IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

LINDA HERNANDEZ, REITA DERRICK, LISA HARRIER, ANNA HEINZE, JACQUELYN SCHMIDT, and LINDA SUPERNOVICH on behalf of themselves and all other similarly situated individuals, Plaintiffs, v. UNITED STATES STEEL CORPORATION, a Delaware corporation, Defendant.	CIVIL DIVISION – CLASS ACTION Case No. GD-19-005325 FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PLAINTIFFS' MOTIONS FOR CLASS CERTIFICATION

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PLAINTIFFS' MOTIONS FOR CLASS CERTIFICATION

Starting on August 11, 2022, the Court held a four-day class certification hearing in the above-captioned matter. All parties were provided ample opportunity to present their evidence, argue their positions, and submit their proposed findings of fact and conclusions of law. After careful review of the parties' evidence, testimony, briefings, etc., the Court concludes class certification is proper in this action.

I. Introduction and Class Allegations

United States Steel Corporation ("US Steel") operates an integrated coke and steel-making operation at three separate manufacturing sites in the Mon Valley region of Allegheny County, Pennsylvania: the Clairton Coke Works in Clairton, the Irvin Plant in West Mifflin, and the Edgar Thomson Works in Braddock, collectively known and referred to as the "Mon Valley Works." (Plaintiffs' Proposed Findings of Fact and Conclusions of Law at P. 1, L. 1, Linda Hernandez v. United States Steel Corporation, No. 19-005325 (Allegheny Cty. Ct. Com. Pl. Oct. 21, 2022), ECF No. 96) ("Plaintiffs' Proposed Findings"). This action arises out of a

fire/explosion which occurred on December 24, 2018 at US Steel's Clairton Plant in the Mon Valley. (*Id*. at P. 2, L. 4); (Defendant's Proposed Findings of Fact and Conclusions of Law at P. 2, L. 6, Linda Hernandez v. United States Steel Corporation, No. 19-005325 (Allegheny Cty. Ct. Com. Pl. Oct. 21, 2022), ECF No. 95) ("Defendant's Proposed Findings"). As a result, until April 4, 2019, coke oven gas generated at the Clairton Plant could not be treated by the plant's desulfurization equipment due to fire damage, which emitted sulfur dioxide ("SO_2") and hydrogen sulfide ("H_2S") into the air of the Mon Valley. (Plaintiffs' Proposed Findings, *supra*, at P. 2, L. 5); (Defendant's Proposed Findings, *supra*, at P. 2, L.7).

The Named Plaintiffs are six Mon Valley residents who lived in the Jefferson Hills, Glassport, and West Mifflin areas during the pollution control outage at the Clairton Plant (Plaintiffs' Proposed Findings, *supra*, at P. 2, L. 6). Plaintiffs allege that the fire, and the continued production after the fire, resulted in a months-long nuisance to them and the surrounding neighborhoods. (*Id*. at L. 7). The proposed class area includes twenty-two community areas in the Mon Valley: Braddock, Clairton, Dravosburg, Duquesne, East McKeesport, East Pittsburgh, Elizabeth Borough, Elizabeth Township, Forward, Glassport, Jefferson Hills, Liberty, Lincoln, McKeesport, North Braddock, North Versailles, Pleasant Hills, Port Vue, Versailles, Wall, West Elizabeth, and West Mifflin. (*Id*.)

The Named Plaintiffs sued US Steel in April 2019 alleging negligence and private nuisance of behalf of the class-area residents to recover non-economic damages for lost-use-and-enjoyment of their properties. (*Id*. at L. 8); (Defendant's Proposed Findings, *supra*, at P. 2, L.4). The Plaintiffs seek to represent a class consisting of approximately 123,000 persons who resided in the twenty-two-community area of the Mon Valley between December 24, 2018 and April 4, 2019. (Defendant's Proposed Findings, *supra*, at P. 1, L.1).

II. The Laws at Issue & Evidence Submitted by the Parties

The Named Plaintiffs allege negligence and private nuisance (intentional and unintentional) on behalf of the class-area residents to recover damages for lost-use-and-enjoyment. (Plaintiffs' Proposed Findings, *supra*, at P. 2, L. 8); (*see generally* Plaintiffs' First Amended Complaint, Linda Hernandez v. United States Steel Corporation, No. 19-005325 (Allegheny Cty. Ct. Com. Pl. Dec. 17, 2019), ECF No. 16) ("Plaintiffs' Amended Complaint"). Plaintiffs allege that the events that occurred during and after a catastrophic explosion at US Steel's Clairton plant, which caused the operation's sulfur pollution controls to fail, were a direct result of Defendant's negligence. (*See generally* Plaintiffs' Proposed Findings, *supra*). Plaintiffs allege that the emissions of SO_2 and H_2S from the Clairton Plant resulted in a months-long nuisance which caused the Plaintiffs and other class-residents eye and throat irritations, coughs, and headaches. (*Id*.) Plaintiffs seek lost-use-and-enjoyment damages to vindicate private property rights, not enforcement of environmental statutes, regulations, or regulatory permits; they seek monetary damages, not injunctive relief. (Plaintiffs' Amended Complaint, *supra*, at P. 2, L. 3).

To hold a defendant liable for negligence, Plaintiffs have the burden to prove the elements of negligence: duty, breach of duty, causation, and damages. *Reason v. Kathryn's Korner Thrift Shop*, 169 A.3d 96, 101 (Pa. Super. 2017).

> "The burden is upon the plaintiffs to make out their case by a fair preponderance of the credible evidence. They must not only prove that the defendant was negligent, but they must prove that the negligence caused an injury to the . . . plaintiff for which they are entitled to recover damages. Proof of one without the other affords no right to recovery."

Kirby v. Carlisle, 116 A.2d 220, 221 (Pa. Super. 1955).

The Court in *Karpiak v. Russo* held that the Restatement (Second) of Torts §822 contains the authoritative definition of a private nuisance tort:

> § 822. General Rule
> One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either
>
> (a) intentional and unreasonable, or
>
> (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.
>
> The Restatement indicates that a defendant is not subject to liability for an invasion unless the invasion caused significant harm, which is defined as:
> § 821F. Significant Harm
> There is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose.
> Comment C to section 821F further explains the meaning of significant harm:
>
> c. *Significant harm.* By significant harm is meant harm of importance, involving more than slight inconvenience or petty annoyance. The law does not concern itself with trifles, and therefore there must be a real and appreciable invasion of the plaintiff's interests before he can have an action for either a public or private nuisance.... [I]n the case of a private nuisance, there must be a real and appreciable interference with the plaintiff's use or enjoyment of his land before he can have a cause of action.

Karpiak v. Russo, 676 A.2d 270, 272 (Pa. Super. 1996).

The Court granted the parties a total of four days of oral argument on class certification, the longest class certification hearing this Court has ever held. Because of the magnitude of testimony and evidence presented by the parties and the fact that the court cannot rule on the merits of the allegations, only whether class certification is proper, the court will recapitulate the parties' positions briefly to determine whether class action is appropriate.

Plaintiffs presented evidence of numerous common factual and legal issues regarding U.S. Steel's alleged negligence leading up to the fire, including: (a) whether the long-term corrosion of the sprinkler piping, rotor shaft, and flapper that led to the fire was part of a pattern

of neglect and failed maintenance; (b) whether specific, feasible measures would have prevented the fire; (c) whether U.S. Steel had a duty of care to its class-member neighbors; (d) whether U.S. Steel breached that duty by its continued production after the fire, its failure to reduce emissions by extending coking times as it had in the past, and/or "hot idling" at least some coke batteries as it had also done; and (e) whether U.S. Steel considered, in continuing production without pollution controls, the malodor and eye, nose, and throat irritant effects associated with H_2S and SO_2, or how these effects were likely to impact neighboring properties during the control outage after the fire. (Plaintiffs' Proposed Findings, *supra*, at P. 22, L. 17).

Plaintiffs also presented evidence of common issues regarding the impacts of U.S. Steel's conduct after the fire, including: (a) whether the excess SO_2 and H_2S emitted after the fire dispersed throughout the class area; (b) whether – applying Pennsylvania's objective "normal person" test for nuisance – the excess pollutant concentrations caused odors, discomforts, and worry that "normal persons" living in the class area found definitely offensive, seriously annoying, or intolerable; (c) whether these odors, discomforts, and worry impeded the neighbors' ability to use and enjoy their class-area properties; and thus (d) whether U.S. Steel's actions and failures to act created a class-area nuisance. (*Id*. at L. 18).

Plaintiffs presented testimony in support of the "normal person" test for nuisance. The excerpts of testimony presented were from fact witnesses, which included some Named Plaintiffs and non-residents that experienced the results of the outage. The testimony included complaints of smells, headaches, throat irritations, and worries during the outage months.[1] All of the

[1] (*See generally*, Transcript of Class Certification Hearing at (8/11/22 – 8/16/22), Linda Hernandez v. United States Steel Corporation, No. 19-005325 (Allegheny Cty. Ct. Com. Pl. Sept. 27, 2022), ECF No. 88, 90, 92, 94) ("Transcript"). Plaintiffs presented excerpts of class-member depositions and declaration testimony during the class certification hearing; these can be found at Plaintiffs' Exhibits 19 and 20 to their Proposed Findings of Fact. (Plaintiffs' Appendix, Volume I Part 2, Linda Hernandez v. United States Steel Corporation, No. 19-005325 (Allegheny Cty. Ct. Com. Pl. Oct. 21, 2022), ECF No. 98) ("Plaintiffs' Appendix 2").

testimony was varied, with each person having differing experiences during the outage months. These experiences ranged from not having any discomforts to suffering from coughing, sore throat, eye irritations, and more.

Plaintiffs also presented a damages model for the Court to consider if intentional and/or unintentional nuisance is established. (Plaintiffs' Proposed Findings, *supra*, at P. 22, L. 19). Plaintiffs presented their air-modeling expert, David Sullivan, who explained at the class certification hearing that he used AERMOD, an EPA-approved computer program, to model the path of SO_2 after release, accounting for variations throughout the class area and accounting for various conditions such as speed, weather, terrain, and land use. (*Id*. at P. 9, L. 39); (Transcript, *supra*, at (8/15/22, ECF No. 88) at P. 79, L. 22 – P. 82, L. 17 (Sullivan)). The air model and demonstrations Mr. Sullivan presented showed a time-lapse of pollutant plumes spreading throughout the class area. (Plaintiffs' Proposed Findings, *supra*, at P. 9, L. 40); (Transcript, *supra*, at (8/15/22, ECF No. 88) at P. 122, L. 17-23 (Sullivan)). Mr. Sullivan explained that the SO2 modeling results served as a rough proxy for H_2S. (Plaintiffs' Proposed Findings, *supra*, at P. 10, L. 41); (Transcript, *supra*, at (8/15/22, ECF No. 88) at P. 94, L. 9 – P. 95, L. 13, P. 116, L. 9 – P. 118, L. 3 (Sullivan)).

Defendant presented testimony to refute Plaintiffs' nuisance claims, namely their own air-modeling expert, physician expert, and fact witnesses. Defendants argue that because each Named Plaintiff or class-resident all had individual experiences, there is no singular "class-wide" nuisance condition about which a jury can make a significant harm determination to rule on Plaintiffs' negligence and nuisance claims, nor would the jury be able to determine class-wide damages. (Defendant's Proposed Findings, *supra*, at P. 30, L.98). Defendant argues that individual cases/trials are necessary to prove negligence and nuisance.

Defendant presented evidence that the emissions from the Clairton Plant were not at the levels necessary to cause the experiences described, namely the physical discomforts. (*See generally* Transcript, *supra*, at (8/11/22, ECF No. 94)).

Dr. Christopher Long, Defendant's toxicology expert, testified that in his opinion, an individual experiencing pollutant effects would have a different experience based on a variety of factors such as genetics, age, health history, smoking habits, and more. (*Id*. at (8/11/22, ECF No. 94) at P. 42, L. 11 – P. 43, L. 9, P. 45, L. 15 – P. 48, L. 19 (Long)). Dr. Robert McCunney, Defendant's physician expert, testified to determine whether pollution from U.S. Steel caused a particular medical condition, an individualized assessment looking at medical records, physical findings, lab tests, and other factors would be necessary. (*Id*. at P. 154, L. 5 – P. 155, L. 20 (McCunney)).

Defendant also presented testimony by their own air-modeling expert, Christopher DesAutels. While Mr. DesAutels agreed with Plaintiffs' air-modeling expert on some of his opinions, he disagreed on others. Mr. DesAutels agreed with Mr. Sullivan that the incomplete combustion of H_2S at any location burning coke oven gas would result in the emission of both H_2S and SO_2. (*Id*. at (8/12/22, ECF No. 92) at P. 117, L.11 – P. 118, L. 4, P. 119, L. 16 – P. 120, L. 9 (DesAutels)).

He also agreed that the amount of H_2S could not be quantified because US Steel reported it all as SO_2. (*Id*.) Because of this, Mr. DesAutels opines that SO_2 should not be characterized as a proxy for H_2S because the H_2S levels could not be quantified. (*Id*. at P. 46, L. 6-16, P. 56, L. 8-9 (DesAutels)). Mr. DesAutels also testified that AERMOD was too uncertain of a computer program to determine air concentrations at specific locations and times. (*Id*. at P. 23, L. 14 – P. 27, L. 11 (DesAutels)).

Defendant argued that the testimony from fact witnesses by Plaintiffs could not be used to prove class-wide nuisance at trial. However, they presented testimony by residents who did not experience the odors and discomforts the Plaintiffs' witnesses described. For example, two witnesses testified that they had never experienced any odor they would attribute to US Steel. (*Id*. at (8/15/22, ECF No. 88) at P. 13 (Pfarr), P.27-28 (Urbassik)).

The court will not and cannot make a ruling on the merits of the allegations and evidence presented. The court must merely use this evidence to determine whether class action certification is proper.

III. Standards for Class Certification

The Standards for Class Certification in Pennsylvania are found in Title 231, Chapter 1700 (Class Actions) of the Pennsylvania Rules of Civil Procedure, as well as relevant caselaw. More specifically, Pa.R.C.P. §1702: Prerequisites to a Class Action outlines the specific criteria to certify a class: 1) Numerosity, 2) Commonality, 3) Typicality, 4) Adequacy, and 5) Fairness and Efficiency. Pa.R.C.P. §1708 and §1709 also provide additional guidance on adequacy of representation and fairness and efficiency.

> During certification proceedings, the proponent of the class bears the burden to establish that the Rule 1702 prerequisites were met. The burden is not heavy at the preliminary stage of the case. Indeed, evidence supporting a *prima facie* case "will suffice unless the class opponent comes forward with contrary evidence; if there is an actual conflict on an essential fact, the proponent bears the risk of non-persuasion." It is essential that the proponent of the class establish requisite underlying facts sufficient to persuade the court that the Rule 1702 prerequisites were met.

Samuel-Bassett v. Kia Motors America, Inc., 34 A.3d 1, 16 (Pa. 2011) (citations omitted).

The trial court is vested with broad discretion in determining whether the criteria for maintaining a class action have been met, and its decision will not be disturbed on appeal unless the court neglected to consider the requirements of the rules governing class certification, or

unless the court abused its discretion in applying the class certification rules. *Braun v. Wal-Mart Stores, Inc.*, 24 A.3d 875, 892-93 (Pa. Super. 2011), *aff'd*, 106 A.3d 656 (Pa. 2014), *citing Liss & Marion, P.C. v. Recordex Acquisition Corp.*, 937 A.2d 503, 505 (Pa. Super. 2007).

> The hearing is confined to a consideration of the class action allegations and is not concerned with the merits of the controversy or with attacks on the other averments of the complaint. Its only purpose is to decide whether the action shall continue as a class action or as an action with individual parties only. In a sense, it is designed to decide who shall be the parties to the action and nothing more. Viewed in this manner, it is clear that the merits of the action and the right of the plaintiff to recover are to be excluded from consideration.

Pa.R.C.P. §1707 Explanatory Comment.

It is the strong and oft-repeated policy of this Commonwealth that, in applying the rules for class certification, decisions should be made liberally and in favor of maintaining a class action. *Braun*, *supra* at 892-93. Again, "[t]his is because such suits enable the assertion of claims that, in all likelihood, would not otherwise be litigated." *Id*. at 893.

As Pennsylvania law requires, the court will not consider the merits of the allegations, but only whether this class can be certified under the criteria above.

IV. Conclusions of Law

PA. R.C.P. § 1710 governs how a court may certify, refuse to certify, or even revoke a certification of a class:

> Rule 1710. Order Certifying or Refusing to Certify a Class Action. Revocation. Amendment. Findings and Conclusions.
> (a) In certifying, refusing to certify or revoking a certification of a class action, the court shall set forth in an opinion accompanying the order the reasons for its decision on the matters specified in Rules 1702, 1708 and 1709, including findings of fact, conclusions of law and appropriate discussion.
> (b) In certifying a class action, the court shall set forth in its order a description of the class.
> (c) When appropriate, in certifying, refusing to certify or revoking a certification of a class action the court may order that
> (1) the action be maintained as a class action limited to particular issues or forms of relief, or

(2) a class be divided into subclasses and each subclass treated as a class for purposes of certifying, refusing to certify or revoking a certification and that the provisions of these rules be applied accordingly.
(d) An order under this rule may be conditional and, before a decision on the merits, may be revoked, altered or amended by the court on its own motion or on the motion of any party. Any such supplemental order shall be accompanied by a memorandum of the reasons therefor.
(e) If certification is refused or revoked, the action shall continue by or against the named parties alone.

Pa. R.C.P. §1710.

A. This action satisfies Pa.R.C.P. §1702

PA. R.C.P. § 1702 provides the requirements of a class:

Rule 1702. Prerequisites to a Class Action.
One or more members of a class may sue or be sued as representative parties on behalf of all members in a class action only if
(1) the class is so numerous that joinder of all members is impracticable;
(2) there are questions of law or fact common to the class;
(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
(4) the representative parties will fairly and adequately assert and protect the interests of the class under the criteria set forth in Rule 1709; and
(5) a class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708.

Pa.R.C.P. §1702.

1. 1702(1): Numerosity

Rule 1702(1) states that "the class is so numerous that joinder of all members is impracticable." The numerosity requirement is satisfied where "the number of potential individual plaintiffs would pose a grave imposition on the resources of the court and an unnecessary drain on the energies and resources of the litigants." *Janicik v. Prudential Ins. Co. of Am.*, 451 A.2d 451, 456 (Pa. Super. 1982). There is no need to prove the specific number of class members, only an ability to define the class with enough precision that the court is afforded sufficient indication that the class consists of more members than would be practicable to join.

Id. While there is no specific minimum number needed for a class to be certified, there is a general presumption that if the number of potential plaintiffs exceeds forty then numerosity is satisfied. *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 595 (3d Cir. 2012).[2]

Plaintiffs seek to represent a class of approximately 123,000 residents whom may have been affected by the outage at US Steel's Clairton plant. There is no question that the potential class size far exceeds the generally accepted number required. Defendant made no argument against numerosity, either during the certification hearing or subsequent briefings. *See generally* (Transcript, *supra*); (Defendant's Proposed Findings, *supra*).

The court finds that joinder of all purported members of the class would be impracticable based on the approximated number of residents. This case would continue for years, perhaps even decades, if attempted to individually join all or a large number of residents. The strain on the court's resources, as well as the parties', would be insurmountable. The Court finds that the numerosity requirement, Rule 1702(1), is satisfied.

2. 1702(2): Commonality

Rule 1702(2) states that "there are questions of law or fact common to the class." Common questions will generally exist if the class members' legal grievances arise out of the "same practice or course of conduct" on the part of the class opponent. *Janicik*, *supra* at 457, *quoting Ablin, Inc. v. Bell Telephone Co. of Pennsylvania*, 435 A.2d 208, 213 (Pa. Super. 1981). The critical inquiry for the certifying court is whether the material facts and issues of law are substantially the same for all class members. *Samuel-Bassett*, *supra* at 408, *citing Liss & Marion, P.C. v. Recordex Acquisition Corp.*, 983 A.2d 652, 663 (Pa. 2009). The court should be able to envision that the common issues could be tried such that "proof as to one claimant would be

[2] Federal precedent is instructive in construing Pennsylvania's class action rules. *Janicik*, *supra*, at 464, n.3*, citing McMonagle v. Allstate Insurance Co.*, 331 A.2d 467, 471–72 (Pa. 1975).

proof as to all" members of the class. *Id*. at 408-09. The Court in *Samuel-Bassett* held that the certifying court found commonality, stating "the class's claims were based on 'a common source of liability' and were susceptible to common proof." *Id*. at 411.

All six of the Named Plaintiffs brought the lawsuit based on allegations that US Steel negligently allowed pollutants, SO_2 and H_2S, to be released into the air of Mon Valley for over four months, causing either intentional or unintentional nuisance. The Named Plaintiffs seek recovery for lost-use-and-enjoyment of property caused by the Defendants actions. Each of the Named Plaintiffs claims arise out of the same incident, the outage at the US Steel Clairton Plant. The claims are also substantially similar: the Plaintiffs allege suffering from smells such as a rotten egg smell, headaches, throat irritations, and more, as a result of Defendant's actions.

Defendants argue that relying on testimony of a few nuisance complainants cannot be used to determine the conditions, experiences, or claims of the entire class. (Defendant's Proposed Findings, *supra*, at P. 69-70, L. 55). Defendant argues further that whether a condition constitutes nuisance would require individual determination because each resident did not have the exact experiences. (*Id*. at P. 70, L. 55). However, the existence of individual questions essential to a class member's recovery is not necessarily fatal to the class, and is contemplated by the rules. *Janick*, *supra* at 457, *see* Pa.R.C.P. 1708(a)(1) (whether common questions "predominate" over individual ones), 1710 (power to limit issues).

The court finds that common questions of law and fact exist with respect to Plaintiffs' claims. The claims arise out of the same series of unfortunate events and each of the Named Plaintiffs have similar-enough experiences to be common amongst each other. The commonality requirement, Rule 1702(2), is satisfied.

3. 1702(3): Typicality

Rule 1702(3) states that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." The typicality requirement is closely akin to the requirements of commonality and the adequacy of representation. *Id*., *quoting Ablin, Inc. v. Bell Telephone Co. of Pennsylvania*, 435 A.2d 208, 212 (Pa. Super. 1981).

> The purpose of the typicality requirement is to ensure that "the class representative's overall position on the common issues is sufficiently aligned with that of the absent class members to ensure that her pursuit of her own interests will advance those of the proposed class members." Typicality exists if the class representative's claims arise out of the same course of conduct and involve the same legal theories as those of other members of the putative class. The requirement ensures that the legal theories of the representative and the class do not conflict, and that the interests of the absentee class members will be fairly represented. But, typicality does not require that the claims of the representative and the class be identical, and the requirement "may be met despite the existence of factual distinctions between the claims of the named plaintiff and the claims of the proposed class."

Samuel-Bassett, *supra* at 421-22 (citations omitted).

The claims and defenses of the representative parties are typical of the class. All six of the Named Plaintiffs have alleged negligence and private nuisance as a result of the emissions from US Steel's actions at its Clairton Plant. The class representatives' overall position aligns with the entire class: the claims that US Steel's emissions caused lost-use-and-enjoyment. The class representatives seek to represent the entire class of residents in the Mon Valley to recover for the lost-use-and-enjoyment of their properties. Advancement of the Named Plaintiffs' interests will undoubtedly advance those of the class.

US Steel has attempted to argue that typicality is defeated because of the differing experiences amongst not only the Named Plaintiffs, but amongst the residents, especially considering relevant factors such as age, health, location of property, etc. However, as the Court held in *Samuel-Bassett*, claims need not be identical and factual distinctions may exist for typicality to remain intact.

The Court finds that all claims and defenses of the representative parties are typical of the class. The typicality requirement, Rule 1702(3), is satisfied.

4. 1702(4): Adequacy

Rule 1702(4) states that "the representative parties will fairly and adequately assert and protect the interests of the class under the criteria set forth in Rule 1709."

> Pa.R.C.P. (1709) Criteria for Certifications. Determination of Fair and Adequate Representation:
> In determining whether the representative parties will fairly and adequately assert and protect the interests of the class, the court shall consider among other matters
> (1) whether the attorney for the representative parties will adequately represent the interests of the class,
> (2) whether the representative parties have a conflict of interest in the maintenance of the class action, and
> (3) whether the representative parties have or can acquire adequate financial resources to assure that the interests of the class will not be harmed.

Pa.R.C.P. §1709.

Preliminarily, a litigant must be a member of the class which he or she seeks to represent at the time the class is certified by the court in order to ensure due process to the absent class members and to satisfy requirements of standing. *Janicik*, *supra* at 458. There has been no evidence to suggest that the named Plaintiffs are not themselves members of the class, having been residents of the Mon Valley during the outage period; they are themselves members of the class.

Generally, until the contrary is demonstrated, courts will assume that members of the bar are skilled in their profession. *Id*. Courts may also infer the attorney's adequacy from the pleadings, briefs, and other material presented to the court, or may determine these warrant further inquiry. *Id*. at 459. No argument has been made that the attorneys won't adequately represent the class members' interests. *See generally* (Transcript, *supra*); (Defendant's Proposed Findings, *supra*); (Plaintiffs' Proposed Findings, *supra*). Rule 1709(1) is satisfied.

To assure that the interests of the class will not be harmed the court must consider whether the representative parties have or can acquire adequate financial resources to prepare the litigation and carry it to completion. *Janicik*, *supra* at 459. No argument has been made that the representative parties will not be able to obtain adequate financial resources. The Court sees no reason to doubt that the representative parties will adequately represent the interests of the class and obtain adequate financial resources to assure their interests. Rule 1709(3) is satisfied.

The Court finds that the only conflict with regards to Rule 1709 falls under 1709(2): whether the representative parties have a conflict of interest in the maintenance of the class action.

Defendant has made the argument that a conflict concerning the allocation of remedies amongst class members exists. (Defendant's Proposed Findings, *supra*, at P. 67, L. 47). Defendant argues that the Named Plaintiffs' circumstances vary from each other (and from the proposed class) and that selection of one of these Named Plaintiff's properties as the "Reference Property" will benefit some and not others (*Id*. at P. 67-68, L. 47). Picking one Reference Property for damages inherently benefits some and creates disadvantages for others because the emissions from the Clairton plant were not equally dispersed; some properties and residents were more affected than others. Defendant uses Dr. Anstreicher's testimony as an example: Plaintiffs' selection of the number of modeled days used to compute an "Exposure Score" can result in one property receiving as much as 36% more in damages and other receiving as much as 33% less in damages. (*Id*. at P. 28, L. 91). Defendant argues that the Named Plaintiffs cannot maximize recovery for the majority of the class and minimize it for others and therefore, they are inadequate to represent the class. (*Id*. at P. 28, L. 93).

Defendant also argues that because the Named Plaintiffs are not seeking personal injury damages, participation in the class will extinguish these claims due to the claim-splitting doctrine. (*Id*. at P. 68, L. 48, *citing Spinelli v. Maxwell*, 243 A.2d 425, 427 (Pa. 1968); *Clark v. Pfizer Inc.*, 990 A.2d 17, 31 (Pa. Super. 2010)). Defendant argues that this would cause a *res judicata* effect of barring any class member from bringing personal injury claims.[3] Defendant argues the potential res judicata effect would render the Named Plaintiffs inadequate to represent the class because they don't allege all of the potential class members' claims. Plaintiffs argue in response that the issues US Steel raises are based on hypothetical situations. (Plaintiffs' Proposed Findings, *supra*, at P. 25, L.31). The Court agrees.

As for the proposed conflict that a single Reference Property will benefit some and not others, Plaintiffs argue that there is no single set of inputs that will advantage the Named Plaintiffs. (*Id*. at L. 32). The Court agrees. The Defendant has not presented enough evidence to the Court that one single Reference Property will significantly negatively impact any class members. For example, Dr. Anstreicher's Report calculated damages for different properties based on exposure scores and recommended a Reference Property with a high, but not the highest exposure score. *See generally* (Plaintiff's Appendix 2, *supra*, at Exhibit 25, Dr. Anstreicher's Report).[4] Plaintiffs' counsel have a duty, in consultation with their experts, to maximize recovery for the class members.

[3] Defendant cites *Cochran v. Oxy Vinyls*, *LP*, No. 3:06-CV-364-H, 2008 WL 4146383, at *10 (W.D. Ky. Sept. 2, 2008) to argue *res judicata* effect. The Court does not find this caselaw convincing, as this case would not be precedential.

[4] Dr. Anstreicher calculated exposure scores by taking the level of SO_2 experienced at a property as the measure of pollutant exposure and applying it to the reference property. The maximum of the hourly concentration per day at a property became the exposure score for that property. Those exposure scores were used to calculate damage amounts. For example, a property with an exposure score of 135 saw an estimated damages amount of $5,000. (Plaintiff's Appendix 2, *supra*, at Exhibit 25, Dr. Anstreicher's Report).

As for the other conflict, Defendant claims that participation in the class would extinguish potential personal injury claims. (Defendant's Proposed Findings, *supra*, at P. 68, L. 48). Plaintiffs assert that no claim for personal injury has been made since the fire, thus resulting in hypotheticals, which would not render the class inadequate. (Plaintiffs' Proposed Findings, *supra*, at P. 25-26, L. 33). The Court agrees with the Plaintiffs. After a class has been certified and notice has been sent to the potential class members, class members will be able to opt-out of the class. Pa.R.C.P. §1711(a). If a potential class member has a personal injury claim, that resident would be able to bring their own claim and the separate claim would not render the class inadequate. Braun, *supra*, at 895.

There has been no evidence presented that would support Defendant's arguments under this criterion. Because of the difficulty of proving a negative, courts have generally presumed that no conflict of interest exists unless otherwise demonstrated and have relied upon the adversary system and the court's supervisory powers to expose and mitigate any conflict. *Janicik*, *supra*, at 136. Counsel for Plaintiffs have a duty to their clients and the class members to obtain the best possible outcome for the class. The court finds no conflict exists under these hypotheticals. Considering all the factors set forth in Rule 1709 and evidence provided by the parties, the Court finds that Plaintiffs and their counsel will adequately represent the class. Rule 1702(4) is satisfied.

5. 1702(5): Fairness and Efficiency

Rule 1702(5) states that "a class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708." Because the Plaintiffs are seeking monetary relief, the Court must consider the seven factors outlined in 1708(a):

1708(a): where monetary recovery alone is sought, the court shall consider:

> (1) whether common questions of law or fact predominate over any question affecting only individual members;
> (2) the size of the class and the difficulties likely to be encountered in the management of the action as a class action;
> (3) whether the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (i) inconsistent or varying adjudications with respect to individual members of the class which would confront the party opposing the class with incompatible standards of conduct;
>
> (ii) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;
>
> (4) the extent and nature of any litigation already commenced by or against members of the class involving any of the same issues;
> (5) whether the particular forum is appropriate for the litigation of the claims of the entire class;
> (6) whether in view of the complexities of the issues or the expenses of litigation the separate claims of individual class members are insufficient in amount to support separate actions;
> (7) whether it is likely that the amount which may be recovered by individual class members will be so small in relation to the expense and effort of administering the action as not to justify a class action.

Pa.R.C.P. §1708(a).

Rule 1708 grants a great deal of discretion to the trial court, *e.g.*, by not according any specific weight to the listed criteria and by not insisting on the exclusivity of the list. *Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 866 (Pa. Super. 1991), *appeal denied*, 616 A.2d 984 (Pa. 1992).

> The Rule (1708) does not tell a court how to decide the question before it, nor which criteria are to be considered the most or least important, nor how to exercise the obvious discretion which the Rule provides; rather the Rule requires a court to keep all of the criteria in mind when it is ready to rule on a motion for certification and forces a court to decide, after considering all of the criteria or as many of them as may be applicable to a particular case, and after considering such "other matters" as may be appropriate to its decision, whether a requested class action is "a fair and efficient method of adjudicating the controversy."

5A Goodrich Amram 2d § 1708:2 (clarification added); *see also*, *Dickler*, *supra* and *ABC Sewer Cleaning Co. v. Bell of Pennsylvania*, 438 A.2d 616 (Pa. Super. 1981).

Considering 1708(a)(1), the court has found that common questions of law and fact predominate over questions affecting individual members. As stated above, there are no individual claims either by the Plaintiffs or potential class members separate from the allegations in this case. There are common questions of law and fact, all based on the alleged actions of the Defendant. The Court is aware of the potentiality of individual claims, but respectfully will not rule on hypotheticals. There is no question that the common issues of law and fact predominate over the nonexistent individual claims. Defendants argue that each resident has individual claims based on their experiences during the outage. However, as the Court held above, all the claims are common and relate to each other.

Concerning 1708(2), regarding the number of individuals in the class and its potential management difficulties, it is axiomatic that the purported class is large, even for a class action. There are possible difficulties Plaintiffs' counsel will encounter when managing the approximate 123,000 member-class. Several of the potential difficulties that the Court anticipates are class notification as well as distribution of potential monetary damages. However, Plaintiffs' counsel has argued that they are more than capable of handling the task ahead of them.[5] The Named Plaintiffs have only alleged negligence and private nuisance as opposed to multiple claims that would require separate actions. The Court sees no reason not to certify the class based on the approximate size of the class; Pennsylvania courts have certified classes of larger sizes.[6] The Court does not foresee any manageability issues that counsel could not handle.

[5] *See generally* (Transcript, *supra*, at (8/16/22, ECF No. 90) at P. 4-88 (Plaintiffs' Closing Argument)).

[6] *See*, *e.g.*, *Dunn v. Allegheny Cty. Prop. Assessment Appeals & Rev.*, 794 A.2d 416, 427 (Pa. Commw. Ct. 2002) (certifying class of over 400,000, finding "no significant management concerns," and emphasizing court's "extensive powers to ensure the efficient conduct of the action").

Concerning 1708(3), prosecution of separate actions out of this same event would cause not only the court enormous time and resources, but would also greatly burden the parties as well, even though Defendant has made the argument for separate actions. Defendant argues certification would violate their due process rights for a jury to hear individual defenses. (Defendant's Proposed Findings, *supra*, at P. 64-65, L. 36). Defendant also argues that collateral estoppel *prevents* a risk to individual class members of inconsistent verdicts. (*Id*. at P. 82, L. 84-86). The Court is not convinced. Many individuals in the class would not have the opportunity or resources to litigate their own claims of negligence or nuisance in court. If multiple, separate lawsuits were filed based on the same events and allegations (and those cases were not certified or consolidated) it is inevitable that different verdicts would occur, as well as different amounts of damages, resulting in lack of fairness to multiple plaintiffs. Defendant's suggestion of individual cases is inefficient and unfair to the parties. There are more feasible problems if the Court were to not certify the class and adjudicate each claim separately. It would cause the Court and parties exorbitant amounts of time and resources. Not only would time and resources become an obstacle, but the potential for different juries to reach varied conclusions is unfair.

Regarding 1708(4), the parties have disclosed there are no previous suits commenced by the Named Plaintiffs or class members against US Steel during the outage period. However, it was disclosed that there is a case pending in this judicial district against US Steel, but the case concerns events after the fire: "The one individual lawsuit U.S. Steel disclosed at the class certification hearing, *Ford v. U.S. Steel Corp.*, No. GD 21-006061 (Pa. Com. Pl. Allegheny Cty.), alleges a personal injury claim arising after the 102 days of pollution at issue here." (Plaintiffs' Proposed Findings, *supra*, at P. 25, n.78).[7]

[7] Other disclosed cases involving US Steel are listed below, though they are unrelated to the underlying facts in this matter: "Clean Air Act enforcement litigation is pending in the Western District of Pennsylvania, *PennEnvironment,*

Regarding 1708(5), the parties do not dispute that the Allegheny Court of Common Pleas is the appropriate forum for Plaintiffs' claims. The Court agrees, as the events took place in Allegheny County and Plaintiffs make allegations based on Pennsylvania law.

Regarding 1708(6), the costs and complexities of this case (such as experts, depositions, discovery, air-modeling, understanding pollution effects, and more) would likely outweigh the benefit for individuals to bring their own cases. The issues are very complex in this matter, such as the process behind making steel, whether Defendant was negligent in their actions before and after the outage, air-modeling, pollutant effects on the environment and humans, which all require expert testimony. The costs for the experts, legal fees, filing motions, etc., will be expensive for this matter, let alone for an individual claim. The costs would likely outweigh potential damages awarded for most individuals to bring their claims. For example, in Dr. Anstreicher's Expert Report, he estimates that depending on the property, damages could range anywhere from a few hundred dollars to below ten thousand dollars. (Plaintiff's Appendix 2, *supra*, at Exhibit 25, Dr. Anstreicher's Report). A class action is more financially feasible regarding these facts and allegations as well as understanding the complexities of pollutants, air-modeling, the steel-making process, and more.

Regarding 1708(7), the potential amount of recovery cannot be determined by the Court absent a crystal ball, and there will always be the possibility for a Defense verdict by the jury that would render no financial recovery for the class. The possibility of loss or a low damages verdict is the risk every Plaintiff, or class member, takes in litigation. The Court will not

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Inc. v. United States Steel Corp., No. CV 19-484 (W.D. Pa.), but the Clean Air Act claims do not and cannot address Plaintiffs' private nuisance claims. A class action asserting nuisance harms similar to the harms in this case, but years before the fire, was settled, with this Court's approval, in July 2021. *Ross v. U.S. Steel*, No. G.D. 17-008663 (Pa. Com. Pl.). And a single personal injury lawsuit over a permanent lung injury allegedly caused by an emissions spike after the damages period in this case was filed in May 2021 and is still pending." (Plaintiffs' Proposed Findings, *supra*, at P. 28, n.79).

begrudge the class their opportunity to be heard when it is impossible to predict what a jury will decide.

The Court finds that the only fair and efficient adjudication for these claims is a class action and therefore finds Rule 1702(5) and 1708 satisfied.

VI. Conclusion/Class Certification

The Court finds that all requirements to certify a class action have been met under Pa.R.C.P. §1702. The Court hereby grants class certification in the above-captioned matter.

BY THE COURT:

Date: May 12, 2023 _____, J.