." R. Doc. 235-2 at 99. Likewise, certain depositions did not take place in time for transcripts to be prepared for the hearing, and the parties spent substantial time at the hearing arguing over issues unrelated to certification. *See id.* at 120-124.
[15] R. Doc. 200-3 at 3.

"may readily determine whether or not he or she is a member of the class."[16] To do so, Judge Cade created a "geographically defined area"[17] based on unauthorized discharge notification reports, call logs from various local and federal entities, plaintiffs' spreadsheets listing client zip codes, and an expert's review of class member intake forms.[18] The expert, Dr. Patricia Williams, testified at the hearing that she simply recorded zip codes as she saw them in the claim forms, and that her intention was not to "develop[] the map to certify the class," but simply to record what she saw in the forms.[19] Nonetheless, Judge Cade noted that he was "restrict[ing] the boundaries of the class to those referenced" in the expert report.[20] In making his findings, Judge Cade concluded that the class met the requirements of Louisiana class action law – namely, numerosity, commonality, typicality, adequacy, predominance, and superiority.[21]

Defendants appealed Judge Cade's decision to the Louisiana Fourth Circuit Court of Appeal, which affirmed Judge Cade's certification.[22] Noting that the lower court's decision on certification is reviewed for abuse of discretion, the Fourth Circuit held that Judge Cade had made reasonable determinations and upheld certification.[23] Defendants sought writs from the Louisiana Supreme Court, which denied writ in relevant part.[24] In July of 2015, defendants brought a motion to decertify the class, claiming that new data produced by experts from both sides suggested that class certification was no longer

---

[16] *Id.* at 18.
[17] *Id.* at 18.
[18] *Id.* at 17-18, n.21.
[19] R. Doc. 235-2 at 248.
[20] R. Doc. 200-3 at 17-18, n.21.
[21] Notably, these requirements are linguistically the same as the requirements under the Federal Rule 23. However, Judge Cade's analysis did not have to reckon with federal precedent interpreting the requirements of Rule 23.
[22] *Guidry v. Dow Chem. Co.*, 105 So. 3d 900 (La. Ct. App. 4th Cir. 2012).
[23] *See generally id.*
[24] *Guidry v. Dow Chem. Co.*, 108 So. 3d 755 (La. 2013). The Louisiana Supreme Court granted writ in part in order to disqualify one class representative who was the spouse of one of the attorneys representing the class.

appropriate.[25] The district judge denied that motion, and defendants again appealed to the Fourth Circuit. While the Fourth Circuit found that it had authority to review and, if appropriate, reverse the judgment of the lower court, it held that defendants had failed to show a "material change in the facts or circumstances" in the case that would warrant decertification, as is required under Louisiana law.[26] The Louisiana Supreme Court again denied writs.[27]

In the wake of the most recent removal to this Court and denial of remand, defendants danced around the notion of decertification without affirmatively moving for it. After several discussions, Judge Martin L.C. Feldman asked the parties to brief whether the Louisiana State Courts' class certification "is binding on the Court as a matter of law."[28] As a result of this briefing, and after Judge Feldman advised parties to "bring any active controversies to the Court's attention by means of an opposed motion,"[29] defendants filed a motion to decertify the class.[30] After Judge Feldman's untimely passing, this case was transferred to this section,[31] where the motion was filed again.[32] Having heard from the parties that this motion does not require a hearing and that it may be decided on the papers, the Court now reviews.

Authority and Legal Standards

A. Modification of the Class as Certified

The first question is whether the Court has authority to decertify the class – and if so, for what cause. The long and short of it is that the Court treats state court certification

[25] R. Doc. 235-2 at 118.
[26] *Guidry v. Dow Chem. Co.*, 214 So. 3d 78, 92 (La. Ct. App. 4th Cir. 2017).
[27] *Guidry v. Dow Chem. Co.*, 2017 La. LEXIS 1446 (2017).
[28] R. Doc. 86.
[29] R. Doc. 118.
[30] R. Doc. 162.
[31] R. Doc. 180.
[32] R. Doc. 200.

just the same as it would its own interlocutory orders.[33] Under Louisiana state law, "a class certification order is ***always*** subject to modification or decertification, 'if later developments during the course of the trial so require.'"[34] Likewise, the federal Fifth Circuit recognizes that "a district court is free to reconsider its class certification ruling as often as necessary before judgment."[35] In fact, the Fifth Circuit has stated that "[u]nder Rule 23 the district court is charged with the duty of monitoring its class decisions in light of the evidentiary development of the case. The district judge must define, redefine, subclass, and decertify as appropriate in response to the progression of the case from assertion to facts."[36]

Plaintiffs suggest three reasons this Court should not consider the motion to decertify. The first is that defendants filed a substantively identical motion in state court and it was denied. While this may speak to the weight of the motion, that in itself does not prevent this Court from hearing the motion and decertifying, if necessary. Next, plaintiffs argue that decertification requires a material change in circumstances. To argue this point, plaintiffs cite to district court decisions from Washington State[37] and Florida.[38] In any case, the Court need not decide whether a material change in circumstances is necessary as one has undoubtedly taken place: this case has moved from state court, with its concomitant rules and procedures, to federal court, with its concomitant rules and procedures. This Court "is charged with the duty" of ensuring that the class as certified is

[33] *See Nissho-Iwai American Corp. v. Kline*, 845 F.2d 1300, 1304 (5th Cir. 1988) ("whenever a case is removed, interlocutory state court orders are transformed by operation of 28 U.S.C. § 1450 into orders of the federal district court to which the action is removed. The district court is thereupon free to treat the order as it would any such interlocutory order it might itself have entered").
[34] *Baker v. PHC-Minden, L.P.*, 167 So. 3d 528, 537 (La. 2015) (citation omitted) (emphasis in original).
[35] *McNamara v. Felderhof*, 410 F.3d 277, 280 (5th Cir. 2005) (citations omitted).
[36] *Richardson v. Byrd*, 709 F.2d 1016, 1019 (5th Cir. 1983).
[37] *Hartman v. United Bank Card, Inc.*, 291 F.R.D. 591 (W.D. Wash. 2013).
[38] *Washington v. Vogel*, 158 F.R.D. 689, 692–93 (M.D. Fla. 1994).

compatible with the requirements of Rule 23.[39] And though the language of Rule 23 tracks with the class action scheme of the state of Louisiana, the interpretation of that language is not identical. This is a material change in circumstances that warrants review of the class certification and the class definition.

Finally, plaintiffs suggest "[t]he *Rooker-Feldman* doctrine bars [d]efendants' motion to decertify."[40] "Reduced to its essence, the *Rooker-Feldman* doctrine holds that inferior federal courts do not have the power to modify or reverse state court judgments."[41] However, this doctrine applies only to **final** state court judgments.[42] As has already been noted, class certification is an interlocutory order subject to modification at any stage of the state or federal court proceedings.[43] The state court decisions concerning class certification were therefore not final state court judgments to which the *Rooker-Feldman* doctrine gives protection.

As plaintiffs correctly note, many judges at all levels of the Louisiana state court system have determined this certification ought to stand.[44] While not bound by their findings, the Court recognizes the persuasive weight of the determination and re-determination. Decertification is a drastic step, especially given the weight of prior decisions. It is not one undertaken lightly. However, as thorough as the review undertaken by the Louisiana state courts may have been, it was done under a different legal scheme – that of the state of Louisiana. In federal court, federal rules apply.

---

[39] *Richardson*, 709 F.2d at 1019.
[40] R. Doc. 235 at 15.
[41] *Burciaga v. Deutsche Bank Nat'l Trust Co.*, 871 F.3d 380, 384 (5th Cir. 2017) (citations omitted).
[42] *See id.* at 385.
[43] *See Baker*, 167 So. 3d at 537; *see also McNamara*, 410 F.3d at 280.
[44] *See* R. Doc. 235 at 5.

B. Rule 23

Class certification in federal court requires a finding that the prerequisites of Rule 23(a) are met. If all four prerequisites of Rule 23(a) are satisfied, a district court may permit the action to be maintained as a class so long as the action falls within any one or more of the three categories established by Rule 23(b). If any of these requirements is no longer met during the pendency of litigation, decertification is appropriate.[45] Here, the class most naturally falls under Rule 23(b)(3). Rule 23 provides in pertinent part:

> **(a) Prerequisites to a Class Action**. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all parties is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> **(b) Class Actions Maintainable**. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition … (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to these findings include: (A) the interest of the members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in management of a class action.[46]

Thus, when read together, Rule 23(a) and 23(b)(3) provide six requirements for a group of claims to be certified as a class action: numerosity, commonality, typicality, adequacy, predominance, and superiority.[47] The Court will address each requirement in turn.

[45] *Richardson*, 709 F.2d at 1019.
[46] Fed R. Civ. P. 23
[47] *Turner v. Murphy Oil USA, Inc.*, 234 F.R.D. 597, 603 (E.D. La. 2006).

Rule 23 Analysis

A. Numerosity

The question of numerosity concerns whether "the class is so numerous that joinder of all parties is impracticable."[48] "Although the number of members of any proposed class is not determinative of whether joinder is impracticable," the Fifth Circuit has generally set the threshold of 100 to 150 people as satisfying the numerosity requirement.[49] There is no serious dispute as to whether this requirement is met – while it is unclear exactly how many people fall within the class, it is not disputed that there are more than enough that joinder would be impracticable.

B. Commonality

Commonality refers to whether there are "questions of law or fact common to the class."[50] The commonality requirement is satisfied if the class members' claims depend on a common issue of law or fact whose resolution will "resolve an issue that is central to the validity of each one of the [class members'] claims in one stroke."[51] There is no doubt there are indeed questions of law or fact common to the class, including whether defendants are liable for the explosion and whether ethyl acrylate was present in certain areas in sufficient concentrations to cause the complained-of injuries.

C. Typicality

The typicality requirement concerns whether "the claims or defenses of the representative parties are typical of the claims or defenses of the class."[52] "The test for typicality, like the test for commonality, is not demanding [and] focuses on the similarity

[48] Fed R. Civ. P. 23(a).
[49] *Mullen v. Treasure Chest Casino*, 186 F.3d 620, 624 (5th Cir.1999).
[50] Fed R. Civ. P. 23(a).
[51] *M.D. ex rel Stukenberg v. Perry*, 675 F.3d 832, 840 (5th Cir.2012) (citation omitted).
[52] Fed R. Civ. P. 23(a).

between the named plaintiffs' legal and remedial theories and the legal and remedial theories of those whom they purport to represent."[53] There is no dispute that the claims of the named parties here are typical of the relevant claims.

D. Adequacy of Representation

This requirement asks whether "the representative parties will fairly and adequately protect the interests of the class."[54] In evaluating adequacy, a district court should determine whether the class representatives have a sufficient stake in the outcome of the litigation, and whether the class representatives have any interests antagonistic to the unnamed class members.[55] The Fifth Circuit has determined that "the adequacy requirement mandates an inquiry into (1) the zeal and competence of the representatives' counsel and (2) the willingness and ability of the representatives to take an active role in and control the litigation and to protect the interests of absentees."[56] Overall, the adequacy requirement ensures the named plaintiffs at all times adequately represent the interests of the absent class members.[57] No party asserts the class is inadequately represented, and the Court sees no reason to conclude the class is inadequately represented.

E. Predominance

The predominance requirement is concerned with "whether the questions of law or fact common to class members predominate over any questions affecting only individual members."[58] Although the predominance requirement shares some features with Rule 23(a)'s commonality requirement, "the predominance criterion is far more

[53] *Lightbourn v. City of El Paso*, 118 F.3d 421, 426 (5th Cir.1997) (citations omitted).
[54] Fed R. Civ. P. 23(a).
[55] *Mullen*, 186 F.3d at 626 (citing *Jenkins v. Raymark Indus. Inc.*, 782 F.2d 468, 472 (5th Cir.1986)).
[56] Berger v. Compaq Computer Corp. 257 F.3d 475, 479 (5th Cir.2001) (internal citations omitted).
[57] *Id.* at 480.
[58] Fed R. Civ. P. 23(b)(3).

demanding."[59] It "entails identifying the substantive issues that will control the outcome, assessing which issues will predominate, and then determining whether the issues are common to the class. Although this inquiry does not resolve the case on its merits, it requires that the court look beyond the pleadings to 'understand the claims, defenses, relevant facts, and applicable substantive law.' Such an understanding prevents the class from degenerating into a series of individual trials."[60] Cases in which there are issues which cannot be tried across the whole class are not necessarily inappropriate for class treatment,[61] but class certification is generally disfavored in such circumstances. The predominance criterion requires that the Court "meaningfully consider how [p]laintiffs' claims would be tried."[62] Absent a "rigorous" analysis, "'it [is] impossible for the court to know whether the common issues would be a 'significant' portion of the individual trials,' much less whether the common issues predominate."[63] The Court must "adequately analyze and balance the common issues against the individualized issues."[64]

To succeed on the merits, plaintiffs will need to prove liability, causation, and injury. The question of liability could seemingly be adjudicated on a class-wide basis. The evidence and arguments that would constitute proof of the alleged negligence of the defendants in relation to the July 7, 2009 tank explosion would not vary from individual to individual. None of the putative class members would claim his or her place in the class due to a special relationship with the defendants;[65] none of the putative class members

---

[59] *Amchem Prods. v. Windsor*, 521 U.S. 591, 624 (5th Cir. 1997).
[60] *O'Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732, 738 (5th Cir. 2003) (citations omitted).
[61] *See Madison v. Chalmette Ref., L.L.C.*, 637 F.3d 551, 557 (5th Cir. 2011) ("We do not suggest that class treatment is necessarily inappropriate. As Chalmette Refining acknowledged at oral argument, class treatment on the common issue of liability may indeed be appropriate. But our precedent demands a far more rigorous analysis than the district court conducted").
[62] *Id.* at 556.
[63] *Id.* at 557 (citation omitted).
[64] *Id.*
[65] In fact, as already mentioned, "defendants Dow and DEQ and any of their officers, directors, or employees" are excluded from the class as certified. Rec. Doc. 200-3 at 17.

would need to assert an individualized duty or breach thereof. If the class were to succeed on liability, it would likely be on the basis of a generalized duty and a correspondent breach. Defendants do not seriously dispute this. In a reply brief, they all but concede that liability is a "common issue[] shared by the class as a whole," but contend that it does not predominate.[66] Plaintiffs' brief, meanwhile, simply concludes that "liability is a predominant and lengthy common issue that must be resolved on a class-wide basis."[67] In defense of this claim, plaintiffs suggest that the cost of litigating liability on an individual basis speaks to predominance, as it would be "economically not feasible to pursue de minimis damages on an individual basis … in a case of (seemingly) clear liability."[68] While the Court is cognizant of the extensive costs associated with bringing and litigating any case, this speaks more to superiority than to predominance, as will be discussed below. Nonetheless, it is true that liability is a common issue with significant weight.

It is far more difficult to conclude that causation and injury are common issues. A review of analogous cases is instructive. One recent case is strikingly analogous. In the wake of Hurricane Harvey, a facility owned by Arkema experienced a series of three ignitions which burned nine refrigerated trailers of combustible chemicals.[69] Local residents then noticed "clouds of white smoke and accumulating ash on their properties, and … reported physical symptoms including bodily rashes, headaches, eye irritation, blisters, and respiratory difficulty."[70] Local property owners then brought an action and sought "to represent a class of all property owners within a seven-mile radius of the …

---

[66] R. Doc. 257 at 10.
[67] R. Doc. 235 at 28.
[68] *Id.* at 29.
[69] *See Prantil v. Arkema Inc.*, 986 F.3d 570, 573 (5th Cir. 2021).
[70] *Id.*

facility."[71] Finding that the requirements of Rule 23(b)(3), including predominance and superiority, were met, the district court granted class certification.[72] Concluding that the district court did not adequately "discuss the considerations affecting the administration of trial," among other things, the Fifth Circuit reversed the class certification order.[73] The Fifth Circuit noted that a district court "must 'respond to the defendants' legitimate protests of individualized issues that could preclude class treatment' . … [as] part of the district court's obligation to 'understand the claims [and] defenses' at play."[74] In *Prantil*, the Fifth Circuit held, the district court had in particular inadequately addressed Arkema's arguments "that a trial of class claims would devolve into individualized inquiries on causation, injury, and damages."[75] The Fifth Circuit did not conclude that class certification was impossible in this case, but it did conclude that certification could only result from a more thorough certification order.[76]

Likewise, in *Madison v. Chalmette Ref., L.L.C.*,[77] the Fifth Circuit reversed a district court's class certification order on a toxic tort claim. In *Madison*, a number of schoolchildren, accompanied by parents and teachers, were participating in a historical reenactment on the Chalmette National Battlefield when petroleum coke dust was released from the adjacent Chalmette Refinery.[78] Seeking redress for injuries including "personal injury, fear, anguish, discomfort, inconvenience, pain and suffering, emotional distress," among other things, plaintiffs brought suit and sought class certification.[79] Finding that "there is one set of operative facts that [will] determine liability," the district

[71] *Id.*
[72] *Id.* at 574.
[73] *Id.* at 578.
[74] *Id.* at 579 (citations omitted).
[75] *Id.*
[76] *Id.* at 580.
[77] 637 F.3d 551 (5th Cir. 2011).
[78] *Id.* at 553.
[79] *Id.*

court granted class certification.[80] The Fifth Circuit reversed, holding that the district court "fail[ed] to adequately analyze and balance the common issues against the individualized issues."[81] Among other issues, the Fifth Circuit noted that the district court "did not meaningfully consider how [p]laintiffs' claims would be tried," "failed to consider whether this case could be 'streamlined using other case management tools,'" and "oversimplifie[d]" the issues of liability because it neglected to reckon with "significant disparities" between individuals as to "exposure, location, and whether mitigative steps were taken."[82] The Fifth Circuit also cited with approval an advisory committee note to Rule 23 which states: "[a] 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways."[83] As with *Prantil*, the Fifth did not rule out the possibility of class treatment, finding that "class treatment on the common issue of liability may indeed be appropriate."[84] "But," the Fifth Circuit concluded, "our precedent demands a far more rigorous analysis than the district court conducted."[85]

Both *Prantil* and *Madison* are Fifth Circuit decisions in which a class certification order was reversed. Another illuminating example is a Fifth Circuit decision in which denial of a class certification order at the district court level was affirmed. *Steering Comm. v. Exxon Mobil Corp.* arose out of a control valve failure in Exxon Mobil's Baton Rouge Chemical Plant.[86] The control valve failure led to oil leaks, which, when ignited, resulted

---

[80] *Id.* at 556.
[81] *Id.* at 557.
[82] *Id.* at 556, 557.
[83] *Id.* at 556 (quoting Fed R. Civ. P. 23(b)(3) advisory committee's note).
[84] *Id.* at 557.
[85] *Id.*
[86] 461 F.3d 598, 600 (5th Cir. 2006).

in a smoke plume that caused many alleged injuries.[87] After hundreds of suits were consolidated, the plaintiffs sought class certification.[88] Finding the plaintiffs had not shown typicality, adequacy, predominance, or superiority, the district court denied the motion.[89] The Fifth Circuit affirmed, holding (among other things) that individual issues predominated. While holding that "it is theoretically possible to satisfy the predominance and superiority requirements of Rule 23(b)(3) in a mass tort or mass accident class action,"[90] the Fifth Circuit noted that most cases are not ripe for such treatment. In *Steering Committee*, the Fifth Circuit held:

> "although the alleged cause of the injuries is … a single accident … the causal mechanism for plaintiff's injuries … is not so straightforward. While it is certainly true that the cause of the fire itself is an issue common to the class, each individual plaintiff must meet his or her own burden of medical causation, which in turn will depend on any number of the factors enumerated by the experts … .[91]

While liability may have been capable of resolution on a class-wide basis, the Fifth held that the district court properly determined that the individual issues were "vastly more complex" and therefore predominated.[92] Among those individual issues were: "location, exposure, dose, susceptibility to illness, nature of symptoms, type and cost of medical treatment, and subsequent impact of illnesses on individuals."[93]

The Court finds this case is analogous to each of the preceding three. Individual issues are more extensive and more complex than those common to the class, and therefore the predominance requirement is not met. As in *Steering Committee*, issues of "location, exposure, dose, [and] susceptibility to illness" are all at issue,[94] and each of

---

[87] *Id.*
[88] *Id.*
[89] *Id.* at 601.
[90] *Id.* at 603.
[91] *Id.*
[92] *Id.*
[93] *Id.* at 602.
[94] *Id.*

these issues requires extensive individual treatment. While the question of the location of the plume may be susceptible to class treatment, the location of each class member is clearly an individual issue. Plaintiffs' own air modeling expert produced a plume dispersion model that suggests the location and density of the plume was highly variable throughout the day following the explosion.[95] Even a difference of one city block could determine whether or not an individual was affected by the ethyl acrylate release; the location of each individual is therefore a significant and probative fact not subject to class treatment. Likewise, the exposure level of an individual depends on both where and when an individual was exposed – again, plaintiffs' expert suggests that a difference of fifteen minutes could be the difference between significant exposure and no exposure at all in a given location.[96] This, too, is a significant factor not subject to class treatment. Finally, plaintiffs' expert toxicologist, Dr. Patricia Williams, has opined: "[t]here's no way for me to know your threshold [the concentration of ethyl acrylate that would case transient symptoms], from my threshold, from his threshold. One might be higher, and one might be lower. You know, there's just no way."[97] And while Dr. Williams stated that she would be comfortable testifying as to causation for anything above the odor threshold for ethyl acrylate, which is 1.3 parts per billion,[98] even that is not sufficient for class treatment. If each individual has a different threshold for irritability, then each individual will need to prove his or her own threshold in order to show causation. If Dr. Williams is correct, then the only realistic means of showing each person's threshold is individual testimony. Each of these issues is complex and necessarily individual, and the Court finds that, in any

---

[95] *See generally* R. Doc. 200-5.
[96] *See, e.g.*, R. Doc. 200-8 at 16.
[97] R. Doc. 200-10 at 12.
[98] *Id.* at 15.

practical examination of how a trial would be managed, they predominate over the relatively less complex issue of liability for the explosion.[99]

Plaintiffs contend that each of these issues is subject to class treatment, but the Court does not find their contentions compelling. As to susceptibility to illness, plaintiffs state Dr. Williams is prepared to testify as to whether a particular dose (as identified by air modeling) "is capable of causing the health effects at issue."[100] But capacity is not sufficient to show causation – as has already been noted, "each individual plaintiff [in a mass toxic tort case] must meet his or her own burden of medical causation, which in turn will depend on any number of … factors enumerated by … experts."[101] Plaintiffs would have this Court permit possibility to stand in for probability. That something is possible does not suffice to demonstrate causation. As individual testimony will be necessary to demonstrate causation, this issue is not susceptible to class treatment.[102] Likewise, plaintiffs claim that variances in exposure are irrelevant, as the claims by this class are simply for "transitory medical occurrences" for which damages will be in a relatively narrow range.[103] Moreover, they assert that the only exposure level that matters is whether an individual "was exposed to levels over the odor threshold," and they state defendants' experts "agree that the entire class was exposed to levels over the odor threshold."[104] In support of this, they point to an affirmative answer given by one of defendants' experts to the question "did you conclude that the plume of [ethyl acrylate] at

---

[99] *See Madison*, 637 F.3d at 556.
[100] R. Doc. 235 at 21.
[101] *Steering Committee*, 461 F.3d at 603.
[102] This also applies to plaintiffs' attempt to stand up defendants' material safety data sheet for ethyl acrylate as evidence for causation. *See* R. Doc. 235 at 22. The document appears to demonstrate that ethyl acrylate can indeed cause the symptoms complained of by the plaintiffs. It does not demonstrate that ethyl acrylate did in fact cause anyone's symptoms.
[103] R. Doc. 235 at 25.
[104] *Id.*

or above the odor threshold spread across the New Orleans area from west to east?"[105] However, neither side's experts suggest that ethyl acrylate was present at levels above the odor threshold across the whole of the New Orleans area for the entire time period at issue – instead, ethyl acrylate concentrations varied wildly by location and time throughout the entire time period.[106] Variances in exposure at levels above the odor threshold may not matter, but there can be no argument that whether or not an individual was exposed at all makes an immense difference. That determination is not susceptible to class treatment.

Finally, plaintiffs suggest these individual issues (namely, where individuals were exposed, when they were exposed, and what symptoms they experienced) could be handled by "sworn claim forms administered by a special master."[107] The Court is not convinced by this solution. While the Court agrees this may be an efficient process, the special master process would be inappropriate to determine these issues. "[T]he Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right.'"[108] The Supreme Court has, on that basis, rejected a "Trial by Formula" experiment that would have precented the defendants from "litigat[ing] its statutory defenses to individual claims."[109] While not identical to the proposal in that case, the plaintiffs' suggestion that a special master handle these individual issues suffers from much the same issue: that this process would deprive defendants of the chance to challenge individuals on essential elements of their claim.

[105] R. Doc. 235-12 at 75.
[106] *See generally* R. Doc. 200-8.
[107] R. Doc. 235 at 31.
[108] *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011) (quoting 28 U.S.C. § 2072(b)).
[109] *Id.*

It is difficult to certify a class action for a mass toxic tort such as this one in the Fifth Circuit. Plaintiffs' precedent consists of cases from 1986[110] and 1992,[111] one of which has been questioned by more recent jurisprudence in this circuit.[112] That the Fifth Circuit's jurisprudence has parted ways with those precedents is easy to understand – it is extremely difficult to find a case in which common issues predominate over individualized issues when every individual must prove specific causation. Having weighed the common issues against the individual ones, the Court must conclude that the latter would predominate in any trial on the merits of this issue. Therefore this action cannot be maintained as a class.

F. Superiority

This concerns whether resolution by means of a class action is "superior to other available methods for fairly and efficiently adjudicating the controversy."[113] Rule 12(b)(3) lists four factors to be considered in determining whether class action procedure is superior: "(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of a class action."[114] "Determining whether the superiority requirement is met requires a fact-specific analysis and will vary depending on the circumstances of any given case."[115]

---

[110] *Jenkins v. Raymark Inds., Inc.*, 782 F.2d 468 at 472, (5th Cir.1986).
[111] *Watson v. Shell Oil Co.*, 979 F.2d 1014 (5th Cir.1992).
[112] *See Madison*, 637 F.3d at 556 ("Whether *Watson* has survived later developments in class action law … is an open question").
[113] Fed R. Civ. P. 23(b)(3).
[114] *Id.*
[115] *Madison*, 637 F.3d at 555.

None of the first three factors identified by the federal rules seems to weigh for or against class treatment. The Court already has identified several difficulties surrounding management of the case, as was highlighted in the predominance section. The risk of trying this as a class action is that the predominance of individual issues would see this become a "series of individual trials."[116] However, the "most compelling rationale for finding superiority in a class action – the existence of a negative value suit" – is likely present in this case.[117] Although it is not determinative given the Court's finding on predominance, the Court finds that a class action would likely be the superior method of hearing this case, if it were available.

CONCLUSION

Accordingly, **IT IS ORDERED**:

That Defendants Dow Chemical and Union Carbide's motion to decertify[118] is **GRANTED**.

New Orleans, Louisiana, this 24th day of May, 2022.

SUSIE MORGAN
UNITED STATES DISTRICT JUDGE

---

[116] *O'Sullivan*, 319 F.3d at 738 (5th Cir. 2003).
[117] Castano v. American Tobacco Co., 84 F.3d 734, 748 (5th Cir. 1996).
[118] R. Doc. 200.