

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

DORIS BANKS, CANDY CAPORALE,
BRUCE DAVIS, GENE SULLENBERGER,
and CHRISTINE WOOTTEN, for themselves
and on behalf of all others similarly situated,

Plaintiffs,

v.

C.A. No. 19-1672-MN-JLH

E.I. DU PONT DE NEMOURS AND
COMPANY, THE 3M COMPANY (f/k/a
Minnesota Mining and Manufacturing, Co.),
ATOTECH USA, LLC, MACDERMID, INC.,
PROCINO PLATING, INC., a/k/a PROCINO
ENTERPRISES, a/k/a PROCINO, and BLADES
DEVELOPMENT LLC,

Defendants.

REPORT AND RECOMMENDATION

In this proposed class action, Plaintiffs allege that Defendants caused the groundwater in Blades, Delaware to be contaminated with perfluorinated compounds, resulting in harm to the class members' health and property. Plaintiffs' First Amended Complaint ("FAC") (D.I. 44) alleges that two electroplating facilities in Blades, Delaware (which are now owned by Defendants Procino Plating, Inc. ("Procino") and Blades Development LLC ("Blades Development")) used products containing perfluorinated chemicals ("PFCs")—including perfluorooctane sulfonate ("PFOS") and perfluorooctanoic acid ("PFOA")—manufactured and sold by Defendants Atotech USA, LLC ("Atotech") and MacDermid, Inc. ("MacDermid"). The FAC further alleges that Defendants E.I. DuPont de Nemours and Company ("DuPont") and The 3M Company ("3M") manufactured and sold PFOS and PFOA used to produce PFC-containing products sold by Atotech

and MacDermid, including products used in the Blades electroplating facilities. The FAC alleges various causes of action.

Defendant Procino answered the FAC, but the other five Defendants filed separate motions to dismiss for failure to state a claim. (D.I. 106; D.I. 109; D.I. 110; D.I. 113; D.I. 115.) For the reasons set forth below, I recommend that each of the motions be GRANTED-IN-PART and DENIED-IN-PART. Plaintiffs should be granted leave to amend their complaint within 21 days to address the deficiencies.

I. BACKGROUND

The following facts are taken from the allegations in the FAC, which I assume to be true for purposes of resolving the motions to dismiss.¹

PFOA and PFOS are human-made chemicals that belong to a class of fluorine-containing compounds called perfluorinated chemicals (“PFCs”). (FAC ¶¶ 4, 7, 13.) PFOA and PFOS are used in the production of commercial and consumer nonstick cookware and in the hard chrome plating process. (*Id.* ¶ 7.)

Defendant 3M began producing PFOA in 1947 and PFOS no later than 1948. (*Id.* ¶ 5.) It ceased making both around 2000. (*Id.* ¶ 14.) Other companies have also manufactured PFOA and PFOS in the United States, including Defendant DuPont, which began using PFOA in the 1950s and began manufacturing PFOA when 3M stopped, around 2000. (*Id.* ¶¶ 6, 15, 16.)

PFOA and PFOS are extremely stable and can remain in the environment for years. (*Id.* ¶¶ 7–9, 146–49.) Studies show associations between human exposure to PFOA and PFOS and negative health effects, which can arise months or years after exposure. (*Id.* ¶¶ 8–12, 150–61.)

¹ *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

According to Plaintiffs, 3M and DuPont have been aware of potential health risks associated with PFOA and PFOS exposure for decades. (*Id.* ¶¶ 26–100.) 3M and DuPont have also known for decades that PFOA and PFOS can leach into and move rapidly in groundwater and that they can contaminate drinking water supplies. (*Id.* ¶¶ 101–19.)²

Defendant Atotech is a surface-finishing solutions provider that manufactured and sold products containing PFOA and PFOS, including Fumetrol-140, a fume suppressant. (*Id.* ¶ 17.) MacDermid is a chemical products provider that manufactured and sold products containing PFOA and PFOS, including Barrett Snap, a wetting agent. (*Id.* ¶ 18.) Atotech and MacDermid knew about studies, reports, and publications demonstrating that PFOA and PFOS were associated with health risks. (*Id.* ¶ 95.) The FAC alleges, “[u]pon information and belief,” that “PFOS and PFOA manufactured by 3M and DuPont was used in the production of mist and fume suppressants, fluorosurfactants, wetting agents and emulsifiers containing PFOA and PFOS . . . , including Fumetrol-140, Barrett Snap, and cadmium fluoroborate[, a PFOS-containing compound used in the electroplating process].” (*Id.* ¶¶ 19, 126, 134.)

Defendant Procino began operating an electroplating business in Blades, Delaware in 1985.³ (*Id.* ¶¶ 7, 122.) Procino used cadmium fluoroborate in its operations. (*Id.* ¶ 126.) In 2007, the Environmental Protection Agency (EPA) and the Delaware Department of Natural Resources and Environmental Control (DNREC) conducted an inspection of Procino and discovered that it

² The FAC contains pages of factual allegations purportedly demonstrating 3M’s and DuPont’s knowledge of the health risks and environmental contamination associated with PFOA and PFOS. The precise details of those factual allegations are not particularly relevant to the parties’ arguments, so I do not recite them here.

³ “Electroplating is a process of depositing a layer of a metal such as chromium, nickel, or copper onto another material for abrasion and wear resistance, corrosion protection, and decoration.” (FAC ¶ 120.)

was also storing and using Fumetrol-140 and Barrett Snap. (*Id.* ¶ 127.) In 2013, Procino pleaded guilty to illegally storing waste and violating the Clean Water Act from December 2007 to May 2010. (*Id.* ¶ 128.)

Peninsula Plating operated a plating facility in Blades, Delaware from 1993 to 1995. (*Id.* ¶¶ 7, 130.) Peninsula used cadmium fluoroborate in its electroplating operations. (*Id.* ¶ 131.) Peninsula had a “history of noncompliance with industrial waste discharge permits” and was subject to an EPA removal action in 1995. (*Id.* ¶ 130–31.)

The FAC alleges, “[u]pon information and belief,” that Procino and Peninsula used PFC-containing products that were manufactured, distributed and supplied by Defendants 3M, DuPont, Atotech, and MacDermid. (*Id.* ¶ 134.) In 2007, Defendant Blades Development acquired the property formerly used by Peninsula. (*Id.* ¶ 132.)

The Procino facility and the former Peninsula facility are close to the Nanticoke River and municipal and private water supply wells for Blades. (*Id.* ¶ 136.) In 2018, EPA and DNREC tested the water supply in Blades and discovered that the private and public wells contained concentrations of PFCs that exceeded the EPA’s Health Advisory Level. Samples collected from Procino wells contained PFOS concentrations more than 40 times the Health Advisory Level. (*Id.* ¶ 142.) On February 8, 2018, DNREC and the Delaware Division of Public Health began warning the residents of Blades not to drink from the town’s municipal wells. (*Id.* ¶ 143.)

The FAC alleges, “[u]pon information and belief,” that “Peninsula and Procino stored, used, disposed and discharged PFOA and PFOS into the ground, water, groundwater, and environment.” (*Id.* ¶ 135.) The FAC further alleges, “[u]pon information and belief,” that PFOA and PFOS have been released and continue to be released from the property that housed the

Peninsula facility, due to Peninsula's handling, use, storage and disposal of PFC-containing products, and that Blades Development has failed to contain or prevent the release. (*Id.* ¶ 132.)

Plaintiffs are residents of Blades. (*Id.* ¶¶ 182–86.) Plaintiffs have been “exposed to elevated levels of PFCs and they have bioaccumulated in [Plaintiffs'] blood.” (*Id.*) Plaintiffs also allege that PFCs have entered their real property. (*Id.*) Plaintiffs allege that they have suffered, or are at increased risk of suffering, from adverse health effects caused by PFC exposure. (*Id.*)

II. PROCEDURAL HISTORY

Plaintiffs propose to represent a class comprising the approximately 1,600 residents of Blades, as well as individuals outside of Blades that receive their drinking water from private wells that were contaminated with PFOA and PFOS from the Procino and Peninsula facilities. (*Id.* ¶ 145.)

Plaintiffs filed their original complaint on May 17, 2019, in Delaware Superior Court. *Banks v. E.I. DuPont de Nemours and Company, et al.*, No. S19C-05-024 ESB. Defendant 3M removed to this Court on September 6, 2019. (D.I. 1.) Plaintiffs filed a First Amended Complaint on February 7, 2020. (D.I. 44.) The FAC contains eight counts:

- Count I: negligence against Defendant Procino (*id.* ¶¶ 195–210);
- Count II: negligence against Defendants 3M, DuPont, Atotech, and MacDermid (*id.* ¶¶ 211–33);
- Count III: medical monitoring against all Defendants (*id.* ¶¶ 234–40);
- Count IV: breach of implied warranty against Defendants 3M, DuPont, Atotech, and MacDermid (*id.* ¶¶ 241–45);
- Count V: trespass against Defendants Procino and Blades Development (*id.* ¶¶ 246–60);
- Count VI: private nuisance against Defendants Procino and Blades Development (*id.* ¶¶ 261–67);

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