

protocol on an emergency basis. This crisis—which the University could have avoided by maintaining the dorms as it knew it should—meant students did not receive the value of their dorm rooms, and instead received degraded living quarters, a disrupted college experience, and were exposed to dangerous mold, which caused many health problems.

At Foster, McNutt, and Teter dorms, residents were exposed to dangerous mold (the “Moldy Dorms Class”) and the University subjected them to disruptive, but ineffective, mold remediation protocols. These students were deprived of access to their rooms entirely for periods of time, with many residents forced to permanently give up their rooms and to live and sleep in common areas in other dorms. At McNutt, Foster, and Teter, the University determined that the mold problems were and continue to be so extensive that no students will be housed there next year.¹ The heating ventilation and air conditioning (“HVAC”) systems at all three dorms—a cause of the mold²— all must be replaced.

Other dorms, such as Ashton, Wright, Collins, and Hillcrest, were not remediated on a widespread basis. Instead, because of mold issues, the University placed noisy high-efficiency particulate air filters (“HEPA machines”) in residents’ dorm rooms and required residents to run the HEPA machines on their highest setting 24-hours a day. The HEPA machines took up residents’ limited floor space while generating constant heat and noise, interfering with the residents’ use and enjoyment of the rooms (the “Noise-Polluted Dorms Class”).

At Forest and Eigenmann dorms, the University converted residents’ common areas into emergency living quarters for displaced students, denying the Forest and Eigenmann residents of

¹ Lilly St. Angelo, *Foster and McNutt Quads To Close For Renovations Next Year*, Indiana Daily Student, Dec. 7, 2018, <https://www.idsnews.com/article/2018/12/foster-and-mcnutt-quads-to-close-for-renovations-next-year>; *Residence Hall Renovation Plans Accelerated On Bloomington Campus*, Indiana University Press Release, Dec. 7, 2018, <https://news.iu.edu/stories/2018/12/iu/releases/07-residence-hall-renovation-plans-accelerated.html>.

² *IU Buildings: Remediation Updates*, Indiana University, <https://buildings.iu.edu/teter.html> (last visited May 30, 2019) (“the building structure and HVAC systems in all three of these buildings are the same”).

their shared social common spaces and creating overcrowded conditions as the shared facilities were used by a disproportionate number of residents (the “Overcrowded Dorms Class”).

As the University itself has repeatedly acknowledged, the damages caused to students by the 2018–2019 Mold Crisis extend beyond mold-related ailments and substandard living conditions; these health and housing problems have undermined the residents’ entire college experience, in breach of the University’s fundamental obligations to them. In fact, the “mission” of the University’s Division of Residential Programs and Services (RPS) is to provide “a residential experience which best meets the educational and developmental goals of our residents outside the classroom, enabling them to succeed inside the classroom,” and RPS promises that “we will provide and maintain facilities that are . . . environmentally healthy and clean.”³

The residents in the proposed Classes share common claims for damages against the University as set forth in Counts 1, 2, 9, 10, and 11 of the pending complaint that should be certified for trial as to liability and damages under Indiana Trial Rules 23(A) and 23(B)(3) (collectively, the “Damages Classes”), and share issues relating to the tort claims set forth in Counts 3–8 that should be certified for liability purposes under Indiana Trial Rule 23(A) and 23(C) (the “Tort Issues Class”).

PROPOSED CLASSES

I. The Damages Classes

The Court should certify the following plaintiff classes under Trial Rules 23(A) and 23(B)(3) for trial as to liability and damages as to the claims raised in Counts 1, 2, 9, 10, and 11:

Moldy Dorms Class: All residents of Foster, McNutt, and Teter dorms during the 2018–2019 school year.

Class Representative: Madeleine O’Connell

³ *Mission Statement*, Indiana University, <https://www.rps.indiana.edu/about/index.html> (last visited May 30, 2019).

Noise-Polluted Dorms Class: All residents of Ashton, Wright, Collins, and Hillcrest dorms during the 2018–2019 school year.

Class Representative: Etienne Najman

Overcrowded Dorms Class: All residents of Forest and Eigenmann dorms during the 2018–2019 school year.

Class Representative: Marley Muhlada

II. The Tort Issues Class

In addition, the Court should certify the Moldy Dorms Class under Trial Rules 23(A) and 23(C)(4) for the determination as to the following basic issues relating to liability:

- (1) Whether the University owed a duty not to expose members of the Moldy Dorms Class to the mold conditions that existed in their dorms during the 2018–2019 school year, including whether the University knew of the hazardous conditions and mold related problems in the dorms;
- (2) Whether the University breached that duty by housing them in those dorms, including the duty to truthfully inform the students of the hazardous conditions and mold related problems; and
- (3) Whether exposure to the hazardous conditions in the dorms generally causes the types of adverse health conditions experienced by the members of the Moldy Dorms Class.

Class Representative: Madeleine O’Connell

FACTS

I. The University for years ignored the worsening mold conditions in its dorms.

The University has been aware of the serious mold conditions in its dorms for over twenty years. In 2005, the University’s School of Public and Environmental Affairs issued a comprehensive report entitled *Mold on the Indiana University Bloomington Campus: A Review of Conditions, Procedures and Impacts* (the “2005 IU Mold Report”). The 2005 IU Mold Report explains that the University “has an acknowledged mold problem” and that “the University does

not seem to have an encompassing strategy to address the current problems and how to prevent future problems.” Am. Compl., Ex. 1 at 1.

The 2005 IU Mold Report reveals that the University did not take the mold problems seriously. *See, e.g., id.* at 47. It warned that “mold issues are not a major concern within RPS. It was estimated that less than 1% of the department’s budget [was] associated with [remediating] mold-related problems.” *Id.* at 25. In addition, the section of the report on training states that “the Physical Plant staff have the attitude that mold growth is not a serious problem.” *Id.* at 52.

The 2005 IU Mold Report not only identified the serious threat of mold problems at the Bloomington campus but also expressed concern about deferred maintenance leading to escalated mold problems and even predicted that the ongoing problem would result in the very liability that is the subject of this class action lawsuit. *Id.* at 40 (“[D]elayed investment in major repair and renovation has the potential to increase health problems and property damage, and therefore liability.”). Although the “goal” of the 2005 IU Mold Report was to identify mold problems on campus and provide recommendations to address these issues, *id.* at 1, the University chose to do nothing and allowed the problem to continue developing for nearly two more decades, until it inevitably developed into an unmanageable crisis. *See* Ex. 1, at IU0055207.

Perhaps most distressing, the 2005 IU Mold Report recognized the financial incentives for the University to defer mold remediation in the dormitories and to allow the students living in those dorms to suffer the harms and to incur the damages that are the subject of this action:

Student health care costs are borne entirely by students, either through their use of the IUB Health Center or other health care services. Additionally, the IUB Health Center is a self-supporting auxiliary unit, which relies on student fees and charges for service for their revenue generation. Therefore, **an additional incentive exists for delayed renovation and repair investments, since expenses related to**

decreased student health due [sic] not accrue to any academic or non-academic unit.

Am. Compl., Ex. 1 at 41 (emphasis added). In other words, the 2005 IU Mold Report recognized that it was economically advantageous for the University to allow students to bear the costs of mold-related illnesses rather than for the University to bear the expense of repairing the moldy dorms. *See id.*

In recent years, the University finally began to address the mold problem, but it did not do enough to effectively remedy that problem. The University initiated limited remediation efforts when mold was identified in Foster and Teter in 2015 and 2016. Ex. 2, at IU0140245. During the 2016–2017 school year, the University again faced widespread mold problems, at which time a Mechanical Electrical and Plumbing consultant for the University determined that the HVAC system used in Foster, Teter, and McNutt was the common cause of mold problems in the buildings and needed to be replaced. Ex. 3.

These HVAC systems, installed in each room in Teter, McNutt, and Foster “weren’t designed to remove humidity” and thus caused the mold growth that plagued the dormitories.⁴ The University has known for years that these HVAC systems caused moisture and mold problem in the dorms.⁵

For example, Dan Derheimer, the Environmental Manager of the Indiana University Bloomington campus, was involved in mold testing in 2016. Ex. 4, at IU0024865. Between

⁴ See Michael Reschke, *To Address Mold, IU Will Renovate Foster, McNutt This Summer*, Herald-Times Online (Dec. 7, 2018), https://www.hoosiertimes.com/herald_times_online/news/iu/to-address-mold-iu-will-renovate-foster-mcnutt-this-summer/article_372337ca-0d90-51f7-986d-2a3a5c3f14df.html.

⁵ Michael Reschke, *Judge Rules IU Must Preserve Evidence of Mold for Lawsuit*, Herald-Times Online (Nov. 21, 2018), https://www.hoosiertimes.com/herald_times_online/news/iu/judge-rules-iu-must-preserve-evidence-of-mold-for-lawsuit/article_30fe1381-a25a-5fa9-a4f1-3dfb161dd621.html (“Old heating and cooling units, installed in the 1980s, were blamed for the mold [in 2016].”).

October 2016 and March 2017, the University implemented some type of “remediation solution,” which obviously was insufficient. Ex. 5, at IU0046748.

After the 2018–2019 Mold Crisis erupted, Mr. Derheimer noted: “We saw this happen two years ago at McNutt and Teter and Foster, so [we] have a bit of experience with the dorms and dealing with students and parents.” Ex. 4, at IU0024866. Media reports in those earlier years also reported on widespread mold conditions at Teter, along with a statement by Mr. Derheimer that the University’s “goal is to have no mold next summer.” Am. Compl., Ex. 2.

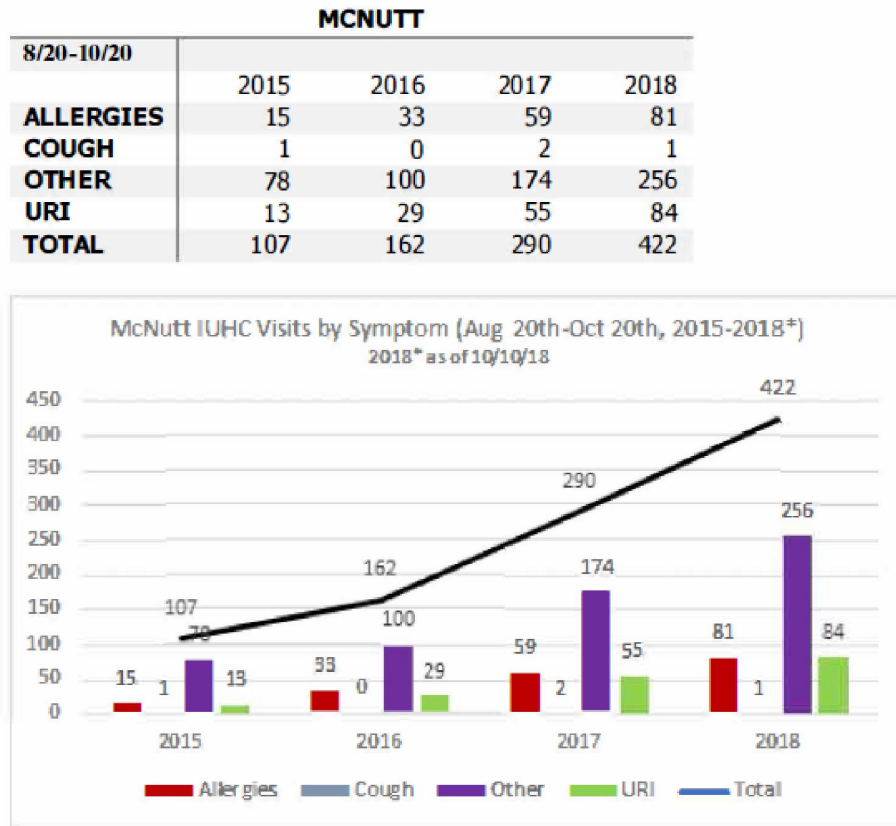
II. The 2018–2019 Mold Crisis.

As a result of the University’s failure to address the moisture and mold problems during earlier eruptions, the problems exploded during the 2018–2019 academic year. Ex. 6, at IU0027429 (internal email from the University’s Asbestos Program Manager “anticipat[ing] additional mold related projects as we move forward due to the lack of preventative maintenance actions”); Ex. 7, at IU0288312 (internal email stating “[t]hese mold situations didn’t happen overnight”). By September 2018, the mold problem had become so widespread that the University was regularly receiving complaints of mold in residence halls and student dorm rooms. *See id.* (“We have 3 new mold jobs today alone. They’re happening everywhere.”). By October 19, 2018, Andi Cailles, the University’s Director of Residential Life, who served as the initial point of contact during the 2018–2019 Mold Crisis, had approximately 1,800 unanswered emails concerning the crisis. Ex. 8, at IU0285713.

A. The number of dorm residents seeking treatment for mold-related illnesses spiked.

The sudden and alarming surge in dorm residents seeking treatment for mold-related illnesses in the fall 2018 semester demonstrates the severity and impact of the 2018–2019 Mold

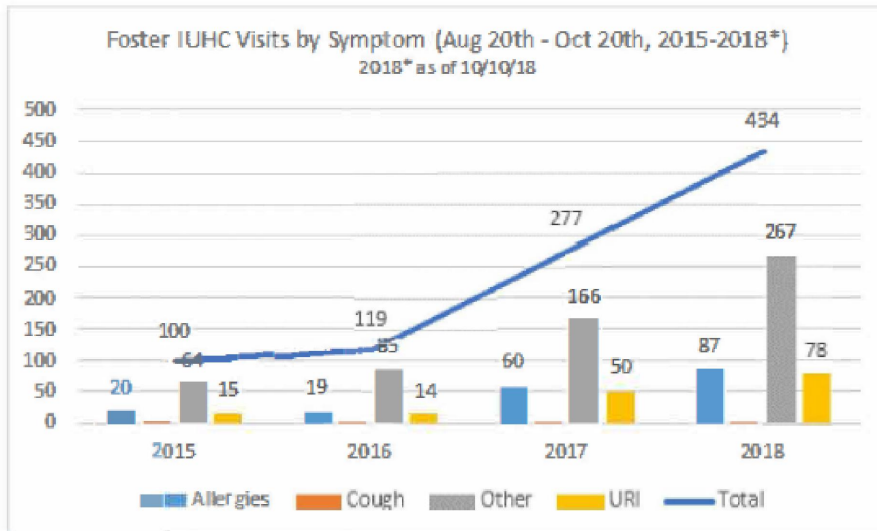
Crisis. University documents reveal a nearly 3–4 times spike in the number of residents from Foster, McNutt, and Teter⁶ seeking treatment for mold-related issues in 2018 versus 2015.



⁶ During the 2018-2019 school year, three of the six Teter buildings were closed for mold related renovations to battle the same problem plaguing Foster, McNutt, and Teter. Michael Reschke, *IU Trustees Approve \$17M Renovation for Teter Residence Halls*, Herald Times Online, Dec. 1, 2017, https://www.hoosiertimes.com/herald_times_online/news/local/iu-trustees-approve-m-renovation-for-teter-residence-halls/article_0cbc2326-e314-5037-8923-04b2bc84d361.html.

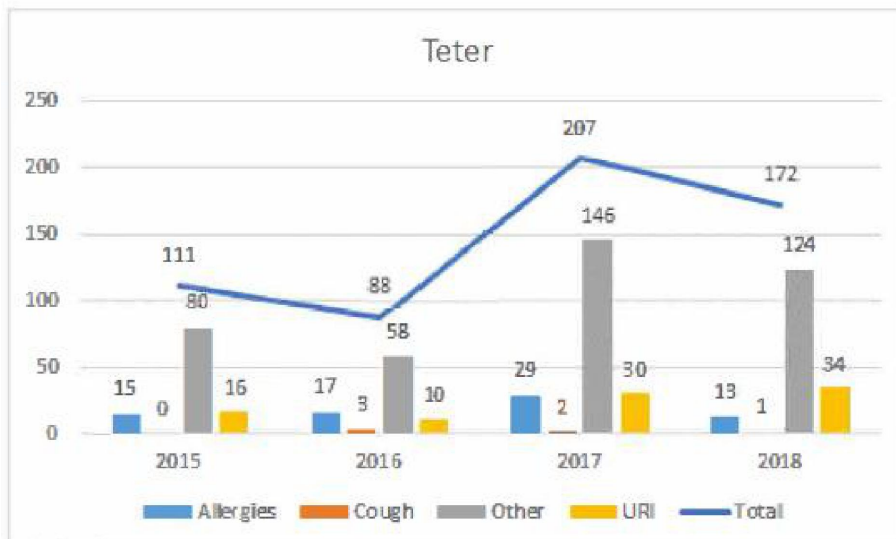
FOSTER

8/20-10/20	2015	2016	2017	2018
ALLERGIES	20	19	60	87
COUGH	1	1	1	2
OTHER	64	85	166	267
URI	15	14	50	78
TOTAL	100	119	277	434



TETER

	2015	2016	2017	2018
ALLERGIES	15	17	29	13
COUGH	0	3	2	1
OTHER	80	58	146	124
URI	16	10	30	34
TOTAL	111	88	207	172



Ex. 9, at IU0025237– IU0025239.

As complaints of mold-infested rooms soared, University officials recognized the increasing personal injuries suffered by dorm residents. In a weekend email bearing the subject line “Illness pervasive,” Ms. Cailles reported to a colleague:

Illness continues to be the greatest concern of all parents I have worked with every day. There has been perhaps 1 out of every 10 that isn’t sick. Rashes are now more and more prevalent (mouth and face rashes).

Ex. 10. In a subsequent email in the same email chain, Ms. Cailles further explained:

Am running out of space, so we are adding emergency spaces to floor lounges. All emergency rooms are in use currently. Setting up more this week. **Just want you to know how ill these students are** and families wanting them moved out for indefinite period of time. . . .

Id. (emphasis added).

B. The widespread dangerous crisis led the University to treat all rooms in Foster, McNutt, and Teter as mold infested.

The University itself repeatedly and candidly referred to the emergency mold conditions in 2018–2019 as the “Mold Crisis.” Ex. 11 (referring to the “magnitude of the mold crisis”); Ex. 12, at IU0055437 (describing the mold as a “crisis with lots of moving parts”). An email from Frankie Minor, Assistant Vice President & Director of Housing and Residential Life, summarized the transience and uncertainty thrust upon the residents as rooms were deemed unsafe and uninhabitable:

There was a decision by the university to start doing mold spore testing on Oct 15/16 of random percentage of rooms in each of the two buildings. The testing resulted in some rooms scoring at moderate and high levels which we then proceed[ed] to remove students from the rooms to remediate them. . . .

A decision also was made to purchase and install HEPA (Honeywell Air Purifier 50255B) Allergen Remover and install in all student rooms. . . .

University has recently decided to shutter any room that they could not get out of the RED range. We now have 48 rooms shuttered. Those students are being placed in temporary housing. . . .

Ex. 13, at IU0119882. The number of displaced students quickly rose to over 260. Ex. 14.

In December 2018, the University reported that it found visible mold in nearly 80% of rooms inspected. Ex. 15, at IU0131758 (confirming mold in 698 of 893 unique student rooms across campus). The mold was attributed to the utility “chases” around the water pipes in the HVAC systems in each room in Foster, McNutt and Teter that were failing and causing mold due to a lack of preventative maintenance and decayed pipe insulation. *Id.* In September of 2018, Jerry Bush, the University’s Asbestos Program Manager, notified various University officials of this common, and widespread cause of mold in Foster, McNutt, and Teter dorms:

We’re discovering mold inside the pipe chases in these rooms where we’re cleaning/disinfecting the room itself and inside the wall units. Most all of these rooms we are only being directed what needs to be cleaned/disinfected after your investigation. But the recommendations are only to clean surface stuff and areas we can reach. However when we’re cleaning the wall units we can see inside the pipe chases. **As we’ve discovered in previous dorm rooms where we’ve actually had to remove the chase (wood) walls, it’s the pipe insulation that’s failing (inside the chase). . . . So the far majority of the rooms chases haven’t been opened up for years to do any form of maintenance activities.** The pipes are condensation [sic] through the insulation and festering inside the chase and sometimes even moisture will run outside the chase. So it appears to me and Brian that we are only taking care of the mold areas that we can access and we’re not addressing the culprit. I hate to open a can of worms, but to us it appears we won’t actually get all the mold (inside the chases without removing), but this could actually reoccur.

I believe we need to remove a chase wall panel to get inside to clean/disinfect and remove the old insulation, then FO or someone should follow us and re-insulate the piping and re-hanging the chase panel. Not that I really want to do all this work, but it seems to be the real solution.

Ex. 16, at IU0029887–IU0029888 (emphasis added).

The issues caused by lack of maintenance at Foster, McNutt, and Teter were systemic.⁷ Mr. Derheimer recognized that the University simply needed “to assume that it [mold] was in every

⁷ For example, one University official noted that “[m]ost of these rooms have window caulk that is starting to fail.” Ex. 24, IU0027809.

room until otherwise verified.” Derheimer Dep., Ex. 17, at 243:13-16. Recognizing that the mold issues were “happening everywhere” on campus, Mr. Bush lamented, “These mold situations didn’t happen overnight.” Ex. 7.

C. The University hastily implemented a flawed and insufficient remediation protocol.

1. McNutt and Foster Remediation

In October 2018, the University notified Foster and McNutt residents, who were studying for and taking midterms, that workers would be entering their rooms to attempt to remediate mold pursuant to a hastily-devised remediation protocol. Ex. 18 (email containing draft third-party inspection strategy); Ex. 19 (notice sent to McNutt residents and parents explaining remediation plan); Ex. 20 (email sent to RPS residents explaining remediation plan).

The University issued nearly identical notices and form letters to all residents of Foster and McNutt describing the emergency mold remediation protocol and the implementation schedule. Ex. 21; Ex. 22. Residents of Forest and Eigenmann were informed that their student lounges were being taken over by workers, that all rooms would be entered by workers for remediation purposes, and that HEPA machines—which residents were required to leave operating on the highest setting for 24-hours a day—would be placed in each resident’s room. *Id.*; *see also* Ex. 23, at IU0038763.

The University adopted a uniform remediation protocol for Foster and McNutt, the elements of which included visual inspections and remediation activities conducted by abatement professionals. Although the University’s plan eliminated visible mold temporarily, it did not replace the defective HVAC systems and thus did not address the cause of the 2018–2019 Mold Crisis. Middaugh Aff., Ex. 25, at 8–9.

2. Teter Remediation

By mid-October of 2018, the University found the same mold issues in Teter as discovered in Foster and McNutt. Ex. 26, at IU0028951. On October 18, 2018, Mr. Derheimer recommended that Teter be added to the Foster and McNutt inspection strategy. Ex. 27.

Residents of Teter received a form letter similar to the letter received by Foster and McNutt residents regarding the attempted remediation program in that dorm. Ex. 28. Before Teter residents were allowed to leave for winter break, they were required to:

- Remove all personal belongings from:
 - Closets
 - Any storage areas above the closet
 - Desks
 - Shelves
 - Windowsill
 - Around the HVAC Unit
 - Walls (take down all posters, decorative lights, etc.)
- Leave HEPA air purifier on the highest setting.

Id. at IU0190874–IU0190875. Room inspections, remediation, and air sampling for post-remediation verification purposes were then performed utilizing the same steps as in the McNutt and Foster protocol. Ex. 29, at IU0066120-IU0066122; Ex. 30.

3. The Honeywell HEPA machines deprived residents of the use and enjoyment of rooms in Wright, Ashton, Collins, and Hillcrest.

In addition to all rooms in Teter, Foster, and McNutt, the University also placed HEPA machines in all rooms in Wright, Ashton, Collins, and Hillcrest. Residents were required to constantly keep the HEPA machines operating at their highest level. *E.g.*, Ex. 28, IU0043875; Ex. 31, at IU0032441;⁸ *see also* Ex. 32, at IU0101476 (identifying dorms where HEPA machines

⁸ IU's reliance on the HEPA machines to dehumidify the dorms was misplaced because HEPA air purifiers do not dehumidify air. Honeywell wanted "to have a conference call" because it "believe[d] the purifiers will not solve the issues." *See* Ex. 33; Ex.34, at IU0045473. The Indiana State Department of Health likewise informed IU of its opinion that this use of HEPA machines "does not address the quality of the remediation work." Ex. 35, at IU0284539.

were placed). The use of the HEPA machines created a significant disturbance in the dorms due to the noise and heat they produced and the space they occupied.

These Honeywell HEPA machines are “designed for extra large spaces” to be operated in rooms as large as 390 square feet, not small dorm rooms that average room only 130–150 square feet.⁹ *See, e.g.,* Derheimer Dep., Ex. 17, at 215:17–20. Dr. Middaugh recognized that “the downside is they do take up space and you can hear the fan running when it is on.” Ex. 36, at IU0045469.

Ironically, Mr. Derheimer admitted that he would not work in his office if it contained one of the HEPA machines running on high because “it’s too noisy.” Derheimer Dep., Ex. 17, at 213:23-24:14. He also admitted that the units were too large and “oversized” for the smaller dorm rooms in which they were placed. *Id.* at 215:21-25.

Not surprisingly, Mr. Derheimer’s reluctance to work in an office with a HEPA machine running was shared by the dorm residents who were forced to live and sleep in rooms with those machines running on high at all times. Ex. 37 (“For many [residents], . . . HEPA filters . . . running on high is seen as an annoyance, the units create heat as well as noise.”); Najman Aff., Ex. 38 at ¶ 4. As one resident explained:

I understand your desire that I have the air purifier on constantly, **but I can’t sleep with it on because it’s too loud. I, like any other student, need to get decent sleep to do well in my classes**, so I turn it off. I shouldn’t have to choose between sleeping and having mold spores floating around my room.

Ex. 39, at IU0133343 (emphasis added).

⁹ *See Honeywell True HEPA Air Purifier 50250-S, White*, Walmart, https://www.walmart.com/ip/Honeywell-True-HEPA-Air-Purifier-50250-S-White/5130782?wmlspartner=wlp&selectedSellerId=0&adid=2222222227009377560&w10=&w11=g&w12=c&w13=40876214312&w14=pla-56836567007&w15=1017003&w16=&w17=&w18=&w19=pla&w10=8175035&w11=online&w12=5130782&w13=&veh=sem&gclid=EAIaIQobChMIv_LmttSc3gIVGLbACh2KdgBHEAQYASABEGJPgPD_BwE (last visited May 30, 2019).

D. The University employed a misleading and deceptive public relations strategy to downplay the serious mold problem.

1. The University at first falsely blamed the 2018–2019 Mold Crisis on the students and on the weather.

Despite knowing about the mold problems for years, when the 2018–2019 Mold Crisis erupted the University sought to downplay it, repeatedly stating to the public that it was not an ongoing concern, and instead was caused by a brief period of high humidity. *See* Ex. 40. On September 5, 2018, the University emailed its residents requesting that they avoid opening their windows on hot and humid days. Ex. 41, at IU0057238. Ms. Cailles later explored “messaging to students about allergens in this region” and how students who might be susceptible to allergens in the local climate might suffer from respiratory conditions. Ex. 42. Mr. Derheimer recognized that Ms. Cailles’ idea “might seem like an excuse for possible indoor mold related symptoms” and recommended against it. *Id.*

In October 2018, Director of Media Relations and University Spokesman Chuck Carney gave a series of media interviews blaming the mold problem on the weather: “When people open their windows, the humid air comes in and that contributes to it, so we don’t think it will be continuing.”¹⁰

A University official rightly criticized the “blame it on the weather” public relations strategy, recognizing that a cover-up is poor policy and that the University should instead accept responsibility for the problem it caused students:

I just saw on the web page that we do suggest that mold was due to extra heat and humidity this year. I strongly suggest we take down that statement immediately. The first rule of crisis communication is to apologize and take the blame—do not try to deflect.

¹⁰ Sara Wittmeyer, *IU Bloomington Responding to Reports of Mold in Residence Halls*, Indiana Public Media (Oct. 5, 2018), <https://indianapublicmedia.org/news/iu-bloomington-responding-to-reports-of-mold-in-residence-halls.php>.

Ex. 40. That email also confirms that the University had prior knowledge of the mold problem: “we have mold claims going back for several years.” *Id.*

Still, the University chose to mislead students as to the severity and extent of the 2018–2019 Mold Crisis in multiple communications. On October 12, 2018, the University emailed McNutt and Foster residents and parents to inform them of upcoming remediation efforts. In this email, the University represented that “mold has only been discovered in a limited number of rooms.” Ex. 21, at IU0177894; Ex. 22, at IU0054104.

On December 17, 2018, Indiana University President Michael McRobbie stated in his “President’s Update” that “mold remediation work in the Foster and McNutt residence halls at IU Bloomington has been completed.” Ex. 43, at IU0066865. In reality, McNutt, Teter, and Foster would require additional remediation efforts stretching into at least 2020.¹¹

2. University officials pressured the University Health Center to modify their diagnoses of potential mold-related illnesses.

Even more disturbing, the University apparently sought to influence the medical advice and perhaps even the medical treatment that University physicians provided to students who presented with mold-related conditions at the University Health Center, and actually encouraged University doctors *not* to inform students that their ailments may be caused by mold in their dorm rooms.

Andi Cailles told Dr. Beth Rupp, Director of the University Health Center, that “it would be helpful if the medical providers could help us to reduce this [mold] stigma.” Ex. 44, at IU0044865. Ms. Cailles suggested that medical providers consider the possible alternative causes of mold-related health ailments because “students and community members that are new to this region of the country struggle with respiratory illness and allergies that comes part in parcel with

¹¹ See St. Angelo, *supra* note 1.

moving to southern Indiana” and inquired about “some messaging in partnership with IU Health Providers to educate on this.” *Id.*

An email from Peter Grogg, the Health Center’s Executive Director, to David O’Guinn, Vice Provost for Student Affairs and Dean of Students, relays RPS’ directive to the Health Center:

[W]hen the source of a student’s allergies are unknown, a provider may list mold as one of the many triggers. It is impossible for us to know if mold exists in the residence halls, so it’s unlikely that our providers would point to mold as the sole trigger. **Anyway, although Pat [Connor, Executive Director of RPS,] admits that there is mold in some of the residence halls, he has asked that we stop saying to patients that his/her [symptoms] may be triggered by that very same mold.**

Ex. 45 (emphasis added).¹²

3. The mold problem in McNutt, Foster, and Teter dorms required removal of the failed HVAC systems

In December, 2018, the University admitted that it could not fully fix the mold problem until it replaced the failed HVAC systems that caused the mold.¹³ Accordingly, the University has announced that each of the Teter, McNutt, and Foster buildings will undergo identical renovations:

In each student residence room, the heating, ventilating and air-conditioning systems will be replaced by exchanging the existing fan coil units with new vertical fan coil units and all associated piping, as well as installation of new fresh air duct to deliver fresh air directly to each student room.

Ex. 46, at IU0261483; Ex. 47, at 26.

¹² The seriousness of instructing a physician to withhold information—in this case, likely accurate information—about the potential cause of patients’ illnesses cannot be downplayed.

¹³ *See Reschke, supra* note 4 (“Despite efforts to clean up the mold, the university has been unable to eliminate it, said Lauren Robel, provost for IU’s Bloomington campus. The only way to solve the problem is a full-scale renovation, she said.”).

During a presentation to the Indiana Commission for Higher Education, Tom Morrison, the University's Vice President of Capital Planning and Facilities, confirmed the mold was caused by the failing HVAC systems:

We had, you may have read, a mold outbreak in [Foster and McNutt] this past year and a big part of that is the older systems that are in those buildings the air, uh, HVAC systems, they do not have central systems, they do not have central air conditioning.¹⁴

By operating with failed HVAC systems, the University has not kept its promise to “provide and maintain facilities that are . . . environmentally healthy and clean.”¹⁵ When describing the “Need and Purpose” for these renovations, the University acknowledged that replacing the failed HVAC systems “will improve student living conditions” and would “provide students with an appropriate living area/environment serving the academic mission of Indiana University at Bloomington,” which students currently lack. Ex. 46, at IU0261484; *see also* Ex. 47, at 26.

E. The University acknowledged the harms caused by the 2018–2019 Mold Crisis.

An initial evaluation of McNutt and Foster reported that mold was identified in 83% of the first 381 rooms tested, and that “the majority of rooms have symptomatic students.” *See* Ex. 48, at IU0024478. In addition, University documents recognized the range of *non-health related* losses suffered by dormitory residents in the first semester alone, including interference with the use of their rooms, displacement from their rooms entirely, the installation of noisy HEPA machines running at all times, and the University's failure to provide the basic college experience as owed to the residents:

¹⁴ *See* Video of Thursday, February 14, 2019 Commission Meeting, Segment 2 at 1:16:42-59, <https://www.in.gov/che/2365.htm> (last visited May 29, 2019).

¹⁵ *Mission Statement, supra* note 3.

As you well know, the students in McNutt and Foster have experienced a lot of disruption this semester. . . . [A]ll have had their rooms entered multiple times . . .

Many students say that is has not been a good semester. **That Indiana University has not delivered on the experience we portrayed or that they were expecting.** . . . [I]n McNutt and throughout Foster, concern is often voiced that the many disruptions have affecting [sic] their grades. . . .

Ex. 37 (emphasis added). Mr. Minor acknowledged that the University was struggling with its failure to meet parents' expectations regarding the college experience "promised for their children." Ex. 13, at IU0119882.

University documents also recognize the damages suffered by residents of the Overcrowded Dorms Class, whose dormitories absorbed the displaced students, thereby depriving those residents of their common areas and creating overcrowded conditions in those facilities. Ex. 49. Emails recount that "[t]he displacement has been so distressing on students and their new floormates too as they now don't have access to their floor community space while the displaced students are present." *Id.* One student's complaint summarizes the University's failure to provide the housing experience those students paid to receive:

[W]hy is RPS taking our lounge away AGAIN? It is the social epicenter of the LLC (which we pay for) . . . This has hurt the Media LLC's social climate immensely . . . we were so happy to get the lounge back this week. And now it's gone again. . . .

Ex. 50, at IU0135230.

The University has repeatedly conceded—both in its official public statements as well in direct communications with various students and parents—the significance of the disruption caused by the 2018–2019 Mold Crisis and how that disruption undermined the college experience owed to the students in the affected dormitories. Ex. 51, at IU0045090 ("The campus is working as swiftly as possible to remediate on a very large scale. **We acknowledge this has been about as disruptive as any situation can be for you.** . . .") (emphasis added).

The University was equally candid in its public statements that its failure to provide these students with acceptable housing conditions also undermined the fundamental academic experience that lies at the heart of college life. A set of talking points distributed to the IU Call Center for responding to calls from students and parents included the following concessions:

- We know mold growing in residence hall rooms and HVAC convector units has **created significant hardship and distress** for students and parents in primarily McNutt and Foster residence halls
- This has also impacted student’s health, **academic life** and in some cases requires student to temporarily relocate personal belongings and where they sleep.
- . . .
- **Many students are struggling to keep up with their academics** and mid-term exams due to extended illness and displacement. . . .

Ex. 52 (emphasis added).

On October 24, the University Provost transmitted a form letter to all residents of Foster and McNutt which began: “All of us at Indiana University are deeply sorry for the **disruption and struggle that have been part of your student experience this semester.**” Ex. 53, at IU0041809 (emphasis added). The form letter went on to say that a “credit of \$3,000 will be applied to your bursar account . . . in recognition of the fact the rooms in Foster and McNutt were not what you or we expected, and we therefore could not ensure the quality of your experience in those residence halls...” *Id.*

The failure of the \$3,000 credit to remedy the damages suffered is seen in emails from dissatisfied parents. One parent sent an email to University President Michael McRobbie, which began “I am not interested in hearing about your miniscule credits to our bursar account,” and went on to pose a series of questions that went unanswered. Ex. 54, at IU0041802. Another parent complained:

I sent my daughter to IU to be healthy and happy. This is definitely not the case. . . . leaving an air purifier at my daughter' dorm room is NOT the solution. Nor is giving back 3K for housing fix the solution. . . . My daughter's health is at risk, and IU just tries to put a bandaid on the situation.

Ex. 55, at IU0038943. By failing to uphold its end of the bargain regarding housing, the University undermined the college experience of these students, the vast majority of whom are freshmen living away from home for the first time and who are required to live in the University's dormitories.

DISCUSSION

I. Overview

This lawsuit brings a series of claims for breach of contract and breach of implied warranty of habitability, and other claims for negligent failure to warn, constructive fraud, negligence, negligent infliction of emotional distress, fraud, statutory deception and breach of the Indiana Deceptive Consumer Sales Act, along with alternative claims for equitable relief, including money had and received and unjust enrichment. All of these substantive claims are well-suited for class certification, particularly because all of those claims turn upon the knowledge, actions and inactions of the University, which are common to all class members.

As to the breach of contract claim, for example, although the terms of the contract extend beyond one writing, the University's contractual obligations are the same for all class members, as the University concedes by arguing in its motion to dismiss that there is one "contract Indiana University utilized with every student seeking residence hall accommodations."¹⁶ Mot. to

¹⁶ In that motion, the University also makes the troubling argument that "the written contractual terms and conditions do not state that Indiana University is contractually obligated to provide dormitories that are either free from mold, 'suitable and ready for habitation' or even 'clean, safe and habitable.'" Mot. to Dismiss at 14. However, limitations on a landlord's liability in residential lease agreements are void as "it is well-settled that a landlord may be held liable for personal injuries caused by latent defects known to the landlord but unknown to the tenant which the landlord fails to disclose." *Hi-Tech Properties, LLC v. Murphy*, 14 N.E.3d 767, 774 (Ind. Ct. App. 2014), *trans. denied*.

Dismiss at 14; *See also Skalbania v. Simmons*, 443 N.E.2d 352, 357 (Ind. Ct. App. 1982) (breach of contract claim presents “textbook example of claim suitable for class action treatment,” and also granting class certification as to claims for breach of express and implied warranty, negligence, fraud and negligent failure to disclose); *ConAgra, Inc. v. Farrington*, 635 N.E.2d 1137, 1139–40 (Ind. Ct. App. 1994) (“Indiana clearly allows common law fraud to be maintained as a class action provided that the requisites of T.R. 23 are met.”); *Hubler Chevrolet, Inc. v. Gen. Motors Corp.*, 193 F.R.D. 574, 577 (S.D. Ind. 2000) (certifying class bringing claims for unjust enrichment and criminal conversion); *NIPSCO v. Bolka*, 693 N.E.2d 613 (Ind. Ct. App. 1998); *Connerwood Healthcare, Inc. v. Herron*, 683 N.E.2d 1322 (Ind. Ct. App. 1997), *disapproved on other grounds by Martin v. Amoco Oil Co.*, 696 N.E.2d 383 (Ind. 1998) (certifying class action as to claim for negligence); *7-Eleven, Inc. v. Bowens*, 857 N.E.2d 382 (Ind. Ct. App. 2006) (certifying class in environmental action bringing claims for negligent infliction of emotional distress); *JK Harris & Co, LLC v. Sandlin*, 942 N.E.2d 875 (Ind. Ct. App. 2011) (class action involving claims for unjust enrichment). Moreover, courts routinely grant certification in cases bringing claims for mold-infested housing conditions. *E.g., Claborne v. Housing Authority of New Orleans*, 165 So.3d 268 (La. Ct. App. 2015) (certifying a class of residents that asserted mold-related tort and breach of lease claims).

Likewise, Indiana’s Deceptive Consumer Sales Act (“DCSA”), expressly provides for its enforcement through a class action lawsuit. Ind. Code § 25-5-0.5-4(b) (“Any person who is entitled to bring an action under subsection (a) on the person’s own behalf against a supplier for damages for a deceptive act may bring a class action against such supplier on behalf of any class

In any event, for purposes of class certification, all such defenses and related public policy concerns as to the terms or to the enforceability of University’s contractual obligations to the dormitory residents are common as to all class members.

of persons of which that person is a member and which has been damaged by such deceptive act, subject to and under the Indiana Rules of Trial Procedure governing class actions . . .”).

The need for a classwide adjudication in this particular case is further demonstrated by an internal University email which admits that the \$3,000 credit or “mold scholarship” provided to McNutt and Foster residents—an amount that is less than board for a single semester in those dorms—was selected arbitrarily as a public relations gesture, and was not determined based on any purported calculation as to the amounts actually owed to those members of the Damages Classes:

The executive policy group decided the week of 10/22 to communicate to all parents and students that the university would provide each student a \$3000 mold scholarship for fall semester...That \$3000 was applied to all students with no distinction ...There are at least two class action suits filed.... The \$3000 was probably too quick and most likely done with thought that if we give some money and acknowledge the issue it would calm folks down, which it did not.

Ex. 13, at IU0119882–IU0119883 (emphasis added, punctuation in original).

II. The Court should certify the Damages Classes under Trial Rule 23(A) and 23(B)(3).

“Whether an action is maintainable as a class action is committed to the sound discretion of the trial court. . . .” *7-Eleven, Inc. v. Bowens*, 857 N.E.2d at 388. For the Court to certify a class under Trial Rule 23, the Plaintiffs must satisfy the four requirements of Rule 23(A) and any one of the three standards in Rule 23(B). At this stage of the proceedings, the Plaintiffs are not required to establish the likelihood of ultimate success on the merits, only that the requirements of Rule 23 are met. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); *Rose v. Denman*, 676 N.E. 2d 777, 781 (Ind. Ct. App. 1997). In this case, the Court should certify the Damages Classes as well as the Tort Issue Class under Trial Rule 23(A) and 23(B)(3) because the claims of those residents are all based on the same legal theories and the same facts regarding the University’s acts, omissions, representations, and misrepresentations.

A. This case satisfies the four requirements of Rule 23(A).

Rule 23(A) has four requirements: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy. Each of these is easily satisfied based on the actions of the University.

1. Rule 23(A)(1)—Numerosity. The members of the classes are so numerous that joinder is impracticable.

The “numerosity” element of Rule 23(A)(1) requires that the members of the class be “so numerous that joinder of all members is impracticable.” “A finding of numerosity may be supported by common sense assumptions.” *Bolka*, 693 N.E.2d at 616 (“While there is no magic number held to satisfy this requirement, classes of forty or more members have generally been found to be sufficiently numerous.”); *Hubler Chevrolet*, 193 F.R.D. at 577; *Hatcher v. Smith*, 152 Ind. App. 299, 300, 283 N.E.2d 582, 583 (1972) (holding that a class with thirty-three members satisfied the numerosity requirement).

In this case, the Damages Classes consist of thousands of residents in the affected dormitories, and the statistics regarding health care visits demonstrates that hundreds of class members have suffered mold-related illnesses. Given this large number of class members, clearly “joinder of all members is impracticable.” Ind. Trial R. 23(A)(1).

2. Rule 23(A)(2)—Commonality. Questions of law and fact are common to all members of the Classes.

The “commonality” requirement of Rule 23(A)(2) requires that there are “questions of law or fact common to the class.” The “commonality” requirement is “satisfied if the court finds the claims of the individual plaintiffs are derived from a common nucleus of operative fact.” *Edward D. Jones & Co. v. Cole*, 643 N.E.2d 402, 405 (Ind. Ct. App. 1994), *trans. denied*; *Skalbania*, 443 N.E.2d at 359. “A common nucleus of operative fact exists where there is a common course of conduct.” *Edward Jones*, 643 N.E.2d at 405; *see also Skalbania*, 443 N.E.2d at 358. The requirement is satisfied where the same acts of the defendant harm a group of

persons. *See Hubler*, 193 F.R.D. at 577; *Skalbania*, 443 N.E.2d at 359; *Bank One Indianapolis, N.A. v. Norton*, 557 N.E.2d 1038, 1042 (Ct. App. Ind. 1990) (affirming class certification based on a single legal issue common to all class members); Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 3:12 (4th ed. 2006) (“The Rule 23(a)(2) prerequisite requires only a single issue common to the class.”).

This case easily meets the commonality requirement because the factual issues and legal issues underlying the class members’ claims turn on the actions, inactions and knowledge of the University. Some of the common factual and legal issues include:

- (i) A determination as to the University’s contractual obligations to the class members.
- (ii) Whether the University breached its contractual obligations to the class members.
- (iii) Whether the University breached the implied warranty of habitability to the class members.
- (iv) Whether the University owed a duty of care to the class members.
- (v) Whether the University breached the duty of care owed to class members.
- (vi) Whether the University was aware of the mold conditions underlying the 2018–2019 Mold Crisis, and when it became aware of those conditions.
- (vii) Whether the University was obligated to disclose the conditions underlying the 2018–2019 Mold Crisis before the 2018 school year.
- (viii) Whether the University negligently or intentionally breached its obligation to disclose the conditions underlying the 2018–2019 Mold Crisis to class members before the 2018 school year.
- (ix) Whether the University misrepresented the conditions of the dormitories.
- (x) Whether the University’s emergency remediation protocols were inadequate to remedy the 2018–2019 Mold Crisis.
- (xi) Whether the members of the Damages Classes are entitled to recover monetary damages, and the amount of those damages.

- (xii) Whether the University owed a duty not to expose members of the Moldy Dorms Class to the mold conditions that existed in their dorms during the 2018–2019 school year, and a duty to disclose those conditions.
- (xiii) Whether exposure to the mold conditions in the dorms generally causes the types of adverse health conditions experienced by the members of the Moldy Dorms Class.
- (xiv) Whether the University’s conduct constitutes spoliation of evidence.

These issues demonstrate that the commonality requirement of Rule 23(A)(2) is satisfied in this case.

3. Rule 23(A)(3)—Typicality. The claims of the Plaintiffs are typical of the claims of the Classes.

The “typicality” requirement of Rule 23(A)(3) requires that the claims or defenses of the representative party be “typical of the claims or defenses of the class.” The “typicality” requirement is satisfied where the class representatives’ claims arise from the same practice or course of conduct that gives rise to the claims of the other class members, and those claims are based on the same legal theory. *Hubler*, 193 F.R.D. at 577.

In Indiana, “typical” as used in T.R. 23(A)(3) does not demand proof of the existence of identical claims, rather it requires only a showing that the class representatives’ interests are not antagonistic or in conflict with the class as a whole. Typicality may be satisfied if the claims of the representatives and class members stem from a single event or are based upon the same legal theory.

ConAgra, 635 N.E.2d at 1140.

This case easily meets the typicality requirement because the class representatives’ interests are not antagonistic to or in conflict with the classes as a whole. In addition, the class representatives’ claims and the class members’ claims all stem from the same event, the 2018–2019 Mold Crisis, and are all based on the same legal theories. Accordingly, this action satisfies the “typicality” requirement of Rule 23(A)(3).

4. Rule 23(A)(4)—Adequacy. The Plaintiffs will fairly and adequately represent the interests of the Classes.

The “adequacy” requirement of Rule 23(A) requires that “the representative parties will fairly and adequately protect the interests of the class.” This provision requires that the Class Representatives possess claims that are typical of the Class, have a sufficient interest in the litigation to ensure vigorous adequacy, and retain counsel that is competent to conduct the proposed litigation. *LHO Indianapolis One Lessee, LLC v. Bowman*, 40 N.E.3d 1264, 1273 (Ind. Ct. App. 2015); *Habler*, 193 F.R.D. at 578. The considerations relevant to assessing the adequacy of the class representatives under Rule 23(A)(4) include:

- (1) the qualifications, experience, and ability of the [named plaintiff’s] attorney to conduct the class litigation;
- (2) the likelihood of a collusive suit;
- (3) the typicality of the representatives’ claims to claims of the class or in other words, whether the representatives have interests antagonistic to the class’ interests; and
- (4) the quality of representation, not the quantity.

Conagra, 635 N.E.2d at 1142.

As set forth above, Plaintiffs’ claims are typical of the claims of the class members, and there is no likelihood of either collusion or antagonism in this case. In addition, the class representatives understand their duties and responsibilities, as set forth in their affidavits, and has been participating in this litigation, including responding to the University’s discovery requests. *Najman Aff.*, Ex. 38, at ¶ 6; *O’Connell Aff.*, Ex. 57, at ¶ 5; *Muhlada Aff.*, Ex. 58, at ¶ 7. Furthermore, their counsel has extensive experience in complex and class action litigation, as set forth in Exhibit 59. No basis exists to question the adequacy of Plaintiffs or their counsel to prosecute this action for the purposes of Rule 23(A)(4).

B. This action meets both of the requirements of Trial Rule 23(B)(3).

Once the Court has determined that Rule 23(A)'s four requirements are met, it may certify a case as a class action under any one of the three standards provided by Rule 23(B). This case should be certified under Rule 23(B)(3), which provides for class certification where common questions predominate over individual ones and a class action is superior to other available methods of adjudication.

1. Rule 23(B)(3)—Predominance. Questions common to the Classes predominate over any individual issue

In *Connerwood Healthcare*, the Court of Appeals observed that “[c]onsiderable overlap exists between Rule 23(A)(2)’s commonality prerequisite and Rule 23(B)(3). Rule 23(A)(2) requires that common questions exist while Rule 23(B)(3) requires that they predominate.” 683 N.E.2d at 1329; *see also Conagra*, 635 N.E.2d at 1143 (the determination of “predominance” under Rule 23(B)(3) “depends on whether the claims of the class members derive from a common nucleus of operative facts”). In *7-Eleven*, the Court of Appeals explained that courts apply a “pragmatic assessment” in determining whether common issues predominate over individual issues by considering:

whether the substantive elements of each class members’ claims require the same proof for each class member; whether the proposed class is bound together by a mutual interest in resolving common questions more than it is divided by individual interests; whether the resolution of an issue common to the class would significantly advance the litigation; whether one or more common issues constitute significant parts of each class member’s individual cases; whether the common questions are central to all the members’ claims; and whether the same theory of liability is asserted by or against all class members, and all defendants raise the same basic defenses.

857 N.E.2d at 393–94.

In this case, the claims of the class representatives and the class members are bound together by the factual and legal issues involved in the 2018–2019 Mold Crisis. The predominant

common questions of law and fact arising from this shared factual scenario include, but are not limited to, the University’s legal obligations to the class members relating to the 2018–2019 Mold Crisis—including whether the University knew of the conditions underlying the 2018–2019 Mold Crisis and negligently or intentionally failed to disclose those conditions—and whether the University breached its obligations to the class members by providing substandard housing and thereby depriving them not only of adequate living conditions but also the college experience it owed to them.

Damages can be assessed on a classwide basis under well-established principles of Indiana law—which recognizes that students housed in substandard, mold-infested residences can recover all of the rent, together with other damages. *Murphy*, 14 N.E.3d at 776 (upholding jury verdict awarding 100% of actual damages together with punitive damages against landlord who leased apartment to college students with knowledge that residence was infested with mold). In addition, Plaintiffs’ have retained Chi Leng, PhD, an economist and senior advisor at Nathan Associates, Inc.¹⁷ Report of Chi J. Leng, PhD, Ex. 56, at ¶ 1. Dr. Leng was asked to review the facts of this case and evaluate whether there are reliable and available economic methods to assess the losses sustained by members of the proposed classes as a result of adverse conditions in IU dormitory housing on the IUB campus during the 2018-2019 school year. *Id.* ¶¶ 7-12. Dr. Leng characterized Class members’ denial of safe, clean, and habitable housing, and their experience of environmental contamination, relocations, intrusive and disruptive remediation and reconditioning measures, noise pollution, and overcrowding and loss of use of functional space, as “housing losses.” *Id.* ¶ 25. She characterized Class members’ degraded college experience

¹⁷ Chi Leng has extensive experience in economic analysis of litigation issues in the United States, Europe and Africa in the context of antitrust, intellectual property, breach of contract, and other commercial issues. Ex. 57, at A-2–A-6.

caused by the stress, fear, and uncertainty stemming from Defendant’s failure to provide safe, clean, and habitable housing and the attendant disruptions to their daily college experience as “experiential losses.” *Id.* ¶ 26.

Following a detailed analysis of available methodologies, Dr. Leng concluded that “hedonic modeling” is a widely-accepted and reliable methodology that can be applied to available data common to all Class members in order to estimate the on a Class-wide basis the “housing losses” sustained by Class members due to the adverse conditions in IUB dormitory housing. *Id.* ¶¶ 24-46. Similarly, Dr. Leng concluded that “contingent valuation” is an accepted and reliable survey-based methodology that can be employed to estimate on a common basis and using common evidence the “experiential losses” incurred by members of each of the three proposed Classes. *Id.* ¶¶ 24-35, 47-50. In short, there are widely-accepted economic methods to reliably measure the losses incurred by the Classes using evidence common to all Class members.

The elements of class members’ claims, and the University’s defenses to those claims, are the same for all class members. Furthermore, the resolution of these claims on a class-wide basis would significantly advance the litigation as both the members of the Damages Classes and the Tort Issues Class, because common issues constitute significant parts of each class members’ individual case. *See 7-Eleven*, 857 N.E.2d at 393–94. Thus, the predominance requirement is met.

C. Rule 23(B)(3)—Superiority. A class action is the superior mechanism to resolve the class members’ claims.

A class action provides the superior mechanism for arriving at a comprehensive and fair resolution of this case. The court’s description of the benefits of a class action in *Hubler* applies directly to this case:

One reason to favor a class action is to avoid duplicative lawsuits, which would thereby waste the parties' and the courts' time and resources. It is without question that allowing this case to proceed as a class action would allow economies of scale to operate and ultimately reduce the overall burden on the courts associated with pursuing the claims versus maintaining individual actions.

Hubler, 193 F.R.D. at 582 (internal citations omitted).

Each of these considerations warrants certification in the present case. A class action is also the only economically feasible method for class members to have their claims resolved, particularly because their damages may not be significant enough on an individual basis to warrant the expense of individual litigation. In *Budden v. Board of School Commissioners*, 698 N.E.2d 1157, 1162 (Ind. 1998), the Indiana Supreme Court recognized that “the class action device has a long and useful history in our state” and as a practical matter class actions are “often essential to the assertion of any claim at all [because] the cost and difficulty of pursuing only an individual claim may render it uneconomic from the point of view of any capable attorney, and financing such an enterprise on a pay as you go basis is often beyond the means of the aggrieved parties.” Without a class action, most class members will likely not obtain relief for the harms they suffered due to the 2018–2019 Mold Crisis.

D. This case satisfies the additional Rule 23(B)(3) factors.

Rule 23(B)(3) identifies the following four additional factors that may assist a court in determining whether a (B)(3) class should be certified:

- (1) whether individual class members have an interest in individually controlling the prosecution of a separate action;
- (2) the extent and nature of any litigation already pending by or against class members;
- (3) the desirability of concentrating the litigation in a particular forum; and
- (4) the difficulties likely to be encountered in the management of a class action.

No particular weight is ascribed to any of these factors, none of them is dispositive, and class certification is not prohibited if any one factor is not satisfied. *See Am. Cyanamid Co. v. Stephen*, 623 N.E.2d 1065, 1074 (Ind. Ct. App. 1993).

In this case, each of the four factors in Rule 23(B)(3) supports certification:

- (1) The relative amount of damages owed to each individual—and the expense of litigating those damages claims on an individual basis—permits the Court to conclude that individual class members do not wish to control their cases and would in fact benefit from the efficiencies of a class action. *See Swanson v. Am. Consumer Indus.*, 415 F. 2d at 1326, 1333 (7th Cir. 1969).
- (2) Plaintiffs’ counsel is not aware of any other pending litigation involving the same claims raised in this case. The prompt certification of a class in this case would eliminate the possibility of inconsistent results through any other such potential litigation.
- (3) The concentration of this action in a single forum obviously facilitates the comprehensive resolution of the controversy. As set forth above, to deny class certification would require individual plaintiffs to bring separate suits, involving the burdensome duplication of discovery and motion practice.
- (4) No manageability problems exist in this matter. The claims of the classes in this case are easily manageable by the parties and the Court.

III. The Court also should certify the Tort Issues Class under Trial Rule 23(C)(4).

Indiana has long recognized the value of “issue” certification under Trial Rule 23. *Norton*, 557 N.E.2d 1038. In upholding the certification of the issue as to whether a trustee breached its fiduciary duty in *Norton*, the Court of Appeals emphasized that it “is important to recognize the role of partial class actions in our judicial system,” and cited a leading treatise regarding the value of this approach:

The theory of Rule 23(c)(A)(4) is that the advantages and economies of adjudicating issues that are common to the entire class on a representative basis should be secured even though other issues in the case may have to be litigated separately by each class member. Accordingly, even if only one common issue can be identified as appropriate for class treatment, that is enough to justify the application of the provision, as long as the other Rule 23 requirements have been met.

Id. at 1041 (quoting Wright, Miller & Kane, Federal Practice and Procedure, Civil 2d 1790, at 271-74).

The use of “issue certification” is not only well-recognized under Indiana law, but is particularly well suited for environmental cases involving tort claims such as the present matter. In *7-Eleven*, the court upheld the certification of a class as to the issue of general liability on behalf of residents who suffered health problems “associated with the exposure to the chemicals found in the groundwater or indoor air” of their residences, much like the students in this case. 857 N.E.2d at 386.

The plaintiffs in *7-Eleven* brought a series of tort claims, including nuisance, negligence, criminal trespass and negligent infliction of emotional distress. The plaintiffs sought class certification as to the issue of liability and general causation¹⁸ regarding a series of the issues like the ones in this case, including (i) whether the defendants were negligent in allowing a pollutant to spread; (ii) whether the spread of the pollutant was foreseeable; (iii) whether defendants knew of the inherent harms resulting from exposures to the vapors from the pollutant; (iv) whether defendants were negligent in failing to warn the residents of the presence of the vapors from the pollutant; (v) whether defendants acted with reckless disregard or willfully and wantonly in deciding not to inform the residents of the contamination; and (vi) whether defendants acted willfully and wantonly in not timely remediating the problem. *7-Eleven*, 867 N.E.2d at 395. The court recognized that that “the Plaintiffs’ approach is not uncommon” and upheld the certification of the issue class under Rule 23(B)(3) as to those issues.

The Indiana Court of Appeals recently reaffirmed the appropriateness of certifying issues as to general liability on behalf of class members with claims for “ailments suffered as a result of

¹⁸ The Court explained that “[g]eneral, or ‘generic’ causation has been defined court to mean whether the substance at issue had the capacity to cause the harms alleged...”. 867 N.E. 2d at 389.

exposure to a substance.” *Bowman*, 40 N.E.3d at 1275 (Ind. Ct. App. 2015). The Court recognized that the food poisoning claims in that case could be resolved on a class wide basis as to the issue of “whether contaminated food was served” by the defendant because “it will be relatively easy to establish [defendant’s] generic liability.” *Id.* at 1277. Although the Court held that class certification was not appropriate as to both liability and damages with regard to the personal injury claims, the Court recommended the use of issue certification for those claims:

[W]e recommend the trial court follow the lead of the *7-Eleven, Inc.* court, and certify the class with respect to Marriott’s general liability. . . . As to generic causation, we believe the substantive elements of the claims require the same proof for each class member, the class is bound together by a mutual interest in resolving this common question more than it is divided by individual interests, that the resolution of this common issue will significantly advance the litigation, and that a common question central to all of the members’ claims exists.

Id. at 1277–78. *7-Eleven* provides the framework for issue certification as to the Tort Issues Class in this case.

CONCLUSION

For all of these reasons, the Court should certify the Damages Classes and the Tort Issues Class.

Dated: May 31, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was electronically filed and served on the following counsel of record, by manner of the IEFS, on May 31, 2019:

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