UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JONI S. BYNUM, ROBIN COBURN, AND JAMES COBURN INDIVIDUALLY AND ON BEHALF OF A PROPOSED CLASS
Plaintiff,

v.

LLT MANAGEMENT LLC F/K/A LTL MANAGEMENT, LLC; JOHNSON & JOHNSON; NEW JJCI; JOHNSON & JOHNSON HOLDCO (NA) INC.; JANSSEN PHARMACEUTICALS, INC.; KENVUE INC.; J&J SERVICES, INC.; AND JOHN DOES 1-100,
Defendants.

JURY TRIAL DEMANDED ON ALL CLAIMS TRIABLE TO A JURY

Case No. 24-cv-07065

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTIONS TO STRIKE PLAINTIFFS' CLASS ALLEGATIONS AND DISMISS MEDICAL MONITORING CLAIMS

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Defendants LLT Management LLC f/k/a LTL Management, LLC ("LLT"), Johnson & Johnson, New JJCI, Johnson & Johnson Holdco (NA) Inc.; Janssen Pharmaceuticals, Inc., Kenvue Inc.; and J&J Services, Inc. (collectively, "Defendants") respectfully submit this Memorandum of Law in Support of their Motion to Strike the Nationwide Class Action Allegations Under Rule 23(d)(1)(D), Rule 23(c)(1)(A), and Rule 12(f) and Dismiss the Medical Monitoring Claims Under Rule 12(b)(6).

PRELIMINARY STATEMENT

The parties have been litigating an MDL—which now contains approximately 60,000 individual claims—for eight years. But according to Plaintiffs' Complaint, all this work was pointless. They could have just filed a single class action like the one currently before the Court representing not only everyone who *currently* has ovarian cancer, but also everyone who ever used Defendants' talc products and *may develop* cancer in the future. The reason no one has done this over the past decade is because it is plainly not possible. The Supreme Court in *Amchem* made clear that a class action is not a permissible tool for resolving mass torts—there are simply too many individualized issues. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-28 (1997). And a class like the one Plaintiffs proposed is particularly impossible where the Court would have to apply the differing laws of all 50 states. In fact, since *Amchem*, no federal appellate court has approved a nationwide product liability or

medical monitoring class. This Complaint, seeking nationwide relief in one fell swoop, is just the latest ploy to attack any upcoming bankruptcy by trying to increase the number of claimants represented by Beasley Allen.

Here, Plaintiffs Joni S. Bynum and Robin Coburn allege that they used Johnson's Baby Powder and/or Shower to Shower for a period of more than four years. Compl. ¶¶ 1-2. Ms. Coburn's husband, James Coburn, is a plaintiff representing derivative claimants. *Id.* ¶ 3. While Ms. Coburn has developed cancer, Ms. Bynum has not. They seek to certify a class including both injured users and non-injured users. For those who allegedly have suffered a "Defined Injury," the Complaint requests damages. For those who have not been diagnosed with such an injury, plaintiffs request medical monitoring.

Plaintiffs' claims break down at the starting line. Plaintiffs' Main Class includes both persons who claim present injuries *and* persons who claim they may be injured in the future. Compl. at 1-2. The Supreme Court held this type of class is not permissible because "the interests of those within the single class are not aligned." *Amchem*, 521 U.S. at 626.

Subclass 1 fails because Ms. Bynum, as a plaintiff without any injury, has no claim for no-injury medical monitoring under relevant state law. It is not a permissible claim in her home state of Washington. And should Plaintiffs argue New Jersey law applies, New Jersey does not recognize a claim for no-injury medical

monitoring in a products liability case like this, either.

Plaintiffs' no-injury medical monitoring claims also present an insurmountable hurdle to class certification. Subclass 1 fails because under *any* choice-of-law analysis, the no-injury medical monitoring claims cannot succeed. New Jersey law does not recognize this type of claim in a products liability case like this, nor does Ms. Bynum's home state of Washington. Indeed, most states prohibit claims for medical monitoring like this one absent a present physical injury. And the minority of states that have recognized these types of claims, generally in the toxic tort context, "have adopted widely varying criteria for recovery." *In re Rezulin Prod. Liab. Litig.*, 210 F.R.D. 61, 74 (S.D.N.Y. 2002).

These differing laws in and of themselves create individualized issues. They also do not "exist in a vacuum but rather interact in complex ways with the factual variations." *Jones v. BRG Sports, Inc.*, 2019 WL 3554374, at *7 (N.D. Ill. Aug. 1, 2019). When applying the different laws to the already individualized factual issues, the individualized nature of the case compounds exponentially. For example, "the requirement that each class member demonstrate the need for medical monitoring precludes certification" because it "raises many individual issues." *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143, 146 (3d Cir. 1998). Those individualized issues fragment even further because the criteria to evaluate whether a plaintiff will require additional monitoring varies from state to state.

Because of these individualized issues, Plaintiffs cannot meet Rule 23(b)(3)'s predominance requirement or Rule 23(b)(2)'s similar cohesion requirement. No amount of discovery will change that most states do not even recognize the kind of claim Plaintiffs seek to certify a class over. That means, at a minimum, the class cannot proceed as currently defined. It covers class members in states that have affirmatively rejected the kind of claim Plaintiffs brought here. And of the states that do recognize the claim, the states' laws vary to an unmanageable degree.

Subclass 2, defined as "Qualifying Talc Users (Class Members) who affirmatively consent (Opt-In) to membership in the Class," fails because Rule 23 does not allow opt-in classes. *Kern v. Siemens Corp.*, 393 F.3d 120, 124 (2d Cir. 2004). By establishing the opt-out procedure in Rule 23, Congress implicitly prohibited opt-in classes. *Id.*

And even if Plaintiffs' Main Class and Subclasses did not each fail for independent reasons, the classes fail as a whole because this kind of nationwide class is just not possible. Plaintiffs' Complaint hits the all the hallmarks of a case unsuitable for class certification under Rule 23: (1) products liability claims (2) seeking personal injury damages or medical monitoring (3) on behalf of a nationwide class.

Product liability cases are almost never appropriate for class actions. They inherently involve individualized questions that cannot be addressed on a class-wide

basis. Claims seeking personal injury damages or medical monitoring similarly are almost never appropriate for class certification. And nationwide classes based on the laws of all 50 states are especially problematic because "the proliferation of disparate factual and legal issues is compounded exponentially" when states' laws differ. *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 627 (3d Cir. 1996). No federal court of appeals has ever approved certification of such a class, and the Third Circuit has affirmed the denial of or reversed certification at least three times. *Gates v. Rohm & Haas Co.*, 655 F.3d 255, 266-71 (3d Cir. 2011); *Barnes*, 161 F.3d at 143, 155; *Georgine*, 83 F.3d at 626-35. Normally the question of whether a class should be certified is not resolved until after discovery. But class action allegations should be struck at the pleading stage when it is plain from the complaint that class treatment is not appropriate. This is one of those cases.

* * *

In short, the futility of Plaintiffs' class allegations is evident on the face of the Complaint. The *Amchem* Court held a quarter of a century ago that the composition of the Main Class here "obvious[ly]" fails Rule 23, Subclass 1's purported class representative has no claim for medical monitoring under any possible applicable jurisdictional law, and Subclass 2 seeks to impose an "opt-in" requirement that the text of Rule 23 plainly rejected. Even if none of that were true, Plaintiffs seek certification of the very type of class barred by *Amchem* and its progeny, which

courts across the country have rejected for decades. All of these significant deficiencies add up to one conclusion: Plaintiffs' counsel is using this lawsuit to artificially inflate the number of "claims" they represent in any impending LLT bankruptcy—allowing them to get a bigger piece of the pie in the event of a settlement.

This Court should strike Plaintiffs' class action allegations and dismiss the medical monitoring claims.

BACKGROUND

As noted above, Plaintiffs allege that using the Defendants' products—Johnson's Baby Powder and/or Shower to Shower—has either caused them to develop a Defined Injury (epithelial ovarian cancer, fallopian tube cancer, or primary peritoneal cancer) or puts them at higher risk of developing one of those injuries. To that end, Plaintiffs seek to certify a nationwide class (the "Main Class") including both injured and non-injured individuals. Specifically, Plaintiffs have defined this Main Class as:

> (1) All female U.S. resident users of Defendants' talc-containing products Johnson's Baby Powder and/or Shower to Shower (hereinafter the "PRODUCTS") between 1960 and the present who, prior to the date of the Court's Preliminary Approval and Class Certification Order, utilized the Product(s) for genital application for a period of more than four (4) years, and have not commenced an individual, non-class lawsuit for the pursuit of any individual, non-class personal injury claims arising from the use and/or exposure to Defendants' Products ("Qualifying Talc Users"); (2) Authorized representatives, ordered by a court or other official of competent jurisdiction under applicable state law, of deceased

> or legally incapacitated or incompetent Qualifying Talc Users ("Representative Claimants"); and, (3) Spouses, parents, children who are dependents, or any other persons who properly under applicable state law assert the right to sue independently or derivatively by reason of their relationship with a Qualifying Talc User ("Derivative Claimants").

Compl. at 1.

Plaintiffs also propose two subclasses, including Subclass 1, for individuals without an injury, and Subclass 2, for those have developed an injury and wish to "opt in" to the class:

> Subclass 1: Qualifying Talc Users (Class Members) and the Representative Claimants of legally incapacitated or incompetent Qualifying Talc Users who as of the date of the Court's Preliminary Approval and Class Certification Order have not been diagnosed with a "Defined Injury", namely: epithelial ovarian cancer, fallopian tube cancer, or primary peritoneal cancer.
>
> Subclass 2: Qualifying Talc Users (Class Members) who affirmatively consent (Opt-In) to membership in the Class and who as of the date of the Court's Preliminary Approval and Class Certification Order have been diagnosed with a "Defined Injury", namely: epithelial ovarian cancer, fallopian tube cancer, or primary peritoneal cancer, and their Representative and Derivative Claimants.

Compl. at 2.

These two subclasses, when viewed together, are not two halves of the whole of the Main Class. Specifically, the Main Class does not allow injured members to opt in, like Sub Class 2 does.

Plaintiff Joni S. Bynum is a resident of Washington and used Defendants' products for genital application between March 2006 and August 2019. Compl. ¶ 1. She has not been diagnosed with cancer but alleges she is at increased risk of

developing it. *Id.* She seeks to represent Subclass 1. *Id.* Plaintiffs Robin and James Coburn are a married couple from Alabama that seek to represent Subclass 2. *Id.* ¶¶ 2-3. Ms. Coburn has been diagnosed with serous fallopian tube cancer and seeks to represent those members of Subclass 2 with a Defined Injury, while Mr. Coburn seeks to represent those with derivative claims against the Defendants. *Id.*

Defendants move to strike all class allegations and dismiss the medical monitoring claims.

LEGAL STANDARDS

Under Rule 12(b)(6), this Court "accept[s] all factual allegations as true, [and] construe[s] the complaint in the light most favorable to the plaintiff." *Warren Gen. Hosp. v. Amgen Inc.*, 643 F.3d 77, 84 (3d Cir. 2011) (citation and quotation marks omitted). The claims, however, must be "plausible on [their] face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This Court is not required to credit "conclusory or bare-bones allegations" or "threadbare recitals of the elements of a cause of action." *Warren*, 643 F.3d at 84.

Under Rule 23, the Court determines whether to certify a class "[a]t an early practicable time after a person sues or is sued as a class representative." Fed. R. Civ. P. 23(c)(1)(A). Although this decision is normally made after discovery, "[s]ometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's

claim." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982).

Rule 23(d)(1)(D) permits a court to "require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly." And Rule 12(f) allows for striking material from a complaint when "class treatment is evidently inappropriate from the face of the complaint." *Zarichny v. Complete Payment Recovery Servs., Inc.*, 80 F. Supp. 3d 610, 615 (E.D. Pa. 2015) (citing *Landsman & Funk PC v. Skinder–Strauss Assocs.*, 640 F.3d 72, 93 n.30 (3d Cir. 2011)). "[W]hen no amount of discovery or time will allow for plaintiffs to resolve deficiencies in class definitions under Rule 23, . . . a motion to strike class allegations should be granted." *McPeak v. S–L Distribution Co., Inc.*, 2014 WL 4388562, at *4 (D.N.J. Sept. 5, 2014).

"To obtain class certification, plaintiffs must satisfy all of the requirements of Rule 23(a) and come within one provision of Rule 23(b)." *Georgine*, 83 F.3d at 624. "Rule 23(a) mandates a showing of (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation . . . ." *Id.* Plaintiffs are trying to certify a class under both Rule 23(b)(2) and Rule 23(b)(3). *See* Compl. ¶ 40. Rule 23(b)(2) applies "when a single injunction or declaratory judgment would provide relief to each member of the class." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011). The rule "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages." *Id.* at 360-61. The Third

Circuit has "question[ed] whether the kind of medical monitoring sought here can be certified under Rule 23(b)(2)" but did "not reach the issue." *Gates*, 655 F.3d at 263. Many courts have found that Rule 23(b)(2) is not appropriate in the medical monitoring context because the "primary claim" is "for money damages." *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1196 (9th Cir. 2001); *see also Zehel-Miller v. Astrazenaca Pharm., LP*, 223 F.R.D. 659, 663 (M.D. Fla. 2004) ("The compensatory and punitive damage claims in the Complaint herein can hardly be considered incidental to the request for the establishment of a medical monitoring class."); *Dhamer v. Bristol-Myers Squibb Co.*, 183 F.R.D. 520, 529 (N.D. Ill. 1998) ("[T]he ultimate relief requested is in the form of money damages which when taken along with plaintiff's other claims for money, demonstrate that money damages is the predominant relief sought.").

The Court need not reach that question to resolve this motion because the claims fail under both (b)(3) and (b)(2). To certify a class under Rule 23(b)(3), the "questions of law or fact common to class members" must "predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). "An individual question is one where members of a proposed class will need to present evidence that varies from member to member." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) (internal quotation marks omitted). "The predominance inquiry asks whether the common, aggregation-enabling, issues in the case are more

prevalent or important than the non-common, aggregation-defeating, individual issues." *Id.* (internal quotation marks omitted).

Under Rule 23(b)(2), "the class claims must be cohesive." *Gates*, 655 F.3d at 263-64. "The two inquiries"—cohesion under (b)(2) and predominance under (b)(3)—"are similar." *Id.* at 270. "The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Id.* (quoting *Amchem*, 521 U.S. at 623). "[D]isparate factual circumstances of class members may prevent a class from being cohesive and, therefore, make the class unable to be certified under Rule 23(b)(2)." *Id.* at 264 (internal quotation marks omitted). "Indeed, a (b)(2) class may require more cohesiveness than a (b)(3) class . . . because in a (b)(2) action, unnamed members are bound by the action without the opportunity to opt out." *Barnes*, 161 F.3d at 142-43. "[I]t would be unjust to bind absent class members to a negative decision where the class representatives' claims present different individual issues than the claims of the absent members present." *Id.* at 143. Additionally, "little value would be gained in proceeding as a class action . . . if significant individual issues were to arise consistently." *Id.* (citation and internal quotation marks omitted).

ARGUMENT

I. This Court Should Strike The Main Class And The Subclasses Due To The Presence Of Injured And Uninjured Claimants.

Plaintiffs' Main Class includes both persons who claim present injuries *and*

persons who claim they may be injured in the future. Compl. at 1-2. But the Supreme Court held a class cannot be legally composed in that way because "the interests of those within the single class are not aligned." *Amchem*, 521 U.S. at 626.

In *Amchem*, as here, the class of asbestos claimants was composed of both individuals who had already developed "diverse medical conditions" and "exposure-only" claimants who had not yet developed any physical injury. *Id.* Finding that the interests of these disparate groups were not aligned—because "for the currently injured, the critical goal is generous immediate payments," which "tugs against" the uninjured plaintiffs' goal of "ensuring an ample, inflation-protected fund for the future"—the Supreme Court affirmed the Third Circuit's reversal of class certification, in part, on adequacy grounds. *Id.* at 626-27.

The same issues are present in Plaintiffs' proposed class, which combines currently injured personal injury claimants (and their derivative claimants) with uninjured medical monitoring claimants. Compl. at 1-2. Such a class simply cannot be maintained. *See, e.g.*, *Rink v. Cheminova, Inc.*, 203 F.R.D. 648, 664 (M.D. Fla. 2001) (concluding that Rule 23 is not satisfied because the "interests and motivations in the personal injury subclass are not necessarily aligned with the interests of the not-yet-injured members of the medical monitoring subclass who, at present, seek only a fund to cover costs related to their monitoring"); *Smith v. Life Invs. Ins. Co. of Am.*, 2009 WL 3756913, at *7 (W.D. Pa. Nov. 6, 2009) (concluding Rule 23 was

not met where the "class definition includes: (1) current claimants, i.e., persons who currently have cancer and have submitted 'actual charges' claims; and (2) possible future claimants, i.e., persons who might be diagnosed with cancer and submit 'actual charges' claims in the future"). The Main Class is therefore legally infirm and should be struck.

This infirmity also extends to the two subclasses. The mere fact that Plaintiffs have proposed subclasses (one with injured plaintiffs and one with uninjured plaintiffs) does not change the analysis. *Id.* To the contrary, the Supreme Court has passed on—and rejected—this very formulation. "[I]t is obvious after *Amchem* that a class divided between holders of present and future claims . . . requires division into homogeneous subclasses under Rule 23(c)(4)(B), ***with separate representation to eliminate conflicting interests of counsel***." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 819 (1999) (emphasis added).

Plaintiffs have not explained or proposed a structure for how the subclasses might be represented by separate counsel, much less which law firms will represent which subclasses. This is impermissible, and no amount of discovery will remedy the fundamental misalignment of the injured and uninjured class members. This Court should therefore strike the class allegations.

II. The Court Should Dismiss The No-Injury Medical Monitoring Claim And Strike Subclass 1.

Even if this Court were to conclude that Subclass 1 does not suffer from the

conflict-of-interest issue discussed above, the Court should nevertheless dismiss the no-injury medical monitoring claims and strike Subclass 1. The applicable state law prohibits no-injury medical monitoring claims for the named plaintiff. *See infra* § II.A. And a nationwide medical monitoring class action cannot be maintained in any event due to the vastly differing state laws—the majority of which do not permit the claims Plaintiffs are attempting to bring. *See infra* § II.B.

A. The Court should dismiss the no-injury medical monitoring claim.

This Court should dismiss Plaintiffs' no-injury medical monitoring claim. The only uninjured named plaintiff and only representative of Subclass 1 (Ms. Bynum) does not have a medical monitoring claim as a matter of law.

Ms. Bynum is the named class representative for Subclass 1 and "has not been diagnosed with epithelial ovarian cancer, fallopian tube cancer, or primary peritoneal cancer." Compl. ¶ 1. Subclass 1 is defined as "Qualifying Talc Users (Class Members) . . . who . . . have not been diagnosed with a 'Defined Injury", namely: epithelial ovarian cancer, fallopian tube cancer, or primary peritoneal cancer." Compl. ¶ 38.

"A federal court sitting in diversity applies the choice-of-law rules of the forum state—here, New Jersey—to determine the controlling law." *Maniscalco v. Brother Int'l (USA) Corp.*, 709 F.3d 202, 206 (3d Cir. 2013) (citations omitted). Under New Jersey's choice-of-law analysis, "the first step is to determine whether

an actual conflict exists." *P.V. ex rel. T.V. v. Camp Jaycee*, 197 N.J. 132, 143 (2008). "If not, there is no choice-of-law issue to be resolved." *Id.* This Court does not need to conduct a choice-of-law analysis because the outcome is the same under the only two possible state laws that Plaintiffs could even attempt to argue may apply: New Jersey and Washington (Ms. Bynum's home state).

The "no injury" medical monitoring claim alleged by Ms. Bynum is prohibited in both New Jersey and Washington. *Sinclair v. Merck & Co.*, 195 N.J. 51, 64 (2008) ("We read [New Jersey law] to require a physical injury" for a medical monitoring claim.); *Duncan v. Nw. Airlines Inc.*, 203 F.R.D. 601, 606, 609-10 (W.D. Wash. 2001) (explaining that Washington does not allow medical monitoring without a "present, existing injury"). Accordingly, this Court must dismiss Ms. Bynum's claim for medical monitoring (Count I) because she has failed to a state a claim for relief.

The dismissal of Bynum's medical monitoring claims also requires the dismissal of Subclass 1. A "plaintiff may not maintain an action on behalf of a class against a specific defendant if the plaintiff is unable to assert an individual cause of action against that defendant." *Haas v. Pittsburgh Nat'l Bank*, 526 F.2d 1083, 1086 n.18 (3d Cir. 1975). "When . . . a court dismisses a named plaintiff's individual allegations, the plaintiff's class allegations will also be dismissed." *Fox v. State Farm Fire & Cas. Co.*, 2021 WL 4398740, at *10 (D.N.J. Sept. 24, 2021) (collecting

cases); *see also, e.g.*, *Bass v. Butler*, 116 F. App'x 376, 385 (3d Cir. 2004) ("Because no class has been certified here, if [plaintiff's] claim fails, the entire action must be dismissed." (citation omitted)); *Napoli v. HSBC Mortg. Servs. Inc.*, 2012 WL 3715936, at *5 (D.N.J. Aug. 27, 2012) ("Because this Court dismisses all of Plaintiffs' individual claims, and Plaintiffs' purported class has not yet been certified, Plaintiffs' class allegations must also be dismissed." (citation omitted)).

This Court should dismiss Ms. Bynum's claim, and Subclass 1 therefore fails as well.

B. Alternatively, this Court should strike Subclass 1 for no-injury medical monitoring.

Even if the Court concludes that Ms. Bynum's claims should not be dismissed, Subclass 1 should nevertheless be struck.

The Court "must apply an individualized choice of law analysis to each plaintiff's claims" in a proposed class. *Georgine*, 83 F.3d at 627. The Third Circuit has "found error where a District Court failed to do so." *Grandalski v. Quest Diagnostics Inc.*, 767 F.3d 175, 180 (3d Cir. 2014). "The plaintiff has the burden to creditably demonstrate, through an extensive analysis of state law variances, that class certification does not present insuperable obstacles." *Sanders v. Johnson & Johnson, Inc.*, 2006 WL 1541033, at *4 (D.N.J. June 2, 2006) (striking medical monitoring class action allegations) (citation and internal quotation marks omitted); *see also Langan v. Johnson & Johnson Consumer Companies, Inc.*, 897 F.3d 88, 97

(2d Cir. 2018) ("[T]he party seeking certification has the ultimate burden to demonstrate that any variations in relevant state laws do not predominate over the similarities."). "[P]laintiffs face a significant burden to demonstrate that grouping is a workable solution." *In re Niaspan Antitrust Litig.*, 464 F. Supp. 3d 678, 724 (E.D. Pa. 2020) (citation and quotation marks omitted).

As noted above, this Court applies New Jersey choice-of-law rules. *Maniscalco*, 709 F.3d at 206. "New Jersey has adopted the 'most significant relationship' test set forth in the Restatement (Second) of Conflict of Laws." *Id.* (citation omitted).

Here, the law of each class member's home state applies as the state with the most significant relationship.[1] *See Ginsberg ex rel. Ginsberg v. Quest Diagnostics, Inc.*, 441 N.J. Super. 198, 217 (App. Div. 2015) (holding that "New York law applies to the tort-based claims" because "New York is the place of injury relating to th[e] alleged wrongdoers" and "also the state with most significant relationship" because that is where plaintiff resided and where the alleged misconduct occurred), *aff'd*, 227 N.J. 7 (2016); *see also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985) (concluding that Kansas law could not apply to the entire class despite "[w]hatever practical reasons may have commended this rule to the Supreme Court of Kansas").

[1] If Plaintiffs were to argue that New Jersey law applies, all the medical monitoring claims simply fail as a matter of law because New Jersey does not recognize no-injury medical monitoring, *Sinclair*, 195 N.J. at 64.

Under that analysis, class treatment is inappropriate because medical monitoring law varies too much among the 50 states, with most states not even recognizing the type of no-injury medical monitoring claim Plaintiffs seek to certify a class over. Classes are often struck at the pleading stage due to this fatal flaw. *See, e.g.*, *Almond v. Janssen Pharms., Inc.*, 337 F.R.D. 90, 100 (E.D. Pa. 2020) (dismissing a nationwide no-injury medical monitoring class because "the variation in state law alone is sufficient to establish that maintenance of the action as a class is inappropriate") (citation and quotation marks omitted).

1. The 50 states have very different medical monitoring laws.

Medical monitoring law varies drastically from one state to the next. Many state supreme courts and state legislatures have rejected claims for medical monitoring like this one without a present physical injury, including those in Alabama, Kentucky, Louisiana, Illinois, Michigan, Mississippi, New Jersey, New York, and Oregon. *See* App'x A. In fact, "the trend among courts that have taken up the issue has been to reject such claims." *Dougan v. Sikorsky Aircraft Corp.*, 2017 WL 7806431, at *6 (Conn. Super. Mar. 28, 2017). In some jurisdictions, lower state courts have reached the same conclusions, such as in Connecticut, North Carolina, Rhode Island, Virginia, and Wisconsin. *See* App'x B. And in still others, federal courts have rejected medical monitoring claims absent a present physical injury when applying state law, including courts applying the law of Georgia, Hawaii,

Iowa, Maine, Minnesota, Nebraska, Oklahoma, South Carolina, Tennessee, and Texas. *See* App'x C.

A minority of courts have permitted medical monitoring claims absent a present physical injury (either as a freestanding claim or as a remedy), including California, Maryland, Missouri, Nevada, Pennsylvania, Utah, and West Virginia. *See* App'x D.[2] In some jurisdictions like Arizona and Florida, only lower courts have ruled on the issue to permit these kinds of claims.[3] And some federal courts have permitted such claims when applying state law, including a court applying Colorado law. *Bell v. 3M Co.*, 344 F. Supp. 3d 1207, 1224 (D. Colo. 2018). And in some jurisdictions, no state or federal court at any level has addressed the issue, such as in Idaho, New Mexico, South Dakota, and Wyoming.

Of the states that permit claims for medical monitoring absent a present physical injury, the requirements for those claims vary. For example, Utah requires "that a doctor prescribe the [medical monitoring] test for this plaintiff," which other states do not require. *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 980 (Utah 1993). Rather than listing elements as many states do, California has a five-factor

[2] Defendants do not admit that Plaintiffs have stated a claim under the law of any of these jurisdictions or that these jurisdictions would permit no-injury medical monitoring claims in the context of a prescription medicine.

[3] *Burns v. Jaquays Min. Corp.*, 156 Ariz. 375, 380 (Ct. App. 1987) (holding that "despite the absence of physical manifestation of any asbestos-related diseases, that the plaintiffs should be entitled to such regular medical testing"); *Petito v. A.H. Robins Co.*, 750 So. 2d 103, 106 (Fla. 3d DCA 1999) (listing elements).

test to determine whether "monitoring is a reasonably certain consequence of the exposure." *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 1006 (1993). Some states have not developed as detailed law regarding medical monitoring as others. Unlike California, Nevada for example, "decline[d] to identify specific factors that a plaintiff must demonstrate to establish entitlement to medical monitoring as a remedy." *Sadler v. PacifiCare of Nev.*, 130 Nev. 990, 1001 (2014).

In West Virginia, when deciding whether medical monitoring is reasonably necessary, the "frequency of testing need not necessarily be given significant weight," but a court may consider "the subjective desires of a plaintiff for information concerning the state of his or her health." *Bower v. Westinghouse Elec. Corp.*, 206 W. Va. 133, 142 (1999). The West Virginia Supreme Court expressly stated it was "not entirely in accord" with Utah Supreme Court which ruled that recovery would not be permitted "if a reasonable physician would not prescribe . . . [medical monitoring] for a particular plaintiff because the benefits of monitoring would be outweighed by the costs, which may include, among other things, the burdensome frequency of the monitoring procedure, its excessive price, or its risk of harm to the patient." *Id.* (quoting *Hansen*, 858 P.2d at 980) (alterations in original).

Pennsylvania and Florida require the defendant to have committed "negligence." *Redland Soccer Club, Inc. v. Dep't of the Army & Dep't of Def. of the U.S.*, 548 Pa. 178, 195 (1997); *Petito*, 750 So. 2d at 106. Missouri and West Virginia

appear to require the plaintiff to establish liability under any traditional tort theory. *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712, 717 (Mo. 2007) (Medical monitoring a "compensable item of damage when liability is established under traditional tort theories of recovery."); *Bower*, 206 W. Va. at 142 ("[U]nderlying liability must be established based upon a recognized tort—*e.g.*, negligence, strict liability, trespass, intentional conduct, etc."). Even among those jurisdictions requiring negligence, states "provide different formulations concerning negligence and its related concepts." *Sanders*, 2006 WL 1541033, at *5 (striking class action allegations in the medical monitoring context).

Put simply, medical monitoring law varies drastically from one state to the next.

2. Individualized difference in the laws of the 50 states predominate over any common issue and destroy cohesion.

"In a multi-state class action, variations in state law may swamp any common issues and defeat predominance." *Castano v. American Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996). The reason—as the Third Circuit explained in denying a class certification involving medical monitoring—is plain: "[B]ecause we must apply an individualized choice of law analysis to each plaintiff's claims, the proliferation of disparate factual and legal issues is compounded exponentially." *Georgine*, 83 F.3d at 627 (citation omitted). Accordingly, "[d]ifferences of this kind cut strongly

against nationwide classes." *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 674 (7th Cir. 2001).

For example, in a case involving claims spanning a nationwide medical monitoring class against the same defendants (Janssen Pharmaceuticals and J&J), a court granted the defendants' motion to strike because "the variation in state law alone is sufficient to establish that maintenance of the action as a class is inappropriate." *Almond*, 337 F.R.D. at 100 (citation and quotation marks omitted). The class could not be certified under Rule 23(b)(2) because the "nationwide class includes class members from states that expressly prohibit no-injury medical monitoring claims," and the court could not provide declaratory relief to those class members. *Id.* Nor could the class be certified under Rule 23(b)(2) because "a fault line divide[d] class members whom state law permits to seek relief through a no-injury medical monitoring claim, and those whom state law prohibits from asserting the very claim at issue here," so there was no predominance. *Id.*

Another example is *Sanders v. Johnson & Johnson, Inc.*, 2006 WL 1541033 (D.N.J. June 2, 2006). That case involved a proposed nationwide class against Johnson & Johnson seeking medical monitoring for a product used for coating following surgical procedures. *Id.* at *1, *9. The court granted the defendants' motion to strike the class action allegations. *Id.* at *2, *11. The court relied largely on the all the variations in state law, explaining that "[s]tates, for example, provide

different formulations concerning negligence and its related concepts," *id.* at *5, that "[s]tate laws also vary with respect to the relief that Plaintiff seeks, including medical monitoring," *id.* at *6, and that "[i]ndividual fact questions pose a further obstacle to certifying the Proposed Class," *id.* In striking the class allegations, the court concluded that the "[p]laintiff fail[ed] to show that common issues predominate over individualized ones." *Id.* All these conclusions were reached without the need for discovery.

Indeed, variation in state law frequently serves as a reason to strike class action allegations at the pleading stage. *See, e.g.*, *Brawley v. Bath & Body Works, LLC*, 2019 WL 7945655, at *6 (N.D. Tex. Sept. 25, 2019) ("Even viewing the Complaint in the light most favorable to Plaintiffs, the Court finds that the variations in product liability law across all fifty states defeat predominance and nationwide class certification."); *Jones*, 2019 WL 3554374, at *7 ("The legal variations described at length by Riddell are truly significant. . . . [N]o amount of discovery or further narrowing of class definitions will ameliorate these problems."); *DuRocher v. Nat'l Collegiate Athletic Ass'n*, 2015 WL 1505675, at *10 (S.D. Ind. Mar. 31, 2015) ("The inconsistent laws applicable to the putative members' claims weighs heavily in favor of striking Plaintiffs' current class definition.").[4] "Particularly where

[4] Variation in state law is also a common reason to deny class certification generally. *See Niaspan*, 464 F. Supp. 3d at 724 ("Without an extensive analysis of the

plaintiffs are asserting a relatively novel claim for relief such as medical monitoring—the differences in state law are likely to be substantial." *Lewallen v. Medtronic USA, Inc.*, 2002 WL 31300899, at *5 (N.D. Cal. Aug. 28, 2002).

From the outset, a nationwide class is not possible given that a large number of states have rejected claims for medical monitoring without a present physical injury. Still other states have not recognized that kind of claim because they have never addressed it. The class cannot proceed as currently defined, and Rule 23 is designed to protect against "overbroad class definitions." *Amchem*, 521 U.S. at 620.

Moreover, since "[m]any states never have recognized a claim for medical monitoring," a nationwide class "would force this Court into the undesirable position of attempting to predict how their courts of last resort would resolve that issue." *In*

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applicable state laws and any variation in state law, EPPs cannot meet their burden of proving predominance under Rule 23"); *Blain v. Smithkline Beecham Corp.*, 240 F.R.D. 179, 195 (E.D. Pa. 2007) ("[T]he proposed class will be unmanageable because there is no way to apply the varied state laws and, at the same time, guarantee procedural fairness."); *Vista Healthplan, Inc. v. Cephalon, Inc.*, 2015 WL 3623005, at *34 (E.D. Pa. June 10, 2015) ("Plaintiffs have not met their burden of demonstrating that grouping is a feasible method for addressing the variations amongst the purchase states' unjust enrichment laws."); *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018 (7th Cir. 2002) ("Because these claims must be adjudicated under the law of so many jurisdictions, a single nationwide class is not manageable."); *In re Insulin Pricing Litig.*, 2024 WL 416500, at *48 (D.N.J. Feb. 5, 2024) ("The disparities among the states in defining 'unfair' acts presents individualized questions that overwhelm common issues and defeat predominance."); *Bennett v. Quest Diagnostics, Inc.*, 2023 WL 3884117, at *15 (D.N.J. June 8, 2023) (rejecting motion for class certification in part on superiority grounds "as it fails to account for differences in state law that threaten the efficient management of the class action").

re Rezulin, 210 F.R.D. at 74. This Court's role under *Erie* is to "apply the current law of the appropriate jurisdiction, and leave it undisturbed." *City of Philadelphia v. Lead Indus. Ass'n, Inc.*, 994 F.2d 112, 123 (3d Cir. 1993). "Absent some authoritative signal from the legislature or the state courts, [there is] no basis for even considering the pros and cons of innovative theories." *Id.* (brackets and citation omitted). Given the inherent difficulties in predicting how a state supreme court would rule, the Third Circuit counsels "restraint." *Travelers Indem. Co. v. Dammann & Co.*, 594 F.3d 238, 253 (3d Cir. 2010). "[W]here two competing yet sensible interpretations of state law exist, we should opt for the interpretation that restricts liability, rather than expands it, until the Supreme Court of [the state] decides differently." *Id.* (citation and quotation marks omitted). This is a "well-established principle." *Id.*

After the Supreme Court's decision in *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 441-44 (1997) rejecting no-injury medical monitoring claims, "the trend among courts that have taken up the issue has been to reject [medical monitoring] claims." *See, e.g.*, *Dougan*, 2017 WL 7806431, at *6; *see also Berry v. City of Chicago*, 181 N.E.3d 679, 689 (Ill. 2020). And even among states that recognize claims for medical monitoring absent a present physical injury, "the elements a plaintiff must prove to establish a right to medical monitoring differ among the states" as discussed above. *Dhamer*, 183 F.R.D. at 533; *see also In re*

Rezulin, 210 F.R.D. at 74 (denying class certification in part because the states permitting claims for medical monitoring "have adopted widely varying criteria for recovery"). When more than even "a few of the laws of the fifty states differ," class certification is not appropriate—in part because "the district judge would face an impossible task of instructing a jury on the relevant law." *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996).

The differences in state law render a nationwide medical monitoring class impossible—and no further discovery will change that.

C. The Third Circuit has repeatedly found claims for medical monitoring too individualized for class treatment.

The variation in state law is not the only reason to strike the class. Those legal differences "do not exist in a vacuum but rather interact in complex ways with the factual variations" at issue in each individual plaintiff's case. *Jones*, 2019 WL 3554374, at *7. As the Third Circuit explained when denying a class seeking medical monitoring, "the proliferation of disparate factual and legal issues is compounded exponentially" because the states' laws differ. *Georgine*, 83 F.3d at 627; *see also Pilgrim v. Univ. Health Card, LLC*, 660 F.3d 943, 948 (6th Cir. 2011) (citing *Zinser*, 253 F.3d at 1189-90) ("Variations in state law greatly compounded the factual differences between claims, overwhelming any common issues related to causation and making national class resolution impractical."). "Liability in this instance can only be adjudicated on a claimant by claimant basis, applying a wide array of

different and sometimes conflicting rules." *Dhamer*, 183 F.R.D. at 533 (rejecting a medical monitoring class).

The variations in state laws exacerbate the already individualized inquiry to the point where they "swamp any common issues and defeat predominance." *Castano*, 84 F.3d at 741. The Third Circuit has addressed class actions in the context of medical monitoring three times, and on each occasion it rejected the class because the inquiry is too individualized for class treatment.

In *Gates*, plaintiffs sought to certify a medical monitoring class of all individuals who had lived in the vicinity of a manufacturing facility for more than one year. *Gates*, 655 F.3d at 259. Even in this context—much narrower than the *nationwide* class Plaintiffs seek—the district court denied certification under Rule 23(b)(2), and the Third Circuit affirmed, finding that "medical monitoring classes may founder for lack of cohesion" due to the individualized causation and medical necessity inquiries required to prevail on such claims. *Id.* at 264. Specifically, the district court found that individualized inquiries would be required—thus defeating cohesion—on each plaintiff's exposure to constituents at levels above background, each plaintiff's increased risk of a serious latent disease, and the reasonable necessity of monitoring for each plaintiff. *Id.* at 265 (discussing district court's finding of medical monitoring elements insusceptible to class-wide proof). The Third Circuit affirmed on all three counts, holding plaintiffs "cannot show the cohesiveness

required for certification of a Rule 23(b)(2) class" and that the district court thus "did not abuse its discretion in refusing to certify a class that would be able to resolve few if any issues that would materially advance resolution of the underlying claims." *Id.* 265-69.

The *Gates* court likewise dispensed with plaintiffs' arguments for certification under Rule 23(b)(3), noting that "[c]ourts have generally denied certification of medical monitoring classes when individual questions involving causation and damages predominate over (and are more complex than) common issues." *Id.* at 270. Specifically, the court held that individual issues predominate over class issues—defeating predominance under Rule 23(b)(3)—because "inquiries into whether class members were exposed above background levels, whether class members face a significantly increased risk of developing a serious latent disease, and whether a medical monitoring regime is reasonably medically necessary all require considering individual proof of class members' specific characteristics." *Id.*

In *Barnes*, the Third Circuit affirmed decertification of a nationwide medical monitoring class—just what Plaintiffs seek here—against tobacco companies because, "[a]s in *Amchem*, plaintiffs were exposed to different . . . products, for different amounts of time, in different ways, and over different periods." *Barnes*, 161 F.3d at 143 (citation and quotation marks omitted). These individualized issues, as well as the issues of "addiction, causation, the defenses of comparative and

contributory negligence, the need for medical monitoring, and the statute of limitations present too many individual issues to permit certification." *Id.*

Finally, in *Georgine* the Court stated that the injured and uninjured ("futures") plaintiffs "share little in common." 83 F.3d at 626. The Court pointed to the fact that it was "unclear whether they will contract" the disease and that each will "incur different medical expenses because their monitoring and treatment will depend on singular circumstances and individual medical histories." *Id.* The Court explained: "These factual differences translate into significant legal differences. Differences in amount of exposure and nexus between exposure and injury lead to disparate applications of legal rules, including matters of causation, comparative fault, and the types of damages available to each plaintiff." *Id.* at 627.

The Court also concluded that "the proliferation of disparate factual and legal issues is compounded exponentially" as the "states have different rules governing the whole range of issues raised by the plaintiffs' claims" including "viability of futures claims" and the "availability of causes of action for medical monitoring." *Id.* The decision was affirmed by the Supreme Court. *Amchem*, 521 U.S. at 629.

The different medical monitoring laws applied to the different factual circumstances of each class member render class certification of Subclass 1 impossible.

III. This Court Should Strike Subclass 2.

Subclass 2 is also uncertifiable. Subclass 2 is defined as "Qualifying Talc Users (Class Members) who affirmatively consent (Opt-In) to membership in the Class." Compl. ¶ 38. For this subclass, Plaintiffs seek to certify only a Rule 23(b)(3) class for damages. *Id.* ¶ 40(b). This Court should strike Subclass 2 for three independent reasons. Rule 23 does not allow for opt-in classes. *See infra* § III.A. Additionally, similar to medical monitoring, differences in state tort law make class-wide resolution impossible. *See infra* § III.B. And factual differences under *Amchem* further preclude certification. *See infra* § II.C.

A. The subclass should be struck because Rule 23 does not permit opt-in classes.

The language of Rule 23 does not "require members of any class affirmatively to opt-in membership. Nor is such an 'opt in' provision required by due process considerations." *Kern*, 393 F.3d at 124. Indeed, "substantial legal authority supports the view that . . . Congress prohibited 'opt in' provisions by implication." *Id.* Congress amended Rule 23 in 1966, adding the "opt out" requirement, "mandating that members of a class certified under Rule 23(b)(3) be afforded an opportunity to 'request exclusion' from that class." *Id.* But the Advisory Committee on Civil Rules rejected adding an opt-in requirement. *Id.* Accordingly, the Second Circuit explained that it could not "envisage any circumstances when Rule 23 would authorize an 'opt in' class." *Id.* at 128. Other courts have also concluded that "'opt in' provisions are

contrary to Rule 23." *Id.*; *see also Ackal v. Centennial Beauregard Cellular L.L.C.*, 700 F.3d 212, 219 (5th Cir. 2012) (vacating class certification where "Plaintiff ha[d] effectively created an 'opt in' class"); *Clark v. Universal Builders, Inc.,* 501 F.2d 324, 340 (7th Cir. 1974) (holding that "the requirement of an affirmative request for inclusion in the class is contrary to the express language of Rule 23(c)(2)(B)"); *Enter. Wall Paper Mfg. Co. v. Bodman,* 85 F.R.D. 325, 327 (S.D.N.Y. 1980) ("Rule 23(c)(2)(B) calls for a notice that enables prospective members to opt-out, in language strongly suggesting the impropriety of opt-in requirements (i.e. 'the judgment, whether favorable or not, will include all members who do not request exclusion').").[5]

Relying on *Kern*, this Court rejected an opt-in class, finding that an opt-out requirement achieves the purpose of ensuring which individuals wish to be part of the class, so there is no rationale for an opt-in requirement. *Hassine v. Simon's Agency Inc.*, 2021 WL 9990348, at *2 (D.N.J. Dec. 21, 2021) (citing *Kern*, 393 F.3d at 124; *Ackal*, 700 F.3d at 219); *see also, e.g.*, *Maciel v. Bar 20 Dairy, LLC*, 2018

[5] 5 James Wm. Moore, et al., *Moore's Federal Practice* § 23.104[2][a][ii] (3d ed. 2004) ("There is no authority for establishing 'opt-in' classes in which the class members must take action to be included in the class. Indeed, courts that have considered 'opt-in' procedures have rejected them as contrary to Rule 23."); 7B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1787, at 214 (2d ed. 1986) (noting that "the Advisory Committee specifically rejected the notion of requiring absent class members to opt-into the action to secure its benefits" due to this concern) (internal citations omitted).

WL 5291969, at *7 (E.D. Cal. Oct. 23, 2018) ("As a preliminary matter, requiring Rule 23 class members to opt in to a settlement appears, at least arguably, contrary to law."); *Parker v. Asbestos Processing, LLC*, 2015 WL 127930, at *9 (D.S.C. Jan. 8, 2015) ("[T]here appears to be little support for the legitimacy of an 'opt-in' class under Rule 23."). "[R]equiring the individuals affirmatively to request inclusion in the lawsuit would result in freezing out the claims of people—especially small claims held by small people—who for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step." *Kern*, 393 F.3d at 124 (quoting Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I),* 81 Harv. L. Rev. 356, 397 (1967)).

The request for an opt-in class—something that is plainly not allowed by Rule 23—shows that this lawsuit is not a legitimate attempt to seek class certification, but rather a misguided ploy to increase the number of claims in the LLT bankruptcy. This Court should not countenance it. This Court should strike Subclass 2.

B. Differences in state law also prevent certification.

Similar to the medical monitoring clams, differences in state law for the personal injury and derivative claims are not susceptible to class treatment is fatal to certification under Rule 23(b)(3)'s predominance requirement. *See Gates*, 655 F.3d at 270 (holding individual issues predominated medical monitoring and personal

injury claims even when governed by the law of a single state).

The legal standards imposed by the various states simply differ too greatly to raise even common questions, much less the common answers required for certification. *Dukes*, 564 U.S. at 350. In Texas, for example, a plaintiff cannot prove general causation via epidemiological evidence without—at a minimum—providing multiple studies showing a doubling of the risk of a disease based on exposure to the product at issue *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 718 (Tex. 1997). New Mexico's general causation standard is less demanding. *E.g.*, *Acosta v. Shell W. Expl. & Prod. Co.*, 370 P.3d 761, 769-71 (N.M. 2016) (finding animal studies and expert's own "epidemiological study" probative of causation). To prove specific causation, New York requires quantification of a plaintiff's exposure. *Nemeth v. Brenntag N. Am.*, 194 N.E.3d 266, 271 (N.Y. 2022). Louisiana is more lenient. *E.g.*, *Arabie v. CITGO Petroleum Corp.*, 89 So. 3d 307, 322 (La. 2012) (finding causation established despite epidemiology expert's testimony "that he did not know the quantitative level of exposure"). To establish causation, California requires only that exposure to the product at issue was a "substantial factor" in causing a plaintiff's disease. *Bockrath v. Aldrich Chem. Co.*, 980 P.2d 398, 404 (Cal. 1999). Arizona, on the other hand, applies a more rigid "but for" test in toxic tort cases. *See Benshoof v. Nat'l Gypsum Co.*, 978 F.2d 475, 477 (9th Cir. 1992) (applying Arizona law).

The same issues abound for state laws governing so-called "representative" or "derivative" claims, which include, for instance, loss of consortium claims on behalf of both spouses and "family member plaintiffs." Compl. ¶¶ 445-51. But states differ on who is entitled to a loss of consortium claim. *Compare Campos v. Coleman*, 123 A.3d 854, 857 (Conn. 2015) (recognizing loss of consortium claim by child arising from death of parent), *with Harrington v. Brooks Drugs, Inc.*, 808 A.3d 532, 534 (N.H. 2002) (declining to recognize same claim). They differ on whether a loss of consortium claim is derivative or independent (and on the effects of that nebulous distinction). *Compare Steele v. Botticello*, 21 A.3d 1023, 1028 (Me. 2011) (holding release of injured spouse's claim does not defeat non-injured spouse's loss of consortium claim), *with Erickson v. U-Haul Intern.*, 767 N.W.2d 765, 774 (Neb. 2009) (holding non-injured spouse could not recover where claims of injured spouse failed). They even differ on whether the claim is a claim at all, or simply a category of damages recoverable if a plaintiff has proven liability for a different underlying claim. *Compare Martin v. Ohio Cnty. Hosp. Corp.*, 295 S.W.3d 104, 107-08 (Ky. 2009) (recognizing that loss of consortium is statutorily created cause of action), *with Long v. Dugan*, 788 P.2d 1, 2 (Wash. App. 1990) (analyzing loss of consortium as element of damages).

In short, "[t]he states have different rules governing the whole range of issues raised by the plaintiffs' claims." *Georgine*, 83 F.3d at 627. That alone is reason to

strike the class. But as discussed next, those legal differences, again, are also "exponentially magnified" by the factual differences among Plaintiffs' claims, *id.* at 618, and likewise bar certification.

C. Under *Amchem* and its progeny, factual differences among the class foreclose certification as well.

The putative class is overwhelmed by the individualized factual issues inherent in such claims, further exacerbating the failure to meet predominance under Rule 23(b)(3). Because "no amount of discovery or time will allow for plaintiffs to resolve [these] deficiencies," the Court should strike Plaintiffs' class allegations at the outset to prevent the waste of the parties' and the Court's resources litigating an uncertifiable class. *McPeak,* 2014 WL 4388562, at *4.

Decades ago, the Supreme Court considered the propriety of certifying personal injury class actions in a case—like the one at hand—dealing with alleged asbestos exposure. *Amchem*, 521 U.S. at 622-25. The district court certified a class of all persons occupationally exposed to defendants' asbestos products, and all family members of persons exposed to defendants' asbestos products, who had not already filed suit. *Id.* at 605. The Third Circuit reversed certification, and the Supreme Court affirmed, finding the class failed the predominance requirement of Rule 23(b)(3): "Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. . . . Differences in state law . . . compound these disparities." *Id.* at 624

(citing *Georgine*, 83 F.3d at 626-27). Since *Amchem*, no federal appellate court has approved a nationwide product liability class.

Instead, like courts across the country, this Court can and should strike Plaintiffs' class allegations now for failure to meet Rule 23(b)'s predominance requirement. *See, e.g.*, *Elson v. Black*, 56 F.4th 1002, 1006-07 (5th Cir. 2023) (affirming decision striking class allegations for failure to meet predominance standard); *Donelson v. Ameriprise Fin. Servs., Inc.*, 999 F.3d 1080, 1091-94 (8th Cir. 2021) (reversing denial of motion to strike where claims could not survive Rule 23(b)(2) similar cohesion analysis); *Pilgrim*, 660 F.3d at 946-49 (affirming decision striking class allegations on predominance and superiority grounds); *Jones*, 2019 WL 3554374, at *5 (applying *Amchem* to strike class allegations in personal injury litigation).

Indeed, personal injury claims are the hallmark of claims that fail the predominance or cohesiveness requirements of Rule 23(b).[6] For instance, to recover personal injury damages, Plaintiffs must prove, among other things, specific

[6] In addition to the Third Circuit, courts across the country have found class certification to be inappropriate in personal injury and products liability cases. *See, e.g.*, *Steering Comm. v. Exxon Mobil Corp.*, 461 F.3d 598, 605 (5th Cir. 2006); *Modern Holdings, LLC v. Corning, Inc.*, 2018 WL 1546355, at *17 (E.D. Ky. Mar. 29, 2018); *In re Katrina Canal Breaches Consolidated Litig.*, 258 F.R.D. 128, 143 (E.D. La. 2009); *In re Fosomax Prods. Liab. Litig.*, 248 F.R.D. 389, 463 (S.D.N.Y. 2008); *In re Vioxx Prod. Liab. Litig.*, 239 F.R.D. 450, 463 (E.D. La. 2006); *Kohn v. Am. Housing Foundation*, 178 F.R.D. 536, 544 (D. Colo. 1998); *Reilly v. Gould, Inc.*, 965 F. Supp. 588, 606 (M.D. Pa. 1997).

causation. *Hoefling v. U.S. Smokeless Tobacco Co.*, 576 F. Supp. 3d 262, 270 (E.D. Penn. 2021); *see also In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 752 (3d Cir. 1994) ("[T]he personal injury plaintiffs must show that they were exposed to the chemicals released by the defendants, that these chemicals can cause the type of harm they suffered, and that the chemicals in fact did cause them harm."). Even if the causation standards were consistent across states (they are not, *see supra* § III.B), causation is not amenable to class-wide proof:

> Differential diagnosis, or differential etiology, is a standard scientific technique which identifies the cause of a medical problem by eliminating the likely causes until the most probable one is isolated. A reliable differential diagnosis typically is performed after physical examinations, the taking of medical histories, and the review of clinical tests, including laboratory tests, and generally is accomplished by determining the possible causes for the patient's symptoms and then eliminating each of those potential causes until reaching one that cannot be ruled out, or determining which of those that cannot be excluded is the most likely.

Magistrini v. One Hour Martinizing Dry Cleaning, 180 F. Supp. 2d 584, 609 (D.N.J. 2002) (citations and quotation marks omitted). Nor can other required elements of a personal injury claim, such as exposure and the fact of injury (i.e., that each Plaintiff has suffered an injury).

These significant factual differences mean that Subclass 2 fails the predominance inquiry.

IV. The Court Should Strike The Main Class Due To The Legal And Factual Differences Among The Class Members' Claims.

As discussed above, neither a medical monitoring class (Subclass 1) nor a personal injury class (Subclass 2) can be certified due to the variations in state law. And variations in state law are a common basis to strike a class at the pleading stage. The inherent problem with the differences in state law is magnified many times over for the Main Class because it contains *both* medical monitoring claims *and* personal injury claims.

Also as discussed above, these differing laws "do not exist in a vacuum but rather interact in complex ways with the factual variations," *Jones*, 2019 WL 3554374, at *7. The combination of legal differences in medical monitoring law, legal differences in personal injury law, factual differences among medical monitoring class members and factual differences among personal injury class members makes the Main Class facially uncertifiable.

The Court need not entertain years of litigation to determine what is already obvious and what cannot be changed regardless of how long this litigation proceeds: Plaintiffs' claims can never be certified as a class action. Because Plaintiffs' class is facially uncertifiable under either Rule 23(b)(2) or Rule 23(b)(3), the Court should strike Plaintiffs' class allegations now. *See, e.g.*, *Elson*, 56 F.4th at 1006-07; *Donelson*, 999 F.3d at 1091-94; *Pilgrim*, 660 F.3d at 946-49; *Jones*, 2019 WL 3554374, at *5.

CONCLUSION

This Court should strike the class allegations and dismiss the medical monitoring claims.

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Respectfully submitted,

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Appendix A
Examples Of State Supreme Courts or Legislatures Precluding Medical Monitoring Claims Absent Present Physical Injury

- **Alabama:** The court refused to "recognize[] a distinct cause of action for medical monitoring in the absence of a manifest physical injury or illness." *Hinton ex rel. Hinton v. Monsanto Co.*, 813 So. 2d 827, 828 (Ala. 2001).

- **Kentucky:** "[H]aving weighed the few potential benefits against the many almost-certain problems of medical monitoring, we are convinced that this Court has little reason to allow such a remedy without a showing of present physical injury. … Because Appellant has shown no present physical injury, her cause of action under theories of negligence and strict liability have yet to accrue." *Wood v. Wyeth-Ayerst Labs., Div. of Am. Home Prod.*, 82 S.W.3d 849, 859 (Ky. 2002).

- **Louisiana:** "Damages do not include costs for future medical treatment, services, surveillance, or procedures of any kind unless such treatment, services, surveillance, or procedures are directly related to a manifest physical or mental injury or disease." La. Civ. Code Ann. art. 2315 (1998).

- **Illinois:** "Simply pleading a need for medical monitoring prompts the question: Why is medical monitoring needed? Plaintiffs themselves allege in their complaint that the need for medical monitoring is based on "their increased risk of harm." Without an increased risk of future harm, plaintiffs would have no basis to seek medical monitoring. In other words, plaintiffs' allegation that they require "diagnostic medical testing" is simply another way of saying they have been subjected to an increased risk of harm. And, in a negligence action, an increased risk of harm is not an injury." *Berry v. City of Chicago*, 181 N.E.3d 679, 689 (Ill. 2020).

- **Michigan**: "[P]laintiffs' medical monitoring claim is not cognizable under our current law." *Henry v. Dow Chem. Co.*, 473 Mich. 63, 96 (2005).

- **Mississippi:** "[I]n response to the question from the Fifth Circuit as to whether Mississippi recognizes a medical monitoring cause of action without a showing of physical injury this Court has previously refused to recognize such an action and in accordance with Mississippi common law continues to decline to recognize such a

cause of action." *Paz v. Brush Engineered Materials, Inc.*, 949 So. 2d 1, 9 (Miss. 2007).

- **New Jersey:** "Here, it is not disputed that plaintiffs do not allege a personal physical injury. Thus, we conclude that because plaintiffs cannot satisfy the definition of harm to state a product liability claim under the PLA [Product Liability Act], plaintiffs' claim for medical monitoring damages must fail." *Sinclair v. Merck & Co.*, 195 N.J. 51, 64 (2008).

- **New York:** The court ruled "against a judicially-created independent cause of action for medical monitoring." *Caronia v. Philip Morris USA, Inc.*, 22 N.Y.3d 439, 452 (2013).

- **Oregon:** "[N]egligent conduct that results only in a significantly increased risk of future injury that requires medical monitoring does not give rise to a claim for negligence." *Lowe v. Philip Morris USA, Inc.*, 344 Or. 403, 415 (2008).

Appendix B
Examples Of Lower State Courts
Precluding Medical Monitoring Claims Absent Present Physical Injury

- **Connecticut:** "Connecticut tort law should not be expanded to provide a medical monitoring remedy following exposure to asbestos in the absence of an actual, present injury." *Dougan v. Sikorsky Aircraft Corp.*, 2017 WL 7806431, at *7 (Conn. Super. Mar. 28, 2017).

- **North Carolina:** "Clearly, recognition of the increased risk of disease as a present injury, or of the cost of medical monitoring as an element of damages, will present complex policy questions. . . . Accordingly, we decline to create the new causes of action or type of damages urged by Plaintiffs." *Curl v. Am. Multimedia, Inc.*, 187 N.C. App. 649, 657 (2007).

- **Rhode Island:** It is patently unfair to saddle Defendants with the cost of indefinite monitoring considering Murillo does not exhibit any present harm." *Miranda v. Dacruz*, 2009 WL 3515196, at *8 (R.I. Super. Oct. 26, 2009).

- **Virginia:** "Therefore, although the claim for medical monitoring may in fact be a claim for which Plaintiffs have no adequate remedy at law, the Court does not find that it has the authority to fashion that remedy without authorization or guidance from the General Assembly." *In re All Pending Chinese Drywall Cases*, 80 Va. Cir. 69, 2010 WL 7378659, at *10 (2010).

- **Wisconsin**: "[A] plaintiff in Wisconsin must allege actual, present injury in order to state a tort claim. Like the courts in those other states, we recognize that allowing a medical monitoring claim absent present injury would constitute a marked alteration in the common law." *Alsteen v. Wauleco, Inc.*, 335 Wis. 2d 473, 494 (Ct. App. 2011) (citation omitted).

Appendix C
Examples Of Federal Courts Applying State Law Precluding Medical Monitoring Claims Absent Present Physical Injury

- **Hawaii:** "The Court predicts that the Hawai'i Supreme Court would not adopt an independent tort for medical monitoring." *Camp v. Ohana Mil. Communities, LLC,* 2024 WL 3594742, at *6 (D. Haw. July 30, 2024).

- **Georgia:** "This Court does not read Georgia law as permitting the establishment of a medical monitoring fund with respect to persons who have not endured a cognizable tort injury." *Parker v. Brush Wellman, Inc.*, 377 F. Supp. 2d 1290, 1302 (N.D. Ga. 2005), *aff'd sub nom. Parker v. Wellman*, 230 F. App'x 878 (11th Cir. 2007).

- **Iowa:** "Due to Iowa's requirement that negligence claims include an actual injury, this Court concludes that the Iowa Supreme Court, if confronted with the opportunity to recognize a medical monitoring cause of action, would either decline to do so or would require an actual injury. *Pickrell v. Sorin Grp. USA, Inc.*, 293 F. Supp. 3d 865, 868 (S.D. Iowa 2018).

- **Maine:** "I am convinced that the Law Court would not authorize a medical monitoring cause of action, and I am disinclined to do so here." *Higgins v. Huhtamaki, Inc.*, 2022 WL 2274876, at *10 (D. Me. June 23, 2022).

- **Minnesota:** "Given the novelty of the tort of medical monitoring and that the Minnesota Supreme Court has yet to recognize it as an independent theory of recovery, this Court is not inclined at this time to find that such a tort of exists under Minnesota law." *Thompson v. Am. Tobacco Co.*, 189 F.R.D. 544, 552 (D. Minn. 1999).

- **Nebraska:** "Plaintiffs still have not cited any Nebraska authority for the proposition that damages may be awarded for future medical monitoring costs in the absence of a present physical injury. Thus, our recognition of such a cause of action would, in effect, expand substantive liability under Nebraska law. Under the circumstances, it would be both imprudent and improper for us to allow plaintiffs to pursue their medical monitoring claim." *Trimble v. Asarco, Inc.*, 232 F.3d 946,

963 (8th Cir. 2000), *abrogated on other grounds by Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005).

- **Oklahoma: "**Oklahoma law requires plaintiffs to demonstrate an existing disease or physical injury before they can recover the costs of future medical treatment that is deemed medically necessary. Here, the plaintiffs who seek to represent the medical Monitoring Class have disavowed any injury. Thus, Oklahoma law does not support creation of a medical monitoring class." *Cole v. ASARCO Inc.*, 256 F.R.D. 690, 695 (N.D. Okla. 2009) (citation omitted).

- **South Carolina:** "South Carolina has not recognized a cause of action for medical monitoring." *Rosmer v. Pfizer, Inc.*, 2001 WL 34010613, at *5 (D.S.C. Mar. 30, 2001).

- **Tennessee:** "In the absence of Tennessee case law or a statute authorizing this relatively new and controversial type of claim, this Court will not create a new cause of action for Tennessee plaintiffs." *Jones v. Brush Wellman, Inc.*, 2000 WL 33727733, at *8 (N.D. Ohio Sept. 13, 2000).

- **Texas:** "[I]t appears likely that the Texas Supreme Court would follow the recent trend of rejecting medical monitoring as a cause of action." *Norwood v. Raytheon Co.,* 414 F. Supp. 2d 659, 667 (W.D. Tex. 2006).

Appendix D
Examples Of State Supreme Courts Permitting Medical Monitoring Claims Absent Present Physical Injury

- **California:** "Recognition that a defendant's conduct has created the need for future medical monitoring does not create a new tort. It is simply a compensable item of damage when liability is established under traditional tort theories of recovery." *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 1006 (1993).

- **Maryland:** "We agree now with other jurisdictions that recognize that "exposure itself and **76 the concomitant need for medical testing" is the compensable injury for which recovery of damages for medical monitoring is permitted." *Exxon Mobil Corp. v. Albright*, 433 Md. 303, 378 (2013).

- **Missouri:** "Recognizing that a defendant's conduct has created the need for future medical monitoring does not create a new tort. It is simply a compensable item of damage when liability is established under traditional tort theories of recovery." *Meyer ex rel. Coplin v. Fluor Corp*., 220 S.W.3d 712, 717 (Mo. 2007).

- **Nevada:** "[R]ecogniz[ing] that a plaintiff may state a cause of action for negligence with medical monitoring as the remedy without asserting that he or she has suffered a present physical injury." *Sadler v. PacifiCare of Nev*., 130 Nev. 990, 999 (2014).

- **Pennsylvania:** The court listed the "elements to prevail on a common law claim for medical monitoring." *Redland Soccer Club, Inc. v. Dep't of the Army & Dep't of Def. of the U.S.*, 548 Pa. 178, 195-96 (1997).

- **Utah:** The court established an eight-element "test for Utah courts to use in determining whether to award medical monitoring costs." *Hansen v. Mountain Fuel Supply Co*., 858 P.2d 970, 979 (Utah 1993).

- **West Virginia:** "[A] plaintiff asserting a claim for medical monitoring costs is not required to prove present physical harm resulting from tortious exposure to toxic substances." *Bower v. Westinghouse Elec. Corp.*, 206 W. Va. 133 (1999). "[U]nderlying liability must be established based upon a recognized tort—e.g., negligence, strict liability, trespass, intentional conduct, etc." *Id.* at 142.