STATE OF INDIANA	)	IN THE HUNTINGTON SUPERIOR COURT
	) SS:	
COUNTY OF HUNTINGTON	)	CAUSE NO. 35D-01-2006-CT-000338

EDMOND ASHER, *et al.*,	)
	)
Plaintiffs,	)
	)
v.	)
	)
RAYTHEON TECHNOLOGIES CORPORATION f/k/a United Technologies Corporation, LEAR CORPORATION EEDS AND INTERIORS, LLC as successor to United Technologies Automotive, Inc., ANDREWS DAIRY STORE, INC., L.D. WILLIAMS, INC., CP PRODUCT, LLC, as successor to Preferred Technical Group, Inc., and LDW Development, LLC	)
	)
Defendants.	)

DEFENDANT RAYTHEON TECHNOLOGIES CORPORATION'S AMENDED MEMORANDUM IN SUPPORT OF CAUSATION-BASED CASE MANAGEMENT ORDER AND BELLWETHER DISCOVERY AND TRIAL PROCEDURE[1]

Pursuant to Indiana Trial Rule 42(A) and (B), Defendants Raytheon Technologies Corporation (f/k/a United Technologies Corporation), Lear Corporation EEDS and Interiors, and CP Product, LLC (collectively "Raytheon"), by counsel, respectfully move this Court for the entry of a causation-based case management order and bellwether discovery and trial procedure. The bellwether discovery and trial procedure is required to ensure a fair and reasonable discovery and trial structure for the **178 different individual plaintiffs** (not including the Town of Andrews) included in the *Asher*, *Zidar* and *Coffield* cases pending before Special Judge Chad Kukelhan[2].

[1] This amended memorandum corrects minor errors on pages 23 and 24. No other changes have been made.

[2] This motion is filed in connection with all three multiple plaintiff cases pending before Special Judge Kukelhan including the instant case, *Asher, et al v. Raytheon Technologies Corporation, et al.,* 35-D01-2006-CT-000338,

The Asher case alone has 75 plaintiffs, including the Town of Andrews itself, each of which assert distinct and independent personal injury, property damage and/or nuisance claims against Raytheon and the other defendants. Separately, four other cases stemming from the same contamination with similar claims (but greatly varying alleged personal injuries) are pending in state court involving ninety-four (94) plaintiffs, and one case is pending in federal court involving three plaintiffs. As a result, a traditional case management plan in this case (and the others) would create inefficiencies for both the parties and the Court.

Instead, Raytheon proposes that the Court enter (1) an order consolidating the *Asher*, *Zidar*, and *Coffield* cases pending before Special Judge Kukelhan for purposes of discovery only; and (2) an order approving a bellwether case protocol with a causation-based discovery component that provides for selection of bellwether cases in each of the three pending cases for purposes of discovery and trials. Such a structure would streamline the critical issues in each of the three pending cases, promote judicial efficiency and economy, and lead to a quicker resolution, among other benefits.

I. INTRODUCTION.

This case, and two nearly identical cases currently pending in Huntington County courts, total 178 plaintiffs (and the Town of Andrews) who allege a wide variety of claims for trespass, nuisance, negligence, negligent infliction of emotional distress, a claim under Indiana's Environmental Legal Action Statute, and punitive damages related to groundwater contamination in the town of Andrews, Indiana. Those cases are: *Asher, et al. v. Raytheon Technologies Corp., et al.; Coffield, et al. v. Raytheon Technologies Corp., et al.; Zidar, et al. v. Raytheon Technologies*

Zidar, et al. v. Raytheon Technologies Corporation, et al., 35-D01-2105-CT-00303 and *Coffield, et al. v. Raytheon Technologies Corporation, et al*., 35-DO1 – 2105-CT-00032.

Corp., et al.[3] In each of these cases, Plaintiffs allege that they suffered certain injuries as a result of exposure to contamination in Andrews, Indiana emanating from a manufacturing facility (the "Facility") previously owned by one of Raytheon's former subsidiaries, United Technologies Automotive ("UTA"), and a gasoline station owned and operated by defendants Andrews Dairy Store, L.D. Williams, Inc. and LDW Development.

Given the sheer number of total plaintiffs in the three cases, the property damage claims and nuisance claims alleged by all of them, and the wide variety of different and distinct personal injuries alleged by some of them, Raytheon proposes that, after consolidating *Asher*, *Coffield*, and *Zidar* for purposes of discovery only, the Court implement a bellwether discovery and trial structure, as is often used for handling and streamlining mass tort and toxic tort cases involving hundreds (and even thousands) of plaintiffs. This structure would require the parties to meet and confer and select a representative bellwether group of plaintiffs from each case (*Asher*, *Coffield, and Zidar*) ensuring there is variation in the claimed injuries, property damages and geographical locations within the Town of Andrews to maximize the usefulness of the bellwether discovery and trial structure. Ultimately, three separate bellwether trials would take place, one for a plaintiff of each case. At the conclusion of the third trial, the parties would confer upon a schedule for a second wave of individual jury trials.

[3] Including *Asher*, *Coffield*, and *Zidar*, there are eight (8) total pending cases related to the groundwater contamination: *Opal Millman, Eric Powell, and Laury Powell v. United Technologies Corporation, et al.,* Cause No. 1:16-CV-312 in the Northern District of Indiana; *Brown v. Raytheon Technologies Corp., et al.,* 35-D01-2011-CT-00072, and *Harlan v. Raytheon Technologies Corp., et al.*, 35D01-2111-CT-000692 before Special Judge Conrad in Adams County Superior Court; *Fisher v. Raytheon Technologies Corp., et al.,* 35C01-2203-CT-000142 in Huntington Circuit Court; and *Standafer v. Raytheon Technologies Corp., et al.,* 35C01-2205-CT-000321 in Huntington Superior Court. The state court cases stem from a denial of class certification in the *Millman-Powell* case (originally filed as a putative class action) in 2019. *Millman*, 2019 WL 6112559, at *1 (N.D. Ind. Nov. 18, 2019). The putative class members were split up into various state court cases by plaintiffs' counsel to avoid removal under the Class Action Fairness Act (CAFA), 28. U.S.C. § 1332(d)(B).

Additionally, to further maximize efficiency and preserve judicial resources, Raytheon proposes that the case-specific bellwether protocol include a causation-based case management structure that requires the bellwether Plaintiffs to produce admissible evidence supporting their exposure and causation chain of events *first*. In other words, the bellwether plaintiffs will be required to demonstrate that (1) the contaminants at issue in this case have the capability generally to cause each plaintiffs' alleged injuries and (2) that each plaintiff was in contact with those allegedly injury-causing chemicals at exposure, dose and duration levels sufficient to cause the injuries alleged, as opposed to any other causes. Similarly, for the property damage claims, the bellwether plaintiffs would be required to demonstrate actual damage to their homes caused by the Andrews contamination. As the Court knows, each Plaintiff is already obligated to prove those key elements of their claims. But, Raytheon's proposed structure would maximize efficiency by requiring the bellwether plaintiffs make this causal showing first, before any additional resources are expended by the Court and the parties on claims that may ultimately fail because the essential element of causation (for personal injury or property damage) cannot be established.

A bellwether structure with a causation-based discovery component is necessary for the efficient resolution of the varied and distinct claims alleged by the 178 individual plaintiffs in these three cases. The bellwether discovery and trial selection process will allow the parties to evaluate the strength of their claims and defenses, and also possibly facilitate the potential settlement of the remaining claims after the bellwether cases are either disposed of by this Court based on Rule 702 or summary judgment motions, or tried to a jury. A causation-based case management order applicable to the bellwether plaintiffs will assist the parties in assessing and streamlining each claim prior to extensive motion practice and trial. Collectively, these efforts will promote efficient and fair resolution of these matters without consuming the resources of the Court.

II. PROCEDURAL BACKGROUND AND OVERVIEW OF PLAINTIFFS' CLAIMS.

A. The Pending Lawsuits Relating to the Andrews' Contamination.

This action (along with the companion actions discussed below) arises out of existing groundwater contamination in the Town of Andrews, Indiana (the "Town of Andrews") that is alleged to have emanated, in part, from a manufacturing facility located at 303 North Jackson Street in Andrews, Huntington County, Indiana. This facility was at one point owned by United Technologies Automotive, a former subsidiary of Raytheon Technologies Corporation.

Despite Raytheon's ongoing mitigation and monitoring efforts to ensure the continued safety of Andrews' residents, the Andrews contamination has now led to eight separate lawsuits filed by the same counsel. The first is the consolidated action captioned *Opal Millman, Eric Powell, and Laury Powell v. Raytheon Technologies Corporation et al*., 1:16-cv-00312 (the "Millman-Powell Action"). In the *Millman-Powell* Action, Plaintiffs had sought to certify a class, but the court denied the motion for class certification on November 18, 2019. The Millman-Powell case is ongoing, but only with the three named plaintiffs. The individual putative members of the denied class action now constitute the plaintiffs in the state court lawsuits.

1. The *Asher* Lawsuit

On June 19, 2020, Plaintiffs filed this mass action (*Asher*) involving 76 Plaintiffs, including the Town of Andrews, and asserting claims for trespass, nuisance, negligence, negligent infliction of emotional distress, a claim under Indiana's Environmental Legal Action Statute, and punitive damages. Based upon the limited discovery conducted to date in *Asher*, including Plaintiffs serving Responses to Raytheon's Interrogatories, we believe the make-up of the plaintiffs is as follows:

- 74 individual plaintiffs and the Town of Andrews (75 in total)
- 44 individual plaintiffs are current residents of the Town of Andrews and 30 are former residents;

- 68 allege personal injuries of some kind;
- 35 allege property damages in the form of diminution in value;
- 33 allege both personal injuries of some kind and diminution in value
- 4 allege only nuisance damages (no personal injury or diminution in value).

In addition to asserting these claims, the Plaintiff Town of Andrews also previously filed a motion for an emergency preliminary injunction relating to the safety of its drinking water. This Court held three days of live and virtual testimony and issued a 49 page order ultimately denying the motion for an emergency preliminary injunction because the drinking water in the Town was (and always has been) safe. *See* Findings of Fact, Conclusions of Law, and Order Denying Plaintiff's Preliminary Injunction, February 18, 2021.

2. The *Zidar* Lawsuit

Almost a year later, on May 21, 2021, Plaintiffs filed both *Coffield, et al. v. Raytheon Technologies Corp., et al.* and *Zidar, et al. v. Raytheon Technologies Corp., et al.*. Based upon the limited discovery conducted to date in *Zidar*, including Plaintiffs serving Responses to Raytheon's Interrogatories, we believe the make-up of the plaintiffs in *Zidar* is as follows:

- 52 total plaintiffs
- 27 plaintiffs are current residents of the Town of Andrews and 25 are former residents
- 49 allege personal injuries of some kind;
- 25 allege property damages in the form of diminution in value;
- 23 allege both personal injuries of some kind and diminution in value;
- 2 allege only nuisance damages (no personal injury or diminution in value).

3. The *Coffield* Lawsuit

Based upon the limited discovery conducted to date in *Coffield*, including Plaintiffs serving Responses to Raytheon's Interrogatories, we believe the make-up of the plaintiffs in *Coffield* is as follows:

- 52 total plaintiffs
- 35 plaintiffs are current residents of the Town of Andrews and 17 are former residents
- 51 allege personal injuries of some kind;
- 23 allege property damages in the form of diminution in value;
- 23 allege both personal injuries of some kind and diminution in value;

- 1 alleges only nuisance damages (no personal injury or diminution in value).

Other cases have been filed since May 2021, but this motion focuses only on the three actions (*Asher*, *Coffield*, and *Zidar*) currently pending before Special Judge Kukelhan.

From the 178 plaintiffs and the Town of Andrews in *Asher, Coffield,* and *Zidar,* 168 plaintiffs have alleged individual claims for personal injuries, 83 plaintiffs have alleged claims for diminution in property value, 79 plaintiffs allege both personal injury and diminution in value, and 7 plaintiffs allege nuisance damages only (neither a personal injury nor diminution in value).

B. Plaintiffs' Exposure Claims Supporting Personal Injury or Property Damage are Distinct and Different.

In order to recover for injuries as a result of exposure to the contamination, each plaintiff will have to demonstrate the level, dose, intensity and duration of their alleged exposure to TCE, vinyl chloride, other degradation byproducts or benzene at their residence in the Town of Andrews. Some plaintiffs in the three pending cases live directly over the plume, while others live hundreds of yards to a mile or more north, south, east or west of the plume. And, as noted above, some of the plaintiffs don't even live in Andrews, Indiana and haven't for years.

Over the past twenty years, Raytheon has conducted extensive indoor air sampling for "vapor intrusion" within residential and commercial structures in the Town.[4] However, none of the homes in which several plaintiffs are alleged to have resided appear to have been sampled for vapor intrusion (including some for which Plaintiffs have not even provided an address). In addition, some plaintiffs have **never** lived in Andrews at all. *See, e.g. Zidar* Plaintiff Sam Avalos' Response to Defendants' First Set of Interrogatories, pp. 4-5, attached as Exhibit A.

[4] "Vapor Intrusion" occurs when vapors migrate from a subsurface source into an above-ground structure. See https://www.epa.gov/vaporintrusion (last visited October 9, 2018).

For many plaintiffs, no air, vapor, groundwater or sub-soil gas sampling has ever been conducted at or near their residences because they are so far north, south, east or west of the chlorinated solvent and aromatic solvent groundwater plumes. In order to succeed on their personal injury and property damage claims, each of the 178 individual plaintiffs will need to demonstrate routes of exposure, exposure levels, duration of exposure, dose and dose-response to TCE, vinyl chloride, degradation products or benzene while living at these residences. Such a plaintiff-specific expert analysis will be burdensome, costly and time-consuming.

C. Plaintiffs' Have Alleged Complex and Varied Purported Medical Injuries.

In addition to their exposure claims, of the 178 individual Plaintiffs in the *Asher*, *Coffield*, and *Zidar* cases, almost every plaintiff has identified some sort of personal injury or health condition which they allege may be attributed to the contamination. Those injuries, identified in response to Raytheon's discovery requests, vary widely, ranging from "a sinus infection 10 years ago," acid reflux, arthritis, and high cholesterol, to autoimmune disorders and various cancers, such as non-Hodgkin's Lymphoma. Further, as is clear in Plaintiffs' responses to Raytheon's interrogatories, the vast majority of plaintiffs allege more than one health condition or injury which they claim "could" be a result of the contamination. The vast array of injuries alleged complicates the evaluation of Plaintiffs' claims.

For example, *Asher* Plaintiff Raymond Tackett, in his discovery responses, asserts that the following injuries "may" have resulted from exposure to the Andrews contamination: high blood pressure; atrial fibrillation; low heart rate; congestive heart failure; diabetes; neuropathy in his feet; issues with his kidneys and liver; stage three chronic kidney disease; drowsiness; dizziness; Bell's Palsy; nerve issues in hands and feet; a rash on his leg since 1990; sleep apnea; and hearing loss. *See* Raymond Tackett's Response to Raytheon's First Set of Interrogatories, pp. 12-13, attached

as Exhibit B. Therefore, in order for Raymond Tackett to recover for all of his alleged injuries, Plaintiffs would need to prove that Raymond Tackett's purported exposure to TCE, vinyl chloride, degradation products or benzene caused each of his alleged injuries. Extensive fact and expert discovery on all of the above-listed health conditions would be necessary to evaluate the causal connection between each alleged injury and purported exposure to TCE, DCE, VC, and benzene.

Raymond Tackett is *one* plaintiff in the *Asher* case. This extensive, time consuming, and costly fact and expert discovery process would need to be repeated for each and every one of the remaining 170 Plaintiffs alleging personal injuries and/or property damage. Such a prolonged and deliberative process would be inefficient and burdensome to all parties, as well as the Court and take years to accomplish.

A list of just some of the Plaintiffs' other claimed personal injuries underscores the issue. Among the conditions alleged are: autism, facial palsy, kidney disease, breast cancer, cervical cancer, Graves' Disease, Chron's Disease, Hashimoto's disease, medical migraines, prostate cancer, psoriasis, severe respiratory problems, acute myeloid leukemia, multiple myeloma, rheumatoid arthritis, ankylosing spondylitis, Non-Hodgkin's lymphoma, cirrhosis, head, neck and throat cancer, heart defect, Raynaud's Syndrome, ovarian cancer, and Parkinson's Disease. With such a variety of injuries, a traditional case management protocol would take many years to execute in these cases.

And, that's just the personal injury claims for the **119 plaintiffs** in the three pending cases. In addition to those personal injury claims, **82 plaintiffs** from the three cases claim that, as a result of the contamination, their properties have been reduced in value. Much like the personal injury evaluation, these claims will require an individualized, property by property assessment with extensive fact and expert testimony, through which plaintiffs will have to prove, among other

things, that (1) the properties at issue were in fact damaged/reduced in value; and (2) that the Andrews contamination caused such damages. Accordingly, in order to facilitate a feasible and efficient resolution of these claims, a bellwether, causation-based approach is necessary.

III. PLAINTIFFS HAVE THE BURDEN OF PROOF ON THEIR CLAIMS FOR PERSONAL INJURY AND PROPERTY DAMAGE.

As the Court is well aware, Plaintiffs have the burden of proof on their claims for personal injury and property damage. For the personal injury claims, the inquiry will largely focus on general and specific causation. For the property damage claims, the inquiry will focus on proving actual damage to plaintiffs' properties. Both of these sets of questions will require a very individualized approach to each plaintiff. Plaintiffs also have the burden of proving the admissibility of any expert testimony under Indiana Rule 702 by a preponderance of the evidence. *Burnett v. State*, 815 N.E.2d 201, 206 (Ind. Ct. App. 2004).

Although the claims all stem from the same two contamination plumes, the plumes involve different chemicals and byproducts and the claimed injury or injuries of each plaintiff (both personal injury and property damage) necessarily demands an individualized and complex evaluation that will require significant individualized discovery for each of the 178 plaintiffs. Indeed, that is primarily why plaintiffs' putative class action in the *Millman-Powell* federal court case did not succeed. *See Millman v. United Techs. Corp.*, No. 1:16-CV-312-HAB, 2019 WL 6112559, at *1 (N.D. Ind. Nov. 18, 2019). As explained in detail below, both the personal injury and the property damage inquiry will demand extensive resources and time for each plaintiff, if this case, along with *Zidar* and *Coffield*, proceeds on a traditional case management plan.

A. Plaintiffs Must Establish Both General and Specific Causation to Prove Personal Injuries in a Chemical Exposure Case in Indiana.

In a chemical exposure, toxic tort case like this one, "liability" must be established by proving both general and specific causation. *Higgins v. Koch Dev. Corp*., 794 F.3d 697, 701 (7th Cir. 2015) ("Under Indiana law, proving negligence in a case like this one requires proof of both general and specific (individual) causation."); *Jones v. United States*, No. 2:17-cv-00451-WTL-DLP, 2019 WL 2647953, at *6 (S.D. Ind. June 27, 2019). The process of proving general and specific causation in a toxic tort case is extensive and time consuming.

General causation means "whether a particular agent *can* cause a particular illness." *Aurand v. Norfolk So. Ry. Co.* 802, F. Supp. 2d 950, 953 (N.D. Ind. 2011). Specific causation means "whether the substance or chemical *in fact* caused plaintiff's medical condition." *Id*. General causation does *not* mean "[w]hether a substance poses a health risk in the abstract." *Hurd v. Monsanto Co.,* 164 F.R.D. 234, 240 (S.D. Ind. 1995); *see also Hanford Nuclear Reservation Litig*., 292 F.3d 1124, 1130 (9th Cir. 2002) ("plaintiffs would have to show exposure to more than de minimis emissions to establish general causation").

1. General Causation: Plaintiffs must show that the contaminants at issue are *capable* of causing the varied injuries and medical conditions at issue through reliable and admissible expert testimony.

Proof of general causation requires plaintiffs "to present evidence that the dosage of the substance [each of the Plaintiffs] were exposed to is *capable* of causing the harms suffered" in humans.[5] *C.W. v. Textron, Inc.,* No. 3:10 CV 87, 2014 WL 4979211, at *3 (N.D. Ind. Oct. 3, 2014). In other words, "[s]cientific knowledge of the harmful level of exposure to a chemical, plus knowledge that the plaintiff was exposed to such quantities, are *minimal facts* necessary to sustain

[5] If Plaintiffs cannot establish general causation, that alone obviates the claim. Thus, there would be no reason to address specific causation. *Raynor v. Merrell Pharms. Inc.*, 104 F.3d 1371, 1376 (D.C. Cir. 1997).

the plaintiffs' burden in a toxic tort case." *Allen v. Pa. Eng'g Corp*., 102 F.3d 194, 199 (5th Cir. 1996) (emphasis added); s*ee also McManaway v. KBR, Inc*., 852 F.3d 444, 451-455 (5th Cir. 2017).

To properly understand the relationship between any substance and harmful toxic effects, one must understand three critical issues: (1) the dose at issue, (2) the period of exposure (dose rate), and (3) the dose level at which the chemical becomes capable of causing the alleged medical outcome (dose-response). This is the basic and fundamental tenet of all toxicology: the dose makes the poison. *Cunningham v. Masterwear, Inc*., No. 1:04-cv-1616-JDT-WTL, 2007 WL 1164832, at *5 (S.D. Ind. Apr. 19, 2007).

Accordingly, at a minimum, general causation will require Plaintiffs to present (1) evidence of the exposure and dose levels of TCE, vinyl chloride, and benzene which humans could come in contact with through the soil, air, or groundwater of their properties during the time Plaintiffs were allegedly exposed to such materials (*i.e.,* a lower bound threshold and upper limit); (2) epidemiological evidence that exposure to the lower bound threshold of TCE, vinyl chloride, and benzene was sufficient to cause Plaintiffs' injuries and illnesses in humans; (*i.e.*, these injuries and illnesses are capable of occurring at the minimum exposure); and (3) epidemiological evidence linking the injuries and illnesses to the dose range of TCE, vinyl chloride, and benzene. *Federal Judicial Center, The Reference Manual on Scientific Evidence* (3d ed. 2011) (the "Reference Manual"), at 597-606; *Hanford*, 292 F.3d at 1130-1137; *Amorgianos v. Nat'l Railroad Passenger Corp*., 137 F. Supp. 2d 147, 163 (E.D.N.Y. 2001), *aff'd*, 303 F.3d 256 (2d Cir. 2002).

The reason a traditional case management order is not suitable here is obvious. The general causation expert evidence that must be proffered by Plaintiffs to survive a challenge under Indiana Rule 702 will be difference for each of the personal injuries alleged in the three cases. For

example, the evidentiary predicate required to prove the varied personal injuries and medical conditions alleged by plaintiffs will be different for proving high blood pressure, atrial fibrillation, low heart rate, congestive heart failure, diabetes, neuropathy in the feet, chronic kidney disease, drowsiness, dizziness, Bell's Palsy, autism, facial palsy, kidney disease, breast cancer, cervical cancer, Graves' Disease, Chron's Disease, Hashimoto's disease, medical migraines, prostate cancer, psoriasis, severe respiratory problems, acute myeloid leukemia, multiple myeloma, rheumatoid arthritis, ankylosing spondylitis, Non-Hodgkin's lymphoma, cirrhosis, head, neck and throat cancer, heart defect, Raynaud's Syndrome, ovarian cancer, and Parkinson's Disease, among others.

2. Specific Causation: Plaintiffs must also prove that the chemicals did, in fact, cause the alleged injuries and illnesses at issue through reliable and admissible expert testimony.

Establishing specific causation requires that Plaintiffs present reliable, admissible expert evidence relating to the exposure, dose, and dose-response linking the alleged exposure – here TCE, vinyl chloride, and benzene – to the medical and toxicological endpoint at issue.

In analyzing the admissibility of expert opinions in chemical-exposure cases, Indiana courts condition the admissibility of expert testimony on that expert's compliance with the generally accepted methodology for determining toxicological cause and effect. Specifically, experts must prove, "using techniques subject to objective, independent validation," that "actual level[s] of exposure[s]" to the chemicals at issue were present at levels that are "known to cause the kind of harm" they claim they suffered. *Mitchell v. Gencorp Inc.*, 165 F.3d 778 (10th Cir. 1999).

The Indiana Court of Appeals has expounded on the principles of exposure and dose:

> [W]hen an expert witness testifies in a chemical exposure case that the exposure has caused a particular condition because the plaintiff was exposed and later experienced symptoms, without having analyzed the level, concentration or duration of the exposure to the

> chemicals in question, and without sufficiently accounting for the possibility of alternative causes, the expert's opinion is insufficient to establish causation because it is based primarily on the existence of a temporal relationship between the exposure and the condition and amounts to subjective belief and unsupported speculation.

Outlaw v. Erbrich Prods. Co., 777 N.E.2d 14, 29 (Ind. Ct. App. 2002).

In addition to exposure evidence, Plaintiffs' experts must produce evidence of the dose or concentration actually taken in by the individual. Only establishing the mere existence or presence of the chemical in the environment is insufficient. *See Hannan v. Pest Control Servs., Inc.*, 734 N.E.2d 674, 680 (Ind. Ct. App. 2000) (exclusion of specific causation testimony as unreliable and speculative where expert failed to analyze the levels of exposure, duration, dose, or concentration of chemical plaintiff received). This component stems from the central tenet of toxicology that "the dose makes the poison; this implies that all chemical agents are harmful – it is only a question of dose." *Reference Manual* at 636; *see also Wintz v. Northrop Corp.,* 110 F.3d 110 F.3d 508, 513 (7th Cir. 1996) ("The expert should offer an opinion as to whether the dose to which the plaintiff was exposed is sufficient to cause the disease."); *Hannan*, 734 N.E.2d at 682-83 ("excluding plaintiffs' expert because his "diagnosis of a causal connection between the pesticide application and the symptoms alleged by the plaintiffs was devoid of any analysis of the exposure levels or the dose of the pesticides received by the plaintiffs…).

Plaintiffs' experts must also assess dose-response by analyzing the medical and scientific literature or other scientific sources to determine whether a relationship exists between the alleged harms and the exposure levels and doses of the particular chemicals in question. *Cavallo v. Star Enterprise*, 892 F. Supp. 756, 764 (E.D. Va. 1995); *Reference Manual* at 406. This correlation between dosage and the response it engenders in a living organism is called the "dose-response" relationship. *Reference Manual* at 433.

Next, Plaintiffs' experts must rule out alternative causes of the alleged disease or illness by conducting a "differential diagnosis." This "is of particular significance in chemical exposure cases." *Triplett v. USX Corp.*, 893 N.E.2d 1107, 1118 (Ind. Ct. App. 2008). "Such 'differential diagnosis' testing is important in toxic tort cases so that other causes may be negated." *Hannan*, 734 N.E.2d at 682; *see also Pardue v. Purdue Farms, Inc*. 925 N.E.2d 482, 487 (Ind. Ct. App. 2010) (holding plaintiffs failed to establish causation due, in part, to plaintiffs' experts' failure to include a sufficient differential diagnosis to rule out all possible alternative causes of alleged injuries); *Bickel v. Pfizer, Inc*., 431 F. Supp. 2d 918, 923-24 (N.D. Ind. 2006) (…the expert must "rule in" the suspected cause as well as "rule out" other possible causes. . .). Plaintiffs, at minimum, must rule out alternative causes of Plaintiffs' injuries and illnesses, and other sources of chemical exposures, to even reach the threshold of establishing specific causation. A reliable differential diagnosis is critical; particularly where a plaintiff's experts primarily rely on a temporal connection to show causation. *See Triplett*, 893 N.E.2d at 1120.

B. Plaintiffs Must Demonstrate Actual Damage to Establish Diminution in Property Values.

1. Measure of Damages.

Many of the 178 plaintiffs in the three pending cases also allege some form of property damage caused by the alleged contamination.

a. Damages for Injury to Real Property.

As for Plaintiffs' property damage claims, Plaintiffs must prove, with admissible evidence, that their home values have *actually* declined and that the decline was caused by the contamination. Generally, the measure of damages in a case of injury to real property (including trespass) depends upon whether the damages are temporary or permanent. *Sheek v. Mark A. Morin Logging, Inc.*, 993 N.E.2d 280, 288 (Ind. [Ct.] App. 2013). The injury is permanent when the cost of restoration

exceeds the market value of the land before the injury. For a permanent injury, the measure of damages is the difference between the fair market value of the property before and after the injury, based upon a theory that economic waste occurs when the cost of restoration exceeds the economic benefit. If the injury is temporary, then the measure of damages is the cost of repair. *Dow v. Hurst*, 146 N.E.3d 990, 995 (Ind. Ct. App.), *transfer denied,* 152 N.E.3d 584 (Ind. 2020).

b. Damages for Interference with Use and Enjoyment.

As to trespass actions, if a plaintiff proves that there was injury to the property as a result of trespass, the plaintiff is entitled to compensatory damages. *Hawke v. Maus*, 226 N.E.2d 713, 717 (1967). If plaintiffs cannot prove that an injury resulted from the trespass, they are entitled only to nominal damages. *Id*. Further:

> The measure of damages in a trespass action is such sum as will compensate the person injured for the loss sustained. Thus, a contention of a defendant, in an unlawful trespass action, that damages should be apportioned to only parts of the land used by such defendant is untenable, where the defendant deprives the plaintiffs from enjoyment, use and possession of their entire tract.

28 Ind. Law Encyc. Trespass § 20

Specifically as to nuisance actions, Indiana courts have held that when the property of a claimant is subject to an ongoing loss that is permanent in nature, the claimant is entitled to damages equal to the depreciation in the value of the property resulting from the nuisance. *Town of Rome City v. King*, 450 N.E.2d 72, 80 (Ind. Ct. App. 1983). However, "when a nuisance is **abatable**, damages for interference with the use of property may only be awarded upon the basis of a decrease in the fair rental value of the property adversely affected." *Blair v. Anderson*, 570 N.E.2d 1337, 1341 (Ind. Ct. App. 1991); *see also Rust v. Guinn*, 429 N.E.2d 299, 303 (Ind. Ct.

App. 1981) (the general measure of damages for an abatable private nuisance is the loss of use of the land, as measured by the diminution in rental value, proximately caused by the nuisance).

2. Plaintiffs Must Prove Their Property Damage Claims Through Reliable and Admissible Expert Witness Testimony.

In order to recover on their property damage claims, Plaintiffs must rely on experts to prove damages related to lost property value as a result of the contamination. For example, *Asher* Plaintiff John Harshbarger, alleges diminution in value due to the contamination. As of this filing, however, Mr. Harshbarger but has not produced anything to support his assertion other than his subjective belief, despite Raytheon's discovery requests on this issue. His discovery responses to Raytheon's Interrogatories confirmed that he and his wife have lived at 617 N. Jackson Street (a property not located over the existing groundwater plume) since 1978, and that he claims property damages as a result of the Andrews contamination. See John Harshbarger's Responses to Raytheon's Interrogatories, pp. 4-5, 9-10, attached as Exhibit C. But, the responses are devoid of anything to back this claim up, except his personal belief that his home is worth less now than it was worth before. Specifically, Mr. Harshbarger states that "…he imagines the home may be worth around $140,000 to $150,000 with the contamination. But he believes the home would be worth around $250,000 if not for the presence of contamination." *Id*. at pp. 9-10. Mr. Harshbarger did not produce any appraisal or similar document supporting this allegation. He is not a real estate professional or appraiser by profession who may reliably assess a property's value. Mr. Harshbarger simply stated what he believed his home is worth, based on nothing but his personal perspective. That assessment of value, alone, is not permissible under Indiana law.

While a landowner's subjective belief that the value of his home *decreased* is not, by itself, admissible, a landowner is competent to testify to the *value* of his or her land, "provided that he can offer a factual basis for his valuation; with that proviso, it is regarded as a matter within his

personal knowledge." *Cunningham v. Masterwear Corp.*, 569 F.3d 673, 675-76 (7th Cir. 2009); *Court View Centre, L.L.C. v. Witt*, 753 N.E.2d 75, 82 (Ind. Ct. App. 2001). In *Cunningham*, a case alleging that a dry cleaning business's improper storage of chemicals caused contamination and forced the neighboring landowner to sell at a decreased price, the Seventh Circuit affirmed dismissal of plaintiffs' property damage claim because, while the plaintiff had knowledge of his property's value at various times, he was not competent to testify that contamination caused the depreciation. The landowner testified as to the loss based, in part, upon the prices at which he listed and sold the building. Even if the property owner had personal knowledge of the value at "time x and at time x + y, he had no basis for testifying to what caused its value to fall," because that would necessarily depend on prices of comparable properties. The real question is how much the property could have been sold for had it not been for the contamination, which required a real estate agent or appraiser to testify to the effect of the contamination. *Id.* at 676*; see also Witt*, 753 N.E.2d at 82.

Again, Mr. Harshbarger is just one example plaintiff among 178. To prove their property damage claims, all 83 plaintiffs claiming property damage will have to do much more than state their imagination or belief. That will result in significant, individualized, fact and expert discovery. Like the personal injury cases, a traditional case management process for these claims would take many years and significant resources to complete.

IV. A BELLWETHER DISCOVERY AND TRIAL PROTOCOL IS WELL SUITED FOR LARGE, MULTIPLE PLAINTIFF CHEMICAL EXPOSURE AND PROPERTY DAMAGE CASES.

Plaintiffs' counsel advised Defendants' counsel that they intend to try *one* of the plaintiffs' claims pending in a related action in an expedited manner. The intent to try one case individually is consistent with Indiana Trial Rules 42(A) and (B), which allow for the consolidation and

separation of trials where it would promote convenience, efficiency, and economy of the court's and the parties' resources. However, litigating one case at a time from start to finish would be both burdensome to the Court and the parties, and would be an unreasonably prolonged process, potentially lasting decades. To combat this burden, Raytheon respectfully requests the Court, first, consolidate the *Asher*, *Coffield*, and *Zidar* actions for discovery purposes, only. And second, that the Court enter, as part of its case management order, a bellwether trial case management structure for the three cases, allowing for a subset of 28 cases (with variation in claimed personal injuries and geographical property locations) to proceed to trial first (with each of the 28 cases being tried individually if they survive motion practice).

A. Bellwether Discovery and Trials Offer Many Advantages and Are Frequently Used to Manage Mass Tort and Large Multiple Plaintiff Chemical Exposure and Property Damage Cases.

Bellwether trials typically involve the selection of a small group of representative plaintiffs out of a much larger group. These plaintiffs' cases are tried first, and serve as a test case for how legal and factual issues may ultimately be resolved across the entire spectrum of cases. *See generally* 156 Am. Jur. Trials 219, § 1 (hereinafter "Am. Jur.").

The use of bellwether trials has been recognized as offering many advantages and efficiencies:

> Bellwether trials allow for an overview, or perspective, of the litigation based on the representative verdicts and settlements reached. This may enable the parties and the court to evaluate the nature and strength of the claims, whether the claims can be fairly litigated on a group basis, and what range of values the cases may have.
>
> In mass tort litigation there are often numerous trials taking place over several years. Bellwether trials reduce the burden of these trials in a number of ways. First, bellwether trials allow both parties to determine, at the outset, their respective positions. Second, in the context of a bellwether trial, the court can assess experts on specific legal issues common to other litigants, and then extend the jury's conclusion to other cases. Third, there is an argument for efficiency of both time and cost. The MDL proceeding is made more efficient through this frugal use of

> the tools of litigation. Lastly, the importance of the result of a bellwether trial forces the attorneys on both sides to streamline their knowledge and put their best foot forward, presumably resulting in a more fair and thoroughly reasoned outcome.

Am. Jur. § 2.

Fundamentally, bellwether trials promote the "fair and equitable" resolution of mass actions. Am. Jur. § 1. They also tend to ultimately save time and litigation costs. *Id.* at § 5. For example, the parties would not need to expend resources conducting fact and expert discovery for many or most of the Plaintiffs unless and until those Plaintiffs' cases become slated for trial.

In addition, the use of bellwether trials may promote a timely settlement or resolution of the cases as a whole. As the Fifth Circuit recognized more than two decades ago, "[t]he notion that the trial of some members of a large group of claimants may provide a basis for enhancing prospects of settlement or for resolving common issues or claims is a sound one that has achieved general acceptance by both bench and bar." *In re Chevron U.S.A., Inc*., 109 F.3d 1016, 1019 (5th Cir. 1997); see also Am. Jur. § 1 n.1. Verdicts in the initial bellwether cases would allow the parties to better value the remaining cases, and allow the relative strengths and weaknesses of these remaining cases to be identified. Initial bellwether trials "are likely to yield information that will assist the parties in generating an aggregate settlement." Am. Jur. § 7.

Bellwether cases also allow future trials to be streamlined. Rulings and verdicts in earlier cases would not necessarily be binding on subsequent trials in the way that class members are bound by rulings on class representatives' claims. See Am. Jur. § 9, 38. But, such initial rulings and verdicts would provide a useful framework for the Court and the parties to handle recurring legal issues like discovery disputes, motions to exclude experts or defenses like the statute of limitations, and would give the parties a sense of how the Court (or a jury) would handle legal or

factual questions that already have been resolved in an earlier case. Similarly, any ruling on appeal could be assessed prospectively for future cases yet to be tried.

Bellwether trials are a common case management tool in mass tort cases, including multiple-plaintiff chemical exposure and property damage cases. *See, e.g., Morgan v. Ford Motor Co*., No. 06-1080JAP, 2007 WL 1456154, at *6 (D.N.J. May 17, 2007) (implementing bellwether case management structure in suit against contributors to landfill); *Ball v. Bayard Pump & Tank Co*., 67 A.3d 759 (Pa. 2013) (affirming trial court's implementation of bellwether structure to try four of 45 plaintiffs' claims involving gasoline vapor intrusion); *see also In re E. I. Du Pont De Nemours*, 204 F. Supp. 3d 962, 965 (S.D. Ohio 2016) (discussing bellwether structure utilized in case involving 3,500 plaintiffs).

Ball, 67 A.3d at 770–71, provides a particularly useful example of how bellwether trials can be conducted in multiple-plaintiff chemical exposure and property damage cases like the ones at issue here. In that case, a total of 45 plaintiffs sued a gas station and related entities (eight defendants in all), alleging that gasoline vapors from an underground leak had entered their homes, causing property damages and physical illnesses. *Id.* at 761.

The Supreme Court of Pennsylvania found the trial court properly acted within its discretion by severing the cases of four bellwether plaintiffs for trial first, prior to the resolution of the remaining 41 plaintiffs' claims. The trial court explained, and the Supreme Court agreed, that utilizing the bellwether approach would: "a. foster the avoidance of prejudice by the presentation of lesser numbers of parties and witnesses; b. promote efficiency and judicial economy; c. foster a lessening of expenses to all parties; d. enhance the prospects of a possible settlement; and e. foster a more orderly presentation of evidence to the jury." *Id*. at 762.

B. Raytheon's Proposed Bellwether Case Management Structure is the Most Efficient and Manageable Way to Proceed With Discovery, Motion Practice, and, If Necessary, To Try The Individual Bellwether Cases.

From a practical standpoint, it would be virtually impossible to try the claims of all 74 Plaintiffs in *Asher*, all 52 Plaintiffs in *Coffield* and all 52 Plaintiffs in *Zidar*, individually or in some kind of combined trial. In addition to the fact that it would unreasonably burden the Court's resources, a jury could not possibly be expected to keep track of the voluminous amount of factual and expert evidence that such a combined trial would entail. And, to even reach the point that the cases were ready for trial would require resolution of potentially hundreds of simultaneous motions to exclude experts, motions in limine, and motions for summary judgment.

Moreover, it would be impossible to try each of the 178 Plaintiffs' claims individually. There exists overlap in some factual and expert evidence that would be unnecessarily repeated if seriatim individual trials were conducted. For example, details pertaining to vapor intrusion, such as the home's crawl space, VOC testing, construction details, and other property-specific facts should not have to be repeatedly established in numerous separate trials.

The pragmatic solution is to divide up the entire groups of Plaintiffs into smaller, more manageable subsets. The most reasonable basis to subdivide the Plaintiffs is based upon the three pending cases, using geographical zones of each Plaintiff's property addresses, because expert evidence regarding exposure to toxic chemicals will be generated based primarily upon each property zone's location and proximity to the groundwater plume near the former UTA Facility and the gas station. Structuring the cases this way would allow the parties to conduct expert discovery—the single costliest aspect of the case—in an efficient and cost-effective manner.

Property zone-specific individual trials, after discovery and motion practice, would allow the presentation of evidence on both liability and damages, including whether contamination from

the former UTA Facility reached the properties located within the geographical zone at issue, whether and to what extent those living in the properties were exposed to that contamination, and the extent of damages experienced by those living in the selected properties. Additionally, ensuring a variety of claimed personal injuries within each geographical area would further advance efficiency.

C. Defendants' Proposed Bellwether Discovery and Trial Structure.

For the above reasons, a bellwether, property zone-based case management structure should be utilized to efficiently manage discovery and trial. A total of 28 plaintiffs, from three different property zones, will be selected as follows:

Three zones will be established within the town of Andrews. The first zone will cover the plume[6] in the geographic center of the Town. The second zone will be the areas of the Town north of the plume. The third and final zone will be the areas of the Town south of the plume.

Given the variation in injury complexity among plaintiffs' injuries, Raytheon proposes that each party choose at least three plaintiffs per zone group. The parties agree to select plaintiffs with a variety of claimed personal injuries to maximize the usefulness of the bellwether trials.

Plaintiffs and Defendants will confer with the intent to select 28 plaintiffs from the pool of proposed claims that are representative of the claims of each lawsuit. From *Coffield,* the parties will select three plaintiffs who assert personal injury claims, three plaintiffs who assert claims for diminution in property value, and two plaintiffs who do not assert either a personal injury or property value loss. Similarly, from *Zidar*, the parties will select three plaintiffs who assert personal injury claims, three plaintiffs who assert claims for diminution in property value, and two

[6] There are two plumes in Andrews, a chlorinated VOC plume and a petroleum plume. This refers to the chlorinated VOC plume.

plaintiffs who do not assert either a personal injury or property value loss. Finally, from *Asher,* the parties will select four plaintiffs who assert personal injury claims, four plaintiffs who assert claims for diminution in property value, and four plaintiffs who do no assert either a personal injury or property value loss. If the parties cannot agree upon the claims to be heard during the bellwether trials, the Court will select the claims.

28 Bellwether Plaintiffs between *Asher (12), Coffield (8),* and *Zidar (8)*		
Asher 12 plaintiffs	**Coffield** 8 plaintiffs	**Zidar** 8 plaintiffs
4 plaintiffs with personal injury and property damage claims	3 plaintiffs with personal injury and property damage claims	3 plaintiffs with personal injury and property damage claims
4 plaintiffs with only property damage claims	3 plaintiffs with only property damage claims	3 plaintiffs with only property damage claims
4 plaintiffs with only nuisance / trespass claims (not asserting personal injury or property damage)	2 plaintiffs with only nuisance / trespass claims (not asserting personal injury or property damage	2 plaintiffs with only nuisance / trespass claims (not asserting personal injury or property damage

Following the selection of the 28 bellwether claims, each of the bellwether claimants must provide an affidavit or affidavits from qualified expert witnesses setting forth the bases for their causation and damages as set forth in each Plaintiffs' Responses to Raytheon's Interrogatories. If plaintiffs fail to timely submit the required affidavits, or if the claimant cannot produce a preliminary expert affidavit demonstrating that their identified injuries or property damage were caused by the identified toxic chemicals, his or her claim shall be dismissed with prejudice.

For the surviving bellwether claims, following receipt of the causation-based affidavits described above, the parties will engage in further general causation and specific causation fact and expert discovery related only to the bellwether claimants. All other discovery related to the

plaintiffs in *Asher*, *Coffield* and *Zidar* will be stayed until completion of discovery and the individual bellwether trials.

Next, the parties will file all dispositive and Ind. R. Evid. 702 motions regarding the general and specific causation or liability related to the 28 bellwether claims. Following this Court's rulings on the dispositive and Rule 702 motions, the individual jury trials for the bellwether claims will begin starting with one plaintiff each in *Asher*, *Zidar* and *Coffield*. After completion of the individual bellwether trials, the parties will meet and confer regarding a scheduling order for discovery and individual trials for the remaining bellwether claims.

Raytheon believes this structure will allow for the most efficient use of the Court's resources and will facilitate resolution of the remaining issues and claims.

V. A CAUSATION-BASED CASE MANAGEMENT ORDER IS NECESSARY AND APPROPRIATE BASED ON THE COMPLEXITY OF THE ISSUES AND INDIANA'S CAUSATION STANDARDS IN A MULTIPLE PLAINTIFF CHEMICAL EXPOSURE AND PROPERTY DAMAGE CASE.

A. Authority to Enter a Causation-Based Case Management Order.

The Indiana Trial Rules give the court discretion and flexibility in pre-trial matters to simplify issues in a manner that aids the disposition of the action. *See, e.g.,* Ind. Tr. R. 16(a). In addition, courts in Indiana have wide discretion in dealing with discovery related issues. *Vernon v. Kroger Co.*, 712 N.E.2d 976, 982 (Ind. 1999); *Prime Mortg. USA, Inc. v. Nichols*, 885 N.E.2d 628, 648 (Ind. Ct. App. 2008). For this reason, courts have a variety of tools at their disposal to help maintain control of the proceedings and increase efficiencies, including the ability to issue case management orders.

A causation-based case management order is a type of pre-discovery management order originating in a New Jersey case, *Lore v. Lone Pine*, No. L-33606-85, 1986 WL 637507 (N.J. Super. Ct. Law Div. Nov. 18, 1986). In that case, similar to the case at hand, the plaintiffs claimed

personal injury stemming from alleged substance contamination to their property and the local water supply. *Id*. The case posed burdensome, problematic management issues, including the need to retain expensive, specialized experts well versed in the science behind the alleged contamination. *Id*. To ease the burden on the parties and streamline the litigation, the court issued a case management order that required plaintiffs to make a prima facie showing that they had been injured by the defendants *before* requiring the defendants to engage in complex, burdensome discovery. *Id*. Since then, these types of orders have frequently been used by state and federal courts in the multiple-plaintiff chemical exposure and property damage cases arena, where cases carry significant, complex, and burdensome discovery responsibilities for defendants. *See e.g*., *Avila v. Willits Envtl. Remediation Tr.*, 633 F.3d 828, 833 (9th Cir. 2011); *Modern Holdings, LLC v. Corning Inc.*, No. CIV. 13-405-GFVT, 2015 WL 1481443, at *1 (E.D. Ky. Mar. 31, 2015); *McManaway v. KBR, Inc.*, 265 F.R.D. 384, 389 (S.D. Ind. 2009).

Causation-based case management orders are flexible and their demands are often tailored to the immediate case's needs. Commonly, however, a plaintiff is required to identify the chemical and amount of exposure (if any) as well as evidence supporting the causation theory linking defendant's chemicals to the injury in question, generally through expert affidavits. *See e.g., Steering Comm. v. Exxon Mobil Corp.*, 461 F.3d 598, 604 n. 2 (5th Cir. 2006); *McManaway,* 265 F.R.D. at 385; *Cottle v. Superior Court*, 3 Cal. App. 4th 1367, 1373 (1992).

Indiana courts have utilized causation-based case management orders in similar circumstances. In *Hannan v. Pest Control Services, Inc*., the trial court entered a case management order that required plaintiffs to "make a prima facie showing of medical causation before proceeding with other discovery in the case." Revised Case Management Order at 2 n.1, *Hannan v. Pest Control Services*, No. 49D02-9802-CT173 (Ind. Super. Aug. 11, 1997) (Attached to Motion

as Exhibit D). *Hannan* involved three plaintiffs who sued a pesticide company for injuries, emotional distress, and property damage allegedly arising from exposure to pesticides applied at the residence. *Hannan v. Pest Control Servs., Inc.*, 734 N.E.2d 674 (Ind. Ct. App. 2000). The alleged injuries included neurological, neuropsychological, cognitive impairment, brain damage and chemical hypersensitivity. The trial court entered a causation-based case management order requiring plaintiffs' experts to establish causation prior to extensive liability discovery.

The trial court's case management order and plaintiffs' inability to adequately comply eventually led to the exclusion of plaintiffs' experts as inadmissible under Indiana Rule 702. *See* Findings of Fact, Conclusions of Law and Judgment, *Hannan v. Pest Control Services*, No. 49D02-9802-CT173; 1999 WL 34997275 (Ind. Super. July 16, 1999) (attached as Exhibit E). Because of the exclusion, the trial court determined that plaintiffs had failed to establish medical causation for the injuries claimed, which was "an essential element of each cause of action that was pled." *Hannan,* 734 N.E.2d at 678. The trial court further held, and the Court of Appeals agreed, that the failure to submit competent and admissible evidence on the issue of causation entitled the defendant to summary judgment. *Id*.

Causation-based case management orders have also been addressed in federal cases applying Indiana law. For example, a similar order was granted in in *McManaway v. KBR, Inc.*, a case in which Indiana national guardsmen and private civilians were allegedly exposed to the toxic chemical sodium dischromate during their work in Iraq. *McManaway*, 265 F.R.D. at 385 (applying Indiana law). The plaintiffs in *McManaway* had filed a lawsuit against the contractor for personal injuries, and the court granted a causation-based case management order at the request of defendants "to promote efficiency in the resolution of the case." *Id*. at 388 – 89. The court required plaintiffs to provide expert disclosures in three specific areas of inquiry: exposure, injury, and

causation. The order further requested that these experts identify the evidence in the form of medical findings or test results that established medical causation between plaintiffs' alleged injuries and defendant's actions. *Id*.

Much like in the aforementioned cases, the *Asher*, *Zidar*, and *Coffield* actions present the types of difficulties that a causation-based case management order is meant to resolve. The various injuries alleged by the Plaintiffs, the types of chemicals to which those injuries have been linked in varying strengths, and the exposure pathways by which Plaintiffs allege they were injured by different chemicals from Defendants raises complex issues, challenging legal questions, and unusual proof problems. The issues central to the case will require extensive amounts of medical and scientific data, as well as the participation of competent, qualified experts.

Additionally, because the Plaintiffs will have to come forward with causation evidence in order to prove their claims, the entry of a causation-based case management order (limited to the bellwether plaintiffs) will not place any additional burdens on the Plaintiffs. These types of orders usually require "information which plaintiffs should have had before filing their claims. . . ." *Acuna v. Brown & Root Inc.*, 200 F.3d 335, 340 (5th Cir. 2000). On the other hand, such an order will provide much needed relief to the parties and this Court in the form of streamlining and judicial efficiency toward quick resolution.

B. Causation-Based Case Management Orders are a Proven and Effective Tool for Overcoming Complex Discovery Challenges in Mass Tort and Large, Multiple Plaintiff Chemical Exposure and Property Damage Cases.

The purpose behind causation-based case management orders is to assist Courts in effectively and efficiently managing complex causation issues, and the potential burdens on defendants and the Courts that arise in complex litigation. *McManaway,* 265 F.R.D. at 385. As a result, courts have recognized three main benefits of these orders.

First, the sheer number of parties involved presents extraordinary challenges to the logistics of case management. A causation-based case management order allows courts to "identify and cull potentially frivolous claims in complex cases involving numerous claimants" before expending substantial resources. *Baker v. Chevron USA, Inc.*, No. 105-CV-227, 2007 WL 315346, at *1 (S.D. Ohio Jan. 30, 2007); *see also Acuna*, 200 F.3d at 340. *See, e.g.*, *Claar v. Burlington Northern R.R. Co.*, 29 F.3d 499, 500 (9th Cir. 1994) (noting, in a case involving dozens of employees, that a causation-based case management order was issued "out of concern that plaintiffs might not be able to demonstrate a causal connection between their workplace chemical exposure and their injuries"). And, causation-based case management structures have been ordered in cases with fewer plaintiffs than the 178 at issue in the three present actions. *See, e.g. Claar*, 29 F.3d 499 (27 plaintiffs); *McManaway v. KNR, Inc.,* 265 F.R.D. 384 (S.D. Ind. 2009) (161 plaintiffs).

Second, courts have highlighted the efficiency component of such an order because the order allows the streamlining of complex issues by the Court and avoiding burdensome discovery efforts spent on meritless questions. *In re Vioxx Prod. Liab. Litig.*, 557 F. Supp. 2d 741, 743 (E.D. La. 2008), *aff'd,* 388 F. App'x 391 (5th Cir. 2010). For example, *Asher* Plaintiff Vickie Baker alleges she suffered from a sinus infection 10 years ago, which may have been a result of the contamination. See Vickie Baker's Response to Raytheon's Interrogatories, pp. 11-12, attached as Exhibit F. Without a causation-based case management order, the parties would be required to take extensive fact and expert discovery to determine the link between VOC exposure and sinus infections, an extremely common ailment typically not associated with VOC exposure.[7,8] The

[7] 28.9 million adults (11.6% of the adult population) in the United States were diagnosed with sinus infections in 2018 alone. *See* https://www.cdc.gov/nchs/fastats/sinuses.htm

[8] Sinus infections happen when fluid builds up in the air-filled pockets in the face (sinuses). This fluid buildup allows germs to grow. Viruses cause most sinus infections, but bacteria can cause some sinus infections. *See* *https://www.cdc.gov/antibiotic-use/sinus-*

parties' time and resources would be better spent investigating other, more significant injuries which may actually have a connection to VOCs.

Third, this case management method promotes the speedy and efficient resolution of actions. For example, causation-based case management orders promote settlement by identifying potentially meritorious claims swiftly, instead of after a long, expensive, and elaborate discovery period. *In re Asbestos Prod. Liab. Litig. (No. VI)*, No. MDL 875, 2012 WL 10929213, at *1, n.2 (E.D. Pa. Mar. 12, 2012). These three key benefits apply to the cases at hand, and demonstrate that a causation-based case management order would boost efficiency, cut costs, and preserve judicial legitimacy by avoiding frivolous claims.

C. Entry of a Causation-Based Case Management Order is Proper in This Case Because the Plaintiffs' Exposure, Causation, Personal Injury and Property Damage Claims Will be Difficult to Prove.

Courts across jurisdictions have identified several key factors when evaluating whether a particular proceeding merits a causation-based case management order. The main factors identified are: (1) the type of injury alleged and its cause; (2) any particular case management needs; (3) the availability of other procedural devices; (4) external agency decisions (if any); and (5) the posture of the litigation. *Adkisson v. Jacobs Eng'g Grp., Inc.*, No. 3:13-CV-505-TAV-HBG, 2016 WL 4079531, at *3 (E.D. Tenn. July 29, 2016). These factors demonstrate the appropriateness of the entry of a causation-based case management order in the cases at hand.

1. The Types of Injuries Alleged and Complex Medical Causation Issues are the Right Fit for a Causation-Based Case Management Order.

Plaintiffs' wide variety of alleged injuries, ranging from heart defects to leukemia to autoimmune disorders, are precisely the types of injury allegations that weighs in favor of a

infection.html#:~:text=Sinus%20infections%20happen%20when%20fluid,can%20cause%20some%20sinus%20infections.

causation-based case management order, as the complex and varied issues of causation attendant to these conditions will make this case "the classic expansive, time-consuming, and highly expert dependent case that gave birth to the *Lone Pine* case management method." *Abner v. Hercules, Inc.*, No. 2:14CV63-KS-MTP, 2014 WL 5817542, at *5 (S.D. Miss. Nov. 10, 2014).

Plaintiffs allege a litany of injuries and conditions, varying in severity and onset, ranging from a sinus infection 10 years ago to cancer. For Plaintiffs to demonstrate that Defendants are liable for even one of the dozens of injuries alleged, they will have to prove more than mere responsibility for contamination somewhere in the Town of Andrews. This leads to the complicated question of medical causation, discussed above.

Courts reviewing causation-based motions have generally noted that orders are appropriate in instances where "the plaintiff's ability to sustain their burden of proof was found to be questionable." *Roth v. Cabot Oil & Gas Corp.*, 287 F.R.D. 293, 297 (M.D. Pa. 2012) (citing *Avila*, 633 F.3d 828). Here, again, Plaintiffs will be required to establish both general and specific causation to prevail in this case. More specifically, at some point during this litigation, they will have to produce reliable, admissible evidence linking exposure to TCE, vinyl chloride, degradation products, or benzene with each alleged injury to prove general and specific causation. A causation-based case management order will simply shift the timing of the production of these proofs in a manner that will increase efficiency and promote prompt and just resolution.

Finally, the varied nature of each of the Plaintiffs' claims compels a causation-based case management structure. These litigation matters are complicated by the fact that some plaintiffs assert personal injury, property damage, and nuisance/trespass claims, some assert only personal injury or property damage claims, some assert claims for negligent infliction of emotional distress as their only injury, and some assert neither an injury nor property value loss, but rather a claim for nuisance and trespass, only. The causation-based case management structure will allow the

parties to clearly identify each plaintiff's exact claims and facilitate resolution. In the alternative, the refined claims will distill issues and assist the parties in preparing for trial.

2. The Posture of this Litigation Demonstrates that a Causation-Based Case Management Order is Appropriate.

In each of the cases, the Plaintiffs have served Responses to Defendant Raytheon's Interrogatories. Some of the plaintiffs have also produced documents in connection with their claims. A bellwether protocol with a causation-based case management order makes sense at this stage in the litigation to preserve as many resources of the Court and the parties as possible, before more extensive fact discovery (like depositions of each plaintiff, their family members, and their employers, to name a few) and expert discovery begins. The bellwether trial process will focus these efforts on a small cross-section of plaintiffs, and the causation-based order will maximize the efficient resolution of those claims.

The positive effects of these procedural tools at an early stage are many (again, they promote efficiency, streamlining, save costs, and advance settlement discussions, among other things). Moreover, despite the fact that these actions are at an early stage, the events leading to their filing significant developments and history over the past several years through the various related litigation matters, such as the *Millman-Powell* action. Courts repeatedly have relied on this rationale to justify causation-based case management orders in the early stages of litigation. *See e.g., Abner v. Hercules, Inc.*, No. 2:14CV63-KS-MTP, 2014 WL 5817542, at *3 (S.D. Miss. Nov. 10, 2014) (granting causation-based case management order in a recently filed lawsuit where significant history, information and documentation existed from another case surrounding similar contamination allegations as the present case).

3. External Agency Action.

The "agency" factor asks whether any particular agency has issued a decision related to the merits of a plaintiff's claims. *Adkisson v. Jacobs Eng'g Grp., Inc.*, 2016 WL 4079531, at *3 (describing the factor as "the existence of agency decisions that may bear on the case").

Since 1994, IDEM has had oversight of environmental activities and remediation at the former Raytheon Facility connected to these cases. Testing regarding environmental conditions at the former Facility has been conducted for decades now, and that information has been submitted to IDEM for review and consideration. IDEM continues to have direct oversight of clean-up at the former Facility, as well at the Andrews Dairy Store. This is not a case, therefore, in which conditions at the Facility and Dairy Store have gone un-checked. In fact, Defendants continue to this day to conduct extensive remediation activities in the town of Andrews.

D. The Proposed Causation-Based Structure for Case Management Order.

When litigation includes personal injury claims like this one, causation-based management orders typically require the plaintiff to make a prima facie showing of exposure and causation through submission of an affidavit from an expert, as well as other evidence, that identifies: (1) the precise illness suffered by the plaintiff; (2) the identity, exposure level and dose of each chemical to which the plaintiff was exposed; (3) the dates and duration of exposure to each alleged chemical; (4) the pathway or route of the alleged chemical exposure to the plaintiff; and (5) the evidence that supports the expert's opinion that the exposure to the chemical was the cause of the plaintiff's illness. *See, e.g., Acuna*, 200 F.3d at 338. A plaintiff who fails to make the required

showing with sufficient evidence of exposure, causation and injury is subject to having his claims dismissed. *Id*. at 340.

The causation-based case management order Defendants propose here similarly requires that the bellwether plaintiffs present sufficient evidence to establish a prima facie case of exposure to the contaminants allegedly released by Defendants. It would also require the bellwether plaintiffs to present competent medical evidence that each of their alleged injuries or conditions were caused by exposure to those substances. Therefore, the Defendants respectfully request that the Court grant the Defendants' motion for entry of a bellwether protocol with a causation-based case management component, in the form of the proposed order tendered with this motion.

VI. CONCLUSION.

For the reasons set forth above, Raytheon requests this Court (1) consolidate the *Asher*, *Coffield*, and *Zidar* actions for discovery only, (2) enter a property-zone based bellwether protocol adopting a causation-based case management plan for the efficient resolution of plaintiffs' claims and (3) and include a schedule for fact and expert discovery, Rule 702 motions to exclude and summary judgment.

Dated: July 26, 2022

Respectfully submitted,

/s/ Joseph G. Eaton

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 26th day of July, 2022 a copy of the foregoing was filed electronically with the Clerk of Court and served on the following parties via the court's electronic filing system and US Mail:

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