IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

PAUL SNIDER, on behalf of himself and others similarly situated,

Plaintiff,

v.

Civil Action No. 17-C-377
THOMAS A. BEDELL, Judge

SURNAIK HOLDINGS OF WV, LLC, a West Virginia limited liability company,

Defendant.

ORDER

GRANTING CLASS CERTIFICATION

Introduction

This matter is back before this Court after a Writ of Prohibition was granted by the Supreme Court of West Virginia on November 20, 2020, which vacated this Court's Order of September 16, 2019, which had certified this action as a class action. (See *State ex rel. Surnaik Holdings of WV, Inc. v. Bedell*, 244 W.Va. 248, 852 S.E.2d 748 (2020) (hereafter referred to as "*Surnaik*").

This Court, upon having fully considered the Writ of Prohibition, the record evidence, and the arguments of the Parties, hereby orders the certification of a Class pursuant to Rule 23 of the West Virginia Rules of Civil Procedure ("WVRCP") and the new legal standards articulated in the *Surnaik* opinion.

The Class is defined as all lawful residents and possessors of real property located within one of the isopleths depicted on the maps attached hereto as Exhibits I-A, 1 -B, and I-C ("Class Area"), who did one or more of the following in October 2017: (a) resided on the property within the isopleth; (b) conducted business operations,

including those of a non-profit business, on the property within the isopleth; or (c) conducted state, county, or municipal government operations on the property within the isopleths.

Excluded from the Class are Surnaik Holdings of WV, LLC, and its officers, directors, and employees and any affiliates of Surnaik Holdings of WV, LLC, and their officers, directors, and employees; judicial officers and their immediate family members and associated court staff assigned to this case; class Counsel and attorneys who have made an appearance for the Defendants in this case; and persons or entities who exclude themselves from the Certified Class ("Opt Outs").

Findings of Fact

1. On October 21, 2017, a large, uncontrolled fire erupted at a warehouse owned by Defendant, Surnaik Holdings of WV, LLC (the "Warehouse Fire"). The warehouse was situated at the 3800 block of Camden Avenue, in Parkersburg, Wood County, West Virginia.

2. Defendant's tenant at the time of the Warehouse Fire was an affiliated company called Intercontinental Export-Import, Inc., which does business as IEI Plastics ("IEI") and is in the business of acquiring chemical waste and byproducts from chemical manufacturing facilities. *See* Amended Complaint ("AC") 16. IEI also claims that it recycles chemical waste of other companies. *Id.* 17.

3. Plaintiff alleges that at the time Defendant acquired the warehouse that caught fire in October 2017 and, despite the fact that Defendant's tenant dealt in chemical wastes and byproducts, the warehouse was equipped with a fire protection system which was in a state of disrepair and not functioning when the fire department responded to the October 2017 fire. *See* AC ¶¶ 10 – 14. Plaintiff alleges that in the past, Defendant had

notice as far back as 2008 from local volunteer fire departments that the warehouse's fire protection system was in a state of disrepair, and had discovered during a 2012 fire at the warehouse that the fire protection system was not functioning. *Id.* Nonetheless, Plaintiff alleges that by the time of the Warehouse Fire, Defendant had given up even the pretext of maintaining a fire protection system at the warehouse and had even stopped paying the utility fee associated with the system. *Id.*

4. The Warehouse Fire emitted a plume of smoke consisting primarily of particulate matter and gases that Plaintiff alleges adversely impacted neighboring residents, businesses, and government agencies for days.

5. The most obvious and immediate adverse impact to all members of the Class from the Warehouse Fire is annoyance resulting from the smoke itself, which is irritating to the nose and throat.

6. The Warehouse Fire also is alleged by Plaintiff to have resulted in a loss in the use and enjoyment of property by himself and all of the members of the proposed Class.

7. The emissions from the Warehouse Fire were also of sufficient level to be capable of causing conspicuous bodily injuries. Although these physical injuries were suffered only by a smaller percentage of members of the Class, the invasion by tangible particulate matter capable of causing those injuries was experienced by all Class members.

8. The maps by which the class is defined reference geographical areas (designated by boundaries or "isopleths") where emissions from the Warehouse Fire were determined by Plaintiffs' air modeling expert, William Auberle, P.E., to have averaged at least three micrograms per cubic meter ("ug/m^3") of fine particles less than

2.5 microns in size ("PM2.5"). Mr. Auberle determined those isopleths using standard air dispersion modeling techniques and data available from the Warehouse Fire, including meteorological data.

9. The critical criteria of three micrograms per cubic meter ("ug/m^3") of fine particles less than 2.5 microns in size ("PM2.5") corresponds to the concentration of fine particles in air that are known to cause inflammation in the human respiratory tract. Plaintiffs' medical expert, Michael McCawley, Ph.D., stated in his expert report that inflammation caused by such particles is sensed by most if not all individuals exposed to that concentration, and can be especially harmful to the health of susceptible individuals. In other words, three micrograms of PM2.5 per meter of cubic air over 24 hours is the concentration at which smoke is objectively experienced by reasonable people as unpleasant, annoying and irritating, and increases the risk of death, asthma, heart attacks, and coronary artery thickening in a small percentage of persons subjected to them.

10. Plaintiff's expert, Mr. Auberle, also showed that all putative class members within the proposed class geographical boundary was invaded by, at one point or another during the fire, at least 100 ug/m^3 of total suspended particulate ("TSP"). The evidence of record submitted by Mr. Auberle indicates that such a level is between three and five times the background amount of total particulate.

11. Plaintiff's information systems and analysis expert, who is also a professional engineer, Seward G. Gilbert, Jr., P.E., used Mr. Auberle's isopleths and data from the U.S. Census Bureau to estimate the number of persons who reside within the isopleths. Mr. Gilbert estimated that approximately 57,782 individuals reside within the

isopleths that define the geographic boundary of the Class. Approximately 86% of these individuals are residents of West Virginia, and the remainder are residents of Ohio.

12. At the hearing on Plaintiffs motion for class certification, on July 8, 2019, Plaintiff Snider appeared and testified with regard to his responsibilities as class representative. Mr. Snider testified that he has been a resident of Parkersburg for the last fourteen years and that he lived a few blocks from where the Warehouse Fire occurred. *Tr.* at 39. He testified that he understood his responsibility as a class representative to maintain contact with his attorneys and to ensure that the case was making progress. *Id.* at 45. He reaffirmed his commitment to attend additional hearings, provide additional information in response to discovery, and to submit to additional deposition questioning if necessary. *Id.*

13. In granting the writ, the Supreme Court of West Virginia raised a concern about a lack of clarity in the factual record about "certain alleged racist and political remarks" from Mr. Snider's social media. *Surnaik*, at n.14. The record reflects that Mr. Snider's wife was a regular Facebook user and he himself was not, and that she regularly used his Facebook account and posted the material in question. Further, Mr. Snider "didn't pay much attention" to his wife's posts. *Tr.* 43-44. Mr. Snider's testimony at the hearing reflects that he does not bear animosity toward minority groups and indeed the record is suggestive that the opposite is true, as he regularly interacts with such members of the community in his role as a karate instructor. *Tr.* at 44-45.

Conclusions at Law

A. *Class Members Are Objectively Ascertainable*

14. As a threshold matter, this Court concludes that the Class, as defined, satisfies the requirement that membership within a defined Class be readily

ascertainable by defined and objective criteria. The Class is defined by a geographical boundary, and membership in the Class is defined as maintaining a lawful residence or conducting a business within one of the isopleths depicted on the attached maps (*see* Exhibits I-A, I-B and I-C). Plaintiffs' information systems and analysis expert, who is also a professional engineer, Seward G. Gilbert, Jr., P.E., even submitted a supplemental expert report that describes the method that can be used to determine, with respect to any individual or business in the area, whether the person's property, residence, or business is located within the boundaries of one of the isopleths, and therefore whether the person is or is not a member of the Class. *See* April 30, 2019 Letter - Report of Seward G. Gilbert, P.E. (attached as "Exhibit 5" to Plaintiffs Motion for Class Certification). This Court concludes that these are objective and ascertainable criteria for determining membership in the Class. With these objective criteria in place, notice of the class action will be feasible and members will be informed, without difficulty, of their right to opt out of the Class and that by participating in the class action they will be bound by the jury's determination of the issues to be tried, including the area of contamination.

B. The Proposed Class Satisfies the Rule 23(a) Prerequisites

- ***Numerosity***

15. This Court concludes that the Class is so numerous that joinder of all members is impracticable, and thus that the numerosity requirement of WVRCP 23(a)(I) is met. The record reflects that the Class consists of in excess of 57,000 residents and additional businesses in the area surrounding the Warehouse Fire which are alleged to have suffered damages as a result of the incident. Joinder does not need to be impossible; it simply needs to be impracticable. *In re West Virginia Rezulin Litig.*, 214 W.Va. 52, 585 S.E.2d 52, 65 (2003). A Class with over 57,000 individuals and

businesses cannot practicably participate on an individual basis through joinder. Accordingly, it is clear that this element is satisfied.

- ***Commonality***

16. This Court concludes that there are questions of law or fact common to the Class and that the commonality requirement of WVRCP 23(a)(2) is met. Here, common questions of law and fact exist for each of the Class Members with regard to the alleged conduct of the Defendant, including:

(a) Did Defendant maintain the sprinkler system in the warehouse, and if not, why not?

(b) Did Defendant know or should it have known that a fire in its warehouse would adversely impact nearby landowners and occupants?

(c) Did Defendant expect to profit, through hazard insurance proceeds above the actual market value of the property, at the expense of the health, enjoyment, and convenience of nearby landowners and occupants in the event a fire consumed its warehouse?

(d) Was Defendant negligent in failing to maintain the warehouse's sprinkler system?

(e) Was Defendant willful, wanton, or recklessly indifferent to the interests of nearby landowners and occupants with respect to its decision not to maintain the warehouse's sprinkler system?

(f) How much particulate matter, gasses, and smoke were released from the fire and where did it go?

(g) What are the objective hazards of particulate matter of various sizes (such as fine particles below 2.5 microns, and larger particles) from this fire at certain concentrations?

17. Among these common questions are questions relating to the Defendant's liability for its alleged negligent failure to maintain the fire protection system in the warehouse, as well as its alleged wanton indifference in allegedly making a strategic, money-saving decision that ultimately resulted in failing to prevent a fire which may spread to nearby buildings and harm nearby properties and persons.

18. This Court also concludes that each of the common questions above will generate a common answer for all Class Members. In other words, the answer to each of those questions is the same for every Class Member. For commonality to exist under Rule 23(a)(2) of the West Virginia Rules of Civil Procedure [2017], class members' 'claims must depend upon a common contention[,]' and that contention 'must be of such a nature that it is capable of classwide resolution[.]' ... In other words, the issue of law (or fact) in question must be one whose 'determination ... will resolve an issue that is central to the validity of each one of the claims in one stroke.'" Syl. pt. 3, *State ex rel. W. Va. Univ. Hospitals, Inc. v. Gaujot*, 829 S.E.2d 54 (W. Va. 2019) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350, 131 S. Ct. 2541, 2551, 180 L. Ed. 2d 374 (2011)). It is clearly not the case that Defendant failed to maintain its sprinkler system at its warehouse as far as one Class Member goes, but adequately maintained a sprinkler system at the same warehouse with respect to another Class Member, or that its decision was negligent with respect to one Class Member but non-negligent with respect to another. While different quantities of gas and particulate matter may have traveled to different surrounding locations, the gases and particulate matter released from the

warehouse itself during the fire are the same for every Class Member. In other words, the materials—plastics, chemicals, building materials, and other materials—consumed in the actual fire were the same for every Class Member.

19. Yet another common question that binds the Class is the determination of the precise boundaries of the geographical area impacted by harmful levels of smoke from the Warehouse Fire. This common question also has a common answer. While some Class Members may have been invaded by more particulate matter than others, the distribution of particulate matter throughout the area—the boundaries of the area impacted by certain levels of particulate matter—does not change depending on which Class Member is asking the question.

20. The con-mon questions listed above arise out of a common nucleus of operative fact common to all or a substantial number of Class members. They are issues that are central to the resolution of the fact and scope of Defendant's liability to the Class. Thus, they are sufficient to establish commonality under WVRCP 23(a)(2). *Rezulin*, 585 S.E.2d at 68.

- ***Typicality and Standing of Plaintiff Paul Snider***

21 Next, the Court concludes that Plaintiff's claims are typical of the claims of the members of the Class as a whole, such that the typicality element of WVRCP 23(a)(3) is satisfied. A representative party's claims are typical if they arise from the same event or practice or course of conduct that gives rise to the claims of the Class members and is based on the same legal theory. *Rezulin*, 585 S.E.2d at 68.

22. Defendant challenges Paul Snider's standing to bring these cases in addition to challenging class certification under the typicality prong, arguing that Paul Snider's claims cannot be typical because he allegedly did not suffer any "injury." This

Court concludes that Defendant's premise is simply wrong. Paul Snider very much alleges that he suffered an injury and testified to facts that strongly support the inference that he suffered a loss of the use and enjoyment of his property from the smoke invasion of his home that lasted for several days, the duration of the fire. Mr. Snider did testify that he did not notice visible ash deposited on surfaces around his property following the warehouse fire. However, he testified at length in his deposition about the invasion of his home by noxious smoke and how it interfered with his use and enjoyment of his home. *See* Paul Snider Deposition at pp. 93 - 101.

23. According to Paul Snider's own testimony, during the eight days of the fire, his "house was full of smoke." *Id.* at p. 94. He and his wife acquired breathing masks to cover their noses and mouths and "couldn't take the masks off' in their own home. *Id.* "That stuff was awful." *Id.* Mr. Snider testified that it was "all the way around the house. ...You could smell it as soon as you walked in the door." *Id.* at p. 99. While he would normally "lounge around" his house with his wife during the day and surf the internet, before leaving to teach karate in the evenings, *id.* at p. 93, during the fire he and his wife "tr[ied] to stay away from the house...because of smoke and stuff." *Id.* at p. 95. Mr. Snider still taught karate in the evenings, but in the daytime he and his wife "tried to get out of that smoke," *id.* at p. 98, and sometimes "just drove off and went anyplace to get away from the smoke." *Id.* However, one problem according to Mr. Snider, was that, "we really didn't have no place to go." *Id.*

24. If the jury believes Mr. Snider's account of his experiences, then this would be a textbook example of an invasion of property resulting in the loss of the use. Mr. Snider felt he had to leave as much as he could, rather than staying and lounging around with his wife and surfing the internet as he would have preferred and enjoyed. When he

was there it was unpleasant, it smelled bad, "[i]t was awful". That is an actionable injury - when the loss of use and enjoyment results from another's negligence - and a form of property damage. Mr. Snider also testified that he developed asthma, a personal injury, as a result of breathing smoke from the fire. Snider Deposition at pp. 95 - 97. Either of these injuries - the property damage from the invasion of his home by smoke and the loss of use and enjoyment or the personal injury resulting in the onset of asthma - is sufficient, by itself, to confer standing on Paul Snider to file this suit.

25. Having resolved the standing question, this Court concludes that the typicality challenge raised by Defendant under Rule 23(a)(3) should also fail for the same reasons. In this instance, Mr. Snider's loss of the use and enjoyment of his property from the smoke invasion is not only property damage and a legal injury sufficient to confer standing, but also appears to be completely typical of the injuries suffered by other class members.

26. Defendant alleges that, because Mr. Snider did not notice ash on the surfaces around his home, Mr. Snider had no property damage, has no standing, and his claims cannot be typical of a class of persons who suffered "property damage," presumably referring to Mr. Snider's allegation that some class members had visible ash deposits on surfaces following the fire. Assuming that some class members, in addition to being invaded by smoke during the fire itself, also noticed ash on surfaces around their homes after the fire and went to the trouble of cleaning those surfaces, that "factual variation" does not come anywhere close to defeating typicality under the standard established and recently affirmed by the West Virginia Supreme Court in *State of West Virginia ex rel. Municipal Water Works v. Swope*, 242 W.Va. 258, 835 S.E.2d 122 (2019). According to that standard, "[a] representative party's claim or defense is typical if it

arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." Syl. Pt. 8, *Swope*. There are two requirements for typicality. First, the representative's claim must "arise from the same event or practice or course of conduct" as the other class members' claims. In this case, the event and course of conduct are the Warehouse Fire and Defendant's allegedly negligent, reckless, and willful failure to maintain its fire protection system. Second, the representative's claims must be based on the same legal theory. Here, all claims are based on negligence.

27. The Supreme Court of Appeals' most recent decision in *Swope* also includes some additional instructions, which further bolster the conclusion that Mr. Snider's claims are sufficiently typical of the absent class members' claims to permit him to represent the class under Rule 23(a)(3). First, "Rule 23(a) only requires that the class representatives' claims be typical of the other class members' claims, not that the claims be identical." *Id.* Second, the Supreme Court of Appeals explained that, "When the claim arises out of the same legal or remedial theory, the presence of factual variations is normally not sufficient to preclude class action treatment." *Id.* In this case, homes were negligently invaded by a fire, resulting in noxious smoke and the loss of the use and enjoyment of property. The fact that there may be minor variations in each individual's experience - for example, some class members may have gone around their homes afterwards, dusting shelves, wiping walls and tables, and changing filters, while others, including the class representative, didn't notice any unusual dust or ash or didn't attribute the need for dusting or cleaning to the smoke from the fire - does not defeat typicality.

28. The Supreme Court of Appeals' standards for Rule 23(a) typicality are in accord with the standards of other jurisdictions. Typicality is an inquiry into alignment of

interest, rather than an investigation into the forms of relief for which the named plaintiff has prayed. See *Gaudin v. Saxon Mortgages Services, Inc.*, 297 F.R.D. 417, 426 (N.D. Cal. 2013). The "main principle behind typicality is that the plaintiff will advance the interests of the class members by advancing her or his own self-interest... . The plaintiff whose claim is typical will ordinarily establish the defendants' liability to the entire class by proving his or her individual claim." *In re Terazosin Hydrochloride Antitrust Ling.*, 220 F.R.D. 672, 687 (S.D. Fla. 2004) (quoting *Newberg on Class Actions sec. 18:8* (4th ed. 2002) at 29). "In determining whether typicality is met, the focus should be on the defendants' conduct and plaintiffs' legal theory, not the injury caused to the plaintiff." *Simpson v. Fireman 's Fund Ins. Co.*, 231 F.R.D. 391, 396 (N.D. Cal. 2005).

29. Accordingly, if a class is certified on the basis of common liability, the court "can also at a later stage certify subclasses of plaintiffs depending on their particular situations, if it turns out to be necessary," but at the class certification stage, the plaintiffs' claim need only be "sufficiently typical" of those possessed by class members. *Gaudin*, 297 F.R.D. at 426. The "plaintiffs' claims need not be identical to those of the proposed class members; so long as the named plaintiffs' claims share the same essential characteristics as that of the proposed class, typicality will be satisfied." *Hill v. City of New York*, 136 F. Supp. 3d 304, 355 (E.D.N.Y. 2015). Paul Snider's interest in vindicating his own right to damages from the smoke that invaded his home for eight days—by proving Defendant's negligence and recklessness with respect to the fire—is squarely aligned with the interests of absent class members, including those who claim, in addition, that the smoke that invaded their homes deposited a residue that had to be cleaned up after. The claim and the legal theory are identical, and the interests are aligned. Typicality is satisfied.

- ***Adequacy of Representation***

30. This Court concludes that Plaintiff Paul Snider, the Class Representative, has interests in this case that do not conflict with, and are co-extensive with, those of absent Class Members. Paul Snider, the Class Representative, testified at the hearing and demonstrated sufficient interest in, knowledge of, and involvement with the case. Defendant previously raised the issue of allegedly racist statements posted to Paul Snider's Facebook account as a challenge to his adequacy. As noted above, Mr. Snider testified at the hearing on this issue, and the Court was more than satisfied that, in his role as Class Representative, Mr. Snider will treat all Class Members the same without respect to their race, religion, ethnicity, or national origin. Mr. Snider testified that he has karate students of all races and religions, and that he treats them the same, as pupils, and that he will do the same with respect to his duties as Class Representative. This Court is satisfied that Mr. Snider's Facebook posts do not detract from his credibility or from his suitability to serve as a representative for the Class in this action. Mr. Snider testified at the class certification hearing that his wife made these posts and this fact was not challenged by Defendant. *Tr.* at 4346. His testimony otherwise reflects a willingness to serve as class representative for all members of the Class regardless of their race or religion. *Id.* at 44. This Court notes that Defendant did not raise the issue of Mr. Snider's alleged racist Facebook posts in its Petition for Writ of Prohibition, an apparent abandonment of the argument.

31. The Plaintiff pursues common law theories of liability (i.e., negligence and nuisance) under West Virginia law, stemming from the accidental and arguably wanton and willful release of pollutants from a fire that occurred on property situated in West Virginia. Although Defendant has never raised the issue as an argument against

certification of the Class—perhaps aware that the law does not favor this argument—the Court is mindful that Plaintiff Snider is a West Virginia resident and that a portion of the Class membership (roughly 14%) is comprised of Ohio residents. As a matter of established law, however, the Court concludes that the claims of Ohio residents also arise under the common law of West Virginia, the state where the alleged pollution release occurred, not under Ohio law, the state where the Ohio class residents were injured. The United States Supreme Court has held that a plaintiff in one state cannot bring a suit against an alleged polluter located in another state, for a release occurring in the polluter's state, under the law of the plaintiff's state. Such a plaintiff can and must bring the suit under the law of the polluter's state, where the release occurred. See *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987). While the United States Supreme Court's decision in *Ouellette* deals directly with common-law claims involving the pollution of streams and waterways, no less an authority than the United States Court of Appeals for the Third Circuit has concluded that the same reasoning and analysis applies with equal force to common-law claims arising from releases of contaminants and particulate matter into the air. See *Bell v. Cheswick Generating Station*, 734 F.3d 188 (3rd Cir. 2013). Therefore, the fact that certain Class Members are located in Ohio does not necessitate an analysis of the similarities or differences under Ohio law, because all claims of all Class Members necessarily arise under West Virginia law.

32. Additionally, this Court recognizes the experience of the counsel designated as Class Counsel below and finds that the requirement of adequate representation under W. Va. R. Civ. P. 23(a) has been fully met. This Court concludes that the proposed Class Counsel fairly and adequately represent the interests of the Class pursuant to W. Va. R. Civ. P. 23. This Court hereby appoints Alex McLaughlin and

the law firm of Calwell Luce diTrapano, LC; Van Bunch and the law firm of Bonnett, Fairbourn, Friedman & Balint, P.C.; and Michael Jacks and the law firm of Jacks Legal Group, P.L.L.C. as class counsel for this matter.

C. The Requirements of Rule 23(b) Are Satisfied

33. In this case, Plaintiff seeks certification primarily under Rule 23(b)(3) of the West Virginia Rules of Civil Procedure. The West Virginia Supreme Court's decision in *Surnaik* focused on and provided clarity and new guidance for analyzing the Rule 23(b)(3) factors of predominance and superiority. Syl. Pt. 7 of *Surnaik* provides:

> When a class action certification is being sought pursuant to West Virginia Rule of Civil Procedure 23(b)(3), a class action may be certified only if the circuit court is satisfied, after a thorough analysis, that the predominance and superiority prerequisites of Rule 23(b)(3) have been satisfied. The thorough analysis of the predominance requirement of West Virginia Rule of Civil Procedure 23(b)(3) includes (1) identifying the parties' claims and defenses and their respective elements; (2) determining whether these issues are common questions or individual questions by analyzing how each party will prove them at trial; and (3) determining whether the common questions predominate. In addition, circuit courts should assess predominance with its overarching purpose in mind— namely, ensuring that a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. This analysis must be placed in the written record of the case by including it in the circuit court's order regarding class certification.

- ***Identifying the Parties' Claims and Defenses and Their Elements***

34. The first task required of circuit courts under Surnaik in analyzing the predominance and superiority requirements under Rule 23(b)(3) is "identifying the parties' claims and defenses and their respective elements." That task here is relatively straightforward, to-wit: in his Amended Complaint, submitted by Plaintiff after remand, Plaintiff essentially abandoned his trespass claim and now proceeds under just two (2) tort theories or claims; nuisance and trespass. As these are tort claims arising under West Virginia common law, the elements of both of these claims are the same: duty,

breach of duty, causation, and damages. See *Carter v. Monsanto*, 212 W.Va. 732, 737, 575 S.E.2d 342, 347 (2002) (noting that "nuisance is a tort, which is governed by the rules relating to torts generally," and holding, "before one can recover under a tort theory of liability, he or she must prove each of the four elements of a tort: duty, breach, causation, and damages.").

35. Plaintiff made clear in his briefing in response to Defendant's motion to dismiss—and in subsequent briefing, including in support of class certification following remand from the Supreme Court—that he views the two claims, nuisance and negligence, as "practically inseparable" under West Virginia law in light of the facts of the instant case, where the claim of nuisance is based on a single act of negligent conduct, rather than an ongoing course of intentional and unreasonable conduct.

36. Prior holdings of the West Virginia Supreme Court support Plaintiffs position that the two causes of action are, in instances such as this, practically inseparable. The Supreme Court's opinion in *Harless v. Workman*, 145 W. Va. 266, 114 S.E.2d 548 (1960), provides an excellent overview of the development and adaptation of nuisance and negligence law with respect to invasions of smoke and dust in an increasingly industrial landscape. In Harless, the defendant started operating a coal tipple and coal loading facility near the plaintiff's residence, which resulted in dust invading his property and dwelling, although the extent of the dust problem was heavily disputed by the parties. The plaintiff sued under both negligence and nuisance theories. The trial court dismissed the nuisance claims but decided to let the negligence claim go to the jury, and the Supreme Court upheld the trial court's decision. See Syl. Pt. 3, *Harless*, 114 S.E.2d 548 ("In an action to recover for damages caused to the plaintiffs' property by dust resulting from the nearby operation by the defendant of a coal loading

tipple and a coal crusher, the trial court did not err in submitting the case to the jury on the basis of the defendant's negligence rather than upon the basis of a nuisance.").

37. In upholding the trial court's decision in *Harless*, the Supreme Court of Appeals canvassed the prior decisions of the West Virginia Supreme Court of Appeals, the holdings of other courts with respect to dust and smoke invasions, and legal treatises. One of the cases discussed is *Harless* is *Rinehart v. Stanley Coal Co.*, 112 W.Va. 82, 82, 163 S.E. 766, 766 (1932). In *Rinehart*, the plaintiff, a neighboring landowner, brought an action in negligence and nuisance against a coal company for "damages caused to [his] property by noxious smoke, fumes and dust from a burning refuse deposit on the leasehold of defendant." 163 S.E. at 766. The sole syllabus point in *Rinehart* is under the heading "Nuisance" and which reads, "An owner is liable for negligently using his property to the injury of another."

38. The Supreme Court in *Harless* also cited with approval the following instructive language from an opinion by the Appellate Court of Illinois:

> The earliest cases proceeded upon the theory that an owner of property was entitled to pure and unadulterated air over his property. As we became more industrial and less pioneering and agricultural, courts were forced to recognize that industry could never develop or even live if exceptions were not made in the original hard and fast rule. The law thus developed that if industrial plants were located in places suitable to their business no action for nuisance would lie unless the interference with use of land was substantial and unreasonable *or unless the defendant was causing more interference than was necessary in the proper conduct of his business. This latter alternative is commonly classified as negligence.*

Harless, 114 S.E.2d at 555 (emphasis added) (quoting *Patterson v. Peabody Coal Co.*, 122 N.E.2d 48, 51 (Ill. App. 1954)).

39. The Supreme Court in *Harless* also quoted extensively from *Corpus Juris Secundum*, including the following highly instructive language:

> While an action for damages caused by an absolute nuisance is not controlled by the rules governing actions for negligence, in actions in which the nuisance is based on negligence, the rules applicable to negligence will be applied in so far as they may be pertinent to the facts disclosed. So, also, where the torts are coexisting and practically inseparable, as where the same acts or omissions constituting negligence give rise to a nuisance, the rules applicable to negligence will be applied. Where an act and condition can become a nuisance solely by reason of the negligent manner in which it is performed or permitted, there can be no recovery independently of the existence of negligence.

Harless, 114 S.E.2d at 553 (emphasis added) (quoting 66 C.J.S., § 11, Nuisances, at 754).

40. In summary, it is well-established that airborne smoke, fumes, and dust negligently released from a facility—including smoke resulting from a fire—that migrates into the air spaces of dwellings and other structures on adjoining private property, and thereby interferes with the comfort, enjoyment, or commercial interests of adjoining landowners, is actionable in negligence.

41. This Court concludes that these two claims—nuisance and negligence—are "practically inseparable," particularly with respect to the elements of duty and breach of duty. Unlike a nuisance claim where the allegedly tortious conduct is intentional, here the Plaintiff contends that the invasion of smoke from the Defendant's Warehouse Fire constituted a nuisance because the release of smoke was negligent, not that it was intentional, substantial, ongoing, and unreasonable. "Where an act and condition can become a nuisance solely by reason of the negligent manner in which it is performed or permitted, there can be no recovery independently of the existence of negligence." *Harless*, 114 S.E.2d at 553 (emphasis added) (quoting 66 C.J.S., § 11, Nuisances, at 754).

42. The Court therefore concludes that for both Plaintiffs negligence and nuisance claims, the duty at issue is the duty to exercise reasonable care. Put another

way, Defendant was within its rights to operate its warehouse business in the location where it was operating prior to the fire, but Defendant had the duty to control and prevent the release of smoke, dust, and other particulate matter to the extent practicable in the conduct of that business. "The law thus developed that if industrial plants were located in places suitable to their business no action for nuisance would lie unless the interference with use of land was substantial and *unreasonable or unless the defendant was causing more interference than was necessary in the proper conduct of his business. This latter alternative is commonly classified as negligence.*" *Harless*, 114 S.E.2d at 555 (emphasis added) (quoting *Patterson v. Peabody Coal Co.*, 122 N.E.2d 48, 51 (Ill. App. 1954)).

43. Specifically included within this duty of reasonable care is the duty to utilize and adopt "proper appliances" for the prevention of the release of smoke and dust. The *Harless* Court cited with approval and quoted the following instructive holding from the Pennsylvania Supreme Court:

> The appellant has the right not only to mine its coal, but to prepare it for the market. In so preparing it by artificial means, volumes of dust necessarily arise, which, if not controlled, as far as possible, by proper appliances and the exercise of proper care, will be borne and scattered by the winds over and upon adjoining and near-by properties, and injuries to the same must result. If such injuries can be avoided by the most effective and approved means known of controlling coal dust, it is the duty of the appellant to adopt them.

114 S.E.2d at 554-55 (quoting *Harvey v. Susquehanna Coal Co.*, 50 A. 770, 771 (Pa. 1902)).

44. Having determined that the Defendant's respective duties in the negligence and nuisance claims are the same - to exercise reasonable care for the prevention of the release of smoke, gases, and particulate matter onto neighboring properties, this Court also concludes that the alleged breach of that duty are the same. Specifically, Plaintiff

contends that Defendant breached that duty to exercise reasonable care by failing to maintain and deploy a suitable fire protection system for the warehouse during its operation.

45. The remaining two elements of a tort action - causation and damages - arguably differ for each claim, depending on whether one chooses to break them apart by damage type. In both his Complaint and his recently filed Amended Complaint, Plaintiff identifies the exact same three categories of damages for Class Members under both nuisance and negligence: "[1] smoke and other suspended particulate matter in the air on their properties and in their residences, which interfered with their use and enjoyment of their property, and, [2] in many cases, caused respiratory ailments ranging from irritation to exacerbation of serious pre-existing conditions such as asthma and chronic obstructive pulmonary disease (COPD); and [3] soot, ash, and other particulate matter deposition necessitating clean-up and constituting an ongoing injury to their properties and potential health hazard from accidental contact, inhalation, or ingestion until it is properly remediated." Amended Compl. ¶¶ 22, 323. Arguably, only the first category of damages - smoke and particulate matter in the air on one's private property that interferes with the use and enjoyment of that property - properly falls under the claim for nuisance, while the second and third categories of damage - bodily injuries and discoloration or contamination of real property from the deposition of soot and ash - properly fall under the heading of negligence.

46. Defendant has not advanced any affirmative defenses of the kind that would require an analysis of the elements of that defense. The case was clearly filed within the applicable statute of limitations, and Defendant has not pressed any other affirmative defenses.

- ***Determining Whether the Individual Elements Will Require Common or Individual Proof at Trial***

47. The second task required of circuit courts under *Sumaik* in analyzing the predominance and superiority requirements under Rule 23(b)(3) is "determining whether these issues are common questions or individual questions by analyzing how each party will prove them at trial."

48. In this instant case, all of the issues related to the duty and breach of duty elements of both the negligence and the nuisance claims are common issues with common answers. The issues implicated by these two elements (duty and breach) include the following:

(a) Did Defendant maintain the sprinkler system in the warehouse, and if not, why not?

(b) Did Defendant know, or should it have known, that a fire in its warehouse would adversely impact nearby landowners and occupants?

(c) Did Defendant expect to profit, through hazard insurance proceeds above the actual market value of the property, at the expense of the health, enjoyment, and convenience of nearby landowners and occupants in the event a fire consumed its warehouse, and was it motivated by this consideration in its decision to neglect the sprinkler system?

(d) Was Defendant negligent in failing to maintain the warehouse's sprinkler system?

(e) Was Defendant willful, wanton, or recklessly indifferent to the interests of nearby landowners and occupants with respect to its decision not to maintain the warehouse's sprinkler system?

49 Included within the common issues identified above for duty and breach of duty are multiple subordinate issues and factual inquiries, such as: What materials and chemicals were stored in the warehouse, and what did Defendant know about those materials and chemicals?; What are the standards of care for the maintenance of fire protections systems?; Are there any state or local ordinances covering fire protection systems?; and How were the materials and chemicals stored in the warehouse and are there any standards or regulations pertaining to the storage of materials and chemicals in relation to fire hazards? Issues such as these are likely to be proved at trial through extensive discovery, much of which has been delayed by exigent circumstances, and expert witnesses. This Court concludes that these issues are time-consuming and costly to prove, and likely require many hours of attorney time for drafting and reviewing discovery, preparing for and conducting depositions, and preparing and cross-examining expert witnesses. All of this work, as well as the costs of the time incurred by expert witnesses, would have to be replicated in potentially thousands of individual cases if the case were not certified as a class action, but could be tried in one trial in one Class Action case.

50. This Court concludes that issues related to damages - questions concerning the existence, degree, and severity of each of the three categories of damages, as well as the quantification of quantifiable special damages—are individual issues requiring individual proof. However, this Court notes that with the exception of damages involving bodily injuries, the evidence supporting these issues at trial consists primarily of the individual Class Members' testimony, and any receipts in their possession. It does not require extensive document or expert discovery. Moreover, even for the claims of bodily injury, the time and effort required to present those claims pales

in comparison to the inefficiencies that would occasion the multiple rehashing of liability evidence in thousands of individual cases.

51. Common proof, in the form of a modeling effort to demonstrate the geographical areas of particulate matter contamination at various concentrations of concern, and the degree to the particulate matter invaded those geographical areas, neighborhoods, and houses, may aid, but likely will not be dispositive of, the damages issue in any individual case if that case goes to trial. As a practical matter, this Court concludes that such common proof of the geographical areas of contamination should help to drive resolution of cases following a series of mini-trials or bellwether-type trials, with the idea being that individuals who experienced similar levels and concentrations of particulate matter and smoke invasion should have had similar experiences and suffered similar inconveniences.

52. With respect to the claims for damages for loss of use and enjoyment of property, as opposed to claims for personal injury, this Court concludes that the causation issues tend not to be significant, and to the extent there are legitimate questions concerning causation, those can be resolved by common proof concerning the area impacted by the particulate matter released during the fire. For personal injury claimants, on the other hand, this Court concludes that the causation elements raise a mixture of common issues and individual issues, which generally trace the distinction in toxic tort cases between general causation (whether an exposure at a given level such as a particulate matter invasion is capable of causing an injury) and specific causation (whether an exposure did, in fact, cause a specific individual's injury). General causation requires common proof from experts in fields like toxicology, epidemiology, and public health, such as Plaintiff's expert Michael McCawley, Ph.D., and experts in air modeling

of the extent, duration, and concentration of the dose in areas, such as the modeling performed in this case by expert William Auberle, P.E., although not all "common" issues of general causation that apply to multiple Class Members or groups of Class Members will apply to all Class Members. For example, proof that certain concentrations of particulate matter can cause asthma attacks will only be relevant to those who suffered asthma attacks, not those who suffered other respiratory ailments. Important common questions of causation for all categories of damages cases include: What chemicals and constituents were released with the smoke from the fire, and what are those chemicals and constituents capable of causing and doing in terms of injuries, discoloration of surface damage to property, and noxiousness of smoke? Where did the smoke and other releases go and in what concentrations?

53. This Court concludes that specific causation, on the other hand, requires common proof of general causation plus individual proof, in the form of testimony from the individual allegedly injured, and in the case of a person alleging a bodily injury, it likely requires expert medical testimony concerning the person's injury, vulnerabilities, medical history, and a consideration of alternative causes of the injury to rule them out.

- ***Determining Whether the Common Questions Predominate***

54. The third task required of circuit courts under *Surnaik* in analyzing the predominance and superiority requirements under Rule 23(b)(3) is "(3) determining whether the common questions predominate." The balance of Syl. Pt. 7 in *Surnaik* is particularly relevant to this section: "[C]ircuit courts should assess predominance with its overarching purpose in mind—namely, ensuring that a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other

undesirable results. This analysis must be placed in the written record of the case by including it in the circuit court's order regarding class certification."

55. Class certification will plainly achieve significant and extensive economies of time, effort, and expense. The common questions noted above for duty and breach of duty are all capable of class wide resolution, and that resolution will significantly advance the case. If Defendant prevails in a class wide trial on duty and breach of duty, that will be the end of all of Class Members' claims, with no individual trials necessary, a remarkable savings in time, effort, and expense in one fell swoop. Should Class Members prevail, then none of the Class Members will have to duplicate the effort, expense, and time involved in proving the duty and breach of duty - an effort that includes or is likely to include extensive document discovery, depositions of managers of Defendant and other fact witnesses such as fire marshals, and extensive and expensive expert discovery. This Court will be spared supervising this extensive discovery in thousands of individual cases, and will further be spared the time and expense of presiding over thousands of trials with separate documents, fact witnesses, and expert witnesses testifying about what Defendant did and did not do, what it knew and did not know, and what the standards of care required of Defendant are.

56. Class certification will also promote uniformity of decision as to persons similarly situated. In the absence of the class device, different individuals could easily end up with different results on the issues of duty and breach of duty, even though those issues are identical for all Class Members.

57. Class certification should not sacrifice procedural fairness or bring about other undesirable results. The Court is mindful that not every issue for every element - especially the element of damages and aspects of causation for claimants alleging bodily

injuries - is capable of class wide resolution. Procedural fairness can be preserved, however, by deploying hearings or minitrials to resolve these individual issues.

58. This Court concludes that, with respect to claims for property damage - and especially nuisance or loss of the use and enjoyment of property during the duration of the smoke or particulate matter invasion - there is no question that the common questions related to the duty and breach of duty elements in both nuisance and negligence claims predominate over the individual questions related to damages. (To the extent there are any individual questions related to causation for these categories of damages, those issues would be so minor as to hardly impact the analysis.) On the one hand, the common questions of duty and breach of duty will involve large investments of attorney and expert witness time and money in document review, depositions of fact and expert witnesses, case preparation, and trial presentation. On the other hand, the individual damages issue will involve, in most cases, little more than the testimony and skillful cross-examination of the claimants themselves as to the impact the event had on their lives.

59. This Court concludes that the predominance analysis is closer where claimants are alleging personal injuries. Like the common questions of duty and breach of duty, the individual questions of causation of bodily injuries will involve document review (mostly medical records) and expert testimony (at least, a medical doctor will have to testify to the diagnosis, specific causation, and ruling out other possible causes). However, this Court concludes that the efficiencies inherent in class wide resolution of the common duty and breach of duty issues ultimately outweigh, and therefore predominate over, any difficulties in managing the individual causation and damages questions. Indeed, by aggregating groups of individual bodily injury claimants according

to injury type, this Court may be able to take advantage of additional efficiencies in the common, class wide proof of general causation questions, as well as class wide proof of the areas of impact and dispersion modeling.

- ***Superiority***

60. The final task in the Rule 23(b)(3) analysis is to determine whether the class action mechanism is superior to other available mechanisms for the resolution of these claims. The Defendant argues that the West Virginia Mass Litigation Panel ("MLP") is a superior venue for handling claims such as the claims of Class Members. For the reasons that follow, this Court disagrees.

61. This Court concludes that the MLP and class actions are not alternatives to one another at all. Class actions are permitted and, indeed, are regularly used within the MLP for resolving cases and issues assigned to the MLP. Indeed, the MLP, at its core, is a mechanism for aggregating multiple claims from multiple circuit courts, a mechanism not needed in the instant case, where all claims arise in the Circuit Court of Wood County, and only the claims of Plaintiff Paul Snider and those he seeks to represent still survive in any court. Were this case assigned to the MLP, Plaintiff could, and almost certainly would, immediately move the MLP for certification of the same class on the same grounds.

62. The real question, therefore, is not whether a class action is superior to the MLP - the case is currently not eligible for the MLP, and the Plaintiff would move for class certification before the MLP were it assigned there anyway. The real question is whether proceeding as a class action is superior to requiring every claimant to file an individual case in order to be eligible for recovery, thereby incurring the filing fees, the service of

process fees, and possibly other fees and expenses, even if the cases were aggregated for discovery or trial of certain issues.

63. This Court concludes that the filing fees and other costs associated with bringing individual actions, even when those actions may be aggregated before the Mass Litigation Panel, would essentially close the courthouse doors to many victims of the smoke from the Warehouse Fire. As Judge Copenhaver explained in *Good v. Am. Water Works Co.*, 310 F.R.D. 274, 297 (S.D.W. Va. 2015), in certifying another single event class with potentially small injuries, "absence of the class device would surely discourage potentially deserving plaintiffs from pursuing their rights under the circumstances here presented." Defendant's counsel stated in the hearing that he would be fine with that result - fewer plaintiffs suing his client - and no doubt he would, but the superiority analysis is not judged from the perspective of one party's interest in limiting the number of lawsuits against it. Indeed, access to justice for persons with small claims is the main justification for invoking the class action mechanism. As the United States Supreme Court explained, "While the text of Rule 23(b)(3) does not exclude from certification cases in which individual damages run high, the Advisory Committee had dominantly in mind vindication of the rights of goups of people who individually would be without effective strength to bring their opponents into court at all." *Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997) (internal quotation marks and citations omitted). In other words:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

Id. (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997).

- ***Predominance and Superiority Determinations in Single Event Mass Accident Cases Around the United States***

64. This Court is also mindful of the great weight of authority from around the United States, especially in federal courts, in finding in favor of the predominance of the liability issue and the superiority of the class action mechanism in single event mass catastrophe cases, and especially for the resolution of the common issues of liability. A leading federal case on the subject from the Seventh Circuit Court of Appeals, *Mejdrech v. Met-coil Sys. Corp.*, 319 F.3d 910 (7th Cir. 2003), held that the district judge's decision to certify a class for determination of the common issues of "whether or not and to what extent [the defendant] caused contamination of the area in question", 319 F.3d at 911, was so sound that: "We can see, in short, no objection to the certification other than one based on a general distaste for the class-action device." *Id.* at 912. This is the general consensus across the United States. See, e.g.: *Crutchfield v. Sewerage and Water Board of New Orleans*, 829 F.3d 370, 378 (2016) (noting that the mass tort cases in which class certification has been found to be appropriate are cases that "involved single episodes of tortious conduct usually committed by a single defendant"); *Watson v. Shell Oil Co.*, 979 F.2d 1014 (5th Cir. 1992) (approving district court's decision to certify a class arising out of an explosion at an oil refinery for resolution of liability and punitive damages issues); *In re Oil Spill by Oil Rig Deepwater Horizon*, 295 F.R.D. 112, 141 (E.D. La. 2013) (certifying class arising out of oil spill on grounds that "[p]redominance is more easily satisfied in single-event, single-location mass tort actions such as this because the defendant allegedly caused all of the plaintiffs' harms through a course of conduct common to all class members.").

65. Even the cases relied upon by the Defendant actually support the use ofthe class action mechanism in cases such as this, for area-of-contaxnination property damage arising from a single incident or single release. For example, Defendant cites *In re MTBE Products Liability Litigation*, 241 F.R.D. 435 (S.D.N.Y. 2007), a case arising out of a sudden release of petroleum from a pipeline break. See Def. 's Resp. at 13 (cited for the proposition that "proximate causation often cannot be resolved on a class-wide basis in the case of exposure to a chemical" and therefore class treatment may not be appropriate). The MTBE court actually certified two of three proposed subclasses - the ones "involving damages to class members' property" - and only denied certification for the subclass "involving personal injuries." 241 F.R.D. at 442. In reaching that decision, the MTBE court noted that "courts have repeatedly recognized that such single-incident mass accidents are suitable for class wide adjudication." *Id.* In certifying the property damage subclasses, that court relied heavily on the distinction between cases arising out of a "single incident or single source of harm and proposed classes involving multiple sources of harm occurring over time," noting that the "difference between the former and the latter is that proximate causation may be determined on a class-wide basis in a mass accident and the only question left to resolve relates to the damages for each member of the class." *Id.* at 447—48.

66. Defendants also rely on and quote from *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988). See Def.'s Resp. at 14. A review of the actual holding and reasoning of that decision by the Sixth Circuit Court of Appeals shows that it even more strongly supports class certification in the instant case, for personal injuries as well as property damage. The *Velsicol* court's analysis begins with this important observation:

> [T]he problem of individualization of issues often is cited as a justification for denying class action treatment in mass tort accidents. While some courts have adopted this justification in refusing to certify such accidents as class actions, numerous other courts have recognized the increasingly insistent need for a more efficient method of disposing of a large number of lawsuits arising out of a single disaster or a single course of conduct. In mass tort accidents, the factual and legal issues of a defendant's liability do not differ dramatically from one plaintiff to the next. No matter how individualized the issue of damages may be, these issues may be reserved for individual treatment with the question of liability tried as a class action. Consequently, the mere fact that questions peculiar to each individual member of the class remain after the common questions of the defendant's liability have been resolved does not dictate the conclusion that a class action is impermissible.

855 F.2d at 1 196 - 97. That court then concludes, in the sentence that immediately follows the last sentence of the block quote from *Velsicol* presented by Defendant (Def.'s Resp. at 14): "However, where the defendant's liability can be determined on a class-wide basis because the cause of the disaster is a single course of conduct which is identical for each of the plaintiffs, a class action may be the best suited vehicle to resolve such a controversy." *Velsicol*, 855 F.2d 1197.

67. The reasoning and analysis in the *Velsicol* case (and other single event mass accident cases) applies precisely to the facts of the instant case. *Velsicol* notes, "In mass tort accidents, the factual and legal issues of a defendant's liability do not differ dramatically from one plaintiff to the next." 855 F.2d at 1196 - 97. This Court has now reviewed extensively the elements of the torts at issue - nuisance and negligence - and the issues involved in proving liability (duty and breach of duty) in each of those torts, and concluded that the liability issues are common and identical to all Class Members, and capable of resolution - a single answer - in one class wide trial. The next sentence in *Velsicol* also applies: "No matter how individualized the issue of damages may be, these issues may be reserved for individual treatment with the question of liability tried as a class action." This Court has set forth a trial plan below that will preserve the

procedural fairness for all parties, absent Class Members and Defendant, to resolve individual damages.

68. This Court is mindful that some courts have carved with a more precise knife, separating out bodily injury claims from property damage claims. While this Court recognizes - as described in detail above - that there are more complicated individual issues in the bodily injury context, and those issues may require more time-consuming discovery and proof, such as document review and individualized expert testimony, this Court still concludes that the liability issues (duty and breach of duty) are identical for the bodily injury claimants as well. This Court concludes, therefore, that it would be inefficient to hold a single, class wide liability trial for all property damage claimants, resolve that identical issue in one fell swoop for them, and then invite the re-litigation of that identical, common issue in potentially hundreds of bodily injury trials. The better, more efficient course is to resolve the common liability issue for all claimants, and then make a determination as to whether the bodily injury claims should be cut loose from the Class action mechanism - armed with that liability determination (if favorable, or barred forever if unfavorable) - and left to file and pursue their own cases in circuit court, rather than proceed to a series of mini-trials or hearings. Such a course of action is permissible under West Virginia Rule of Civil Procedure 23(c)(4). It does not mean that the individual issues of causation and damages "predominate" over the common issues of duty and breach of duty. They do not. It does, however, mean that efficiency might be best served by letting bodily injury claimants proceed to prove causation and damages on their own, following a determination of liability in a common trial.

69. The West Virginia Supreme Court has affirmed the certification of at least one geographically based mass tort class action arising from a chemical release from an industrial site. See *Perrine v. E.I. du de Nemours & Co.*, 225 W. Va. 482, 694 S.E.2d

815 (2010). The *Perrine* case, interestingly, involved a course of conduct and releases spanning many years. The argument for predominance and superiority in the instant case is even stronger.

- ***Defendant's "Injury" Arguments Are Not Persuasive***

70. Defendant devoted considerable energy in its briefing, at the hearing on this matter, and in its Petition for Writ of Prohibition to arguing that many putative Class Members, and Class Representative Paul Snider, in particular, are "uninjured". It seems that the Defendant may mean that Paul Snider and perhaps many Class Members suffered no bodily injury - although Paul Snider himself alleges that he did - and that Paul Snider and perhaps many Class Members will not require property clean-up. However, this Court concludes that the universe of legally cognizable injuries is not so narrowly defined. This Court concludes, as it did in ruling on Defendant's motion to dismiss, that owning or residing in a house that is invaded by noxious or harmful levels of smoke negligently released from a fire is a cognizable injury. A jury, after hearing all the evidence, may disagree with Plaintiffs experts concerning the levels of smoke released from the Warehouse Fire or the levels of smoke that are noxious or harmful, and thereby reject Plaintiffs boundary around the area of contamination - the area that suffered a cognizable injury. Also, whether and to what extent any particular invasion by smoke of a home within that area of contamination rises to the level that a jury deems compensable, and, if so, how much compensation is to be awarded for it, are questions that must be determined by a jury in due course under the Trial Plan set forth below.

71. The cases, however, are clear that even transient smoke events that interfere with the use and enjoyment of property are actionable where the Defendant's conduct was negligent. The cases supporting this proposition were discussed at

considerable length in the section identifying the claims at issue, above. See *Harless v. Workman*, 145 W. Va. 266, 114 S.E.2d 548 (1960); *Rinehart. V. Stanley Coal Co.*, 112 W.Va. 82, 82, 163 S.E. 766, 766 (1932); see generally ¶¶ 36 – 44, *infra*. That entire discussion in paragraphs 36 through 44, above, is appropriate in this section, as well, but should be deemed incorporated rather than replicated. In summary, it is well-established that airborne smoke, fumes, and dust negligently released from a facility - including smoke resulting from a fire - that migrates into the air spaces of dwellings and other structures on adjoining private property, and thereby interferes with the comfort, enjoyment, or commercial interests of adjoining landowners, is actionable in negligence. This injury is the injury to property—the property damage—that binds the class into a cohesive whole. According to Plaintiff Paul Snider's expert evidence, the entire geographical area that defines the class suffered invasions of noxious smoke at levels that interfered with the comfort, use, and enjoyment of their property. The Court therefore concludes that, as alleged, and on the basis of Plaintiff's expert evidence, there are no "uninjured" Class Members.

72. Plaintiff submits that an invasion of property from the negligent release of smoke and particulate matter of 3 ug/m^3 of PM2.5 is a tangible and actional injury to property. According to Plaintiff's expert, those levels of PM2.5 increase the risk of injury, resulting in death, asthma, heart attacks, and coronary artery thickening in a small percentage of persons subjected to them, and some level of discomfort in an unknown but much larger percentage of individuals. *See* McCawley Deposition at 119 – 123 (noting that statistics show that only a small percentage of people die from these low levels of PM2.5, but, estimating based on expected distribution curves that another "10% were feeling sick" and "another 20% were feeling uncomfortable"). Plaintiff has submitted

evidence generated by William Auberle showing that everyone within the proposed class boundary (based on 3 ug/m^3 of PM2.5) also was invaded by, at one point or another during the fire, at least 100 ug/m^3 of total suspended particulate, of TSP, which is between three and five times the background amount of total particulate. *See* Supplemental Disclosure of William Auberle. This invasion is also tangible, and Plaintiff alleges being actionable.

73. Ultimately, the jury in the class wide trial will hear this evidence and the jury can decide whether these levels of small particulate and total particulate are sufficient to constitute an interference with the use of enjoyment of property, or whether higher levels require a narrowing of the class boundary, thereby denying the claims for compensation of those outside of the boundary. The claims for individual damages, however, will still require resolution based on individualized proof at follow-on hearings. This accords with the approach endorsed by the Seventh circuit Court of Appeals in *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910, 911 (7th Cir. 2003), where the panel explained:

> The questions whether Met-Coil leaked TCE in violation of law and whether the TCE reached the soil and groundwater beneath the homes of the class members are common to all the class members. The first question is particularly straightforward, but the second only slightly less so. The class members' homes occupy a contiguous area the boundaries of which are known precisely. The questions is whether this area or some part of it overlaps the area of contamination. Supposing all or part of it does, the next question is the particular harm suffered by particular class members whose homes are in the area of contamination

74. The Defendant also argued at the hearing that the Trial Plan proposed by the Plaintiff, where the issues of liability and the area of contamination is to be tried in a unitary, class wide trial, with damages to be decided in follow-on trials, would unfairly subject it to the possibility that individuals within the certified class area who are determined by the jury to fall outside of the area of contamination might get a second bite

at the apple. That is, Defendant expressed the concern that Class Members who lose at the unitary trial, by virtue of a jury deciding that their property was not contaminated, would not be bound by that verdict.

75. The Court concludes the Defendant's fear is misplaced. Once the class boundary is certified and submitted to be tried to a jury, everyone within that class boundary who did not opt out is bound by the verdict returned by the jury. If a jury determines that the boundary around the area of contamination - those with cognizable and compensable injuries - is merely a subset of the Class Area tried to the jury, then those within the Class Area but left out of the area of compensation have lost their cases. Indeed, the concern expressed by the Defendant of an asymmetrical risk attached to trial is one of the distinct advantages of a class action - absent class members are bound by the result, whereas future plaintiffs are not bound by an adverse finding on liability in an individual case tried by a different plaintiff.

Trial Plan

76. Having decided that class certification is appropriate under West Virginia Rule of Civil Procedure 23, this Court will now explain how the case will be tried. While some of the details may need to be worked out, this Court hereby **ORDERS**, for purposes of notice and scheduling, the Parties to prepare for trial in accordance with the following **TRIAL PLAN**:

- ***Phase 1: Class Wide Trial***

(1) The common question of Sumaik's negligence in failing to maintain its fire protection system will be tried in a unitary trial for all class members, including those alleging personal injuries. Certification for this question is supported by *Mejdrech v. Met-coil Sys. Corp.*, 319 F.3d 910 (7th Cir. 2003); *Watson v. Shell Oil Co.*, 979 F.2d 1014

(5th Cir. 1992); *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188 (6th Cir. 1988); and *Good v. Am. Water Works Co.*, 310 F.R.D. 274, 297 (S.D.W. Va. 2015).

(2) The common question of Surnaik's willfulness or recklessness in failing to maintain a fire protection system, believing that it would profit from total destruction of its building under its insurance policy, and a punitive damages multiplier, will be tried in the same unitary trial for all class members, including those alleging personal injuries. Certification for the punitive damages issue and the use of a punitive damages multiplier was endorsed expressly by the Fifth Circuit in *Watson v. Shell Oil Co.*, 979 F.2d 1014 (5th Cir. 1992), and implicitly by the West Virginia Supreme Court in *Perrine v. E.I. du Pont de Nemours & Co.*, 225 W.Va. 482, 694 S.E.2d 815 (2010) (class action deciding punitive damages), and Syl. Pt. 1 of *In re Tobacco Litig.*, 218 W.Va. 301, 624 S.E. 2d 738 (2005) (bifurcation of punitive damages multiplier from award of compensatory damages does not offend constitution).

(3) The common question of the "area of contamination," i.e., the geographical boundary of area where smoke from the fire resulted in compensable or cognizable harm—in the form of property damage from annoyance, inconvenience, and loss of use and enjoyment, and potentially resulted in personal, bodily injuries—will be tried in a unitary class trial. Certification for at least this issue is expressly endorsed in *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910 (7th Cir. 2003). For purposes of "ascertainability" at the class certification phase—ensuring that putative class members who receive notice of the pending trial can determine whether they are in or out of the class and therefore whether or not they will be bound by the outcome of the trial have standing to object, need to file their own cases, etc. - the proposed methodology for identifying the class boundary and those businesses and individuals who work or live there suffices.

- ***Phase 2: Follow-on Individual Determinations***

(4) If the jury in the unitary trial decides in favor of the class in (1), and delineates a boundary in (3), then the case would proceed, for property owners and lessees within the boundary delineated by the jury, to a series of follow-on hearings (hopefully to serve as bellwethers for resolution), preferably (for efficiency's sake) in groups sorted by neighborhood with common exposure features—e.g., similar peak PM2.5 and similar peak total suspended particulate ("TSP") levels according to the evidence presented in the unitary trial. Individual plaintiffs would testify to their damages - annoyance and inconvenience, etc. - and experiences in the individual trials. Upon an award of compensatory damages, that award would be multiplied by any punitive damages multiplier determined in the unitary trial under (2).

(5) If the jury in the unitary trial decides in favor of the class in (1), and delineates a boundary in (3), then individuals who resided within that boundary delineated in (3) who allege personal injuries from the fire can come forward - following such additional notice as the situation then warrants - and discovery would commence, involving fact sheets, identification of treating physicians, exchange of medical records, and identification of experts. Hearings or trials would proceed in groups based on similar injuries (e.g., sinusitis with doctor's visit, asthma, exacerbation of COPD, myocardial infarction, nausea with emergency department visit, etc.). Upon an award of compensatory damages, that award would be multiplied by any punitive damages multiplier determined in the unitary trial under Issue 2. This general approach to certification of issues under Rule 23(c)(4) has been endorsed most notably in the recent decision of the Southern District of West Virginia in *Good v. Am. Water Works Co.*, 310 F.R.D. 274, 296 - 97 (S.D.W. Va. 2015) (certifying under Rule 23(c)(4) a liability class that includes personal injuries as well as property damage arising from a single disaster).

Having so ordered, this Court further *sua sponte* **ORDERS** that Defendant, Surnaik Holdings of WV, LLC, be and is **GRANTED** all appropriate objections and exceptions thereon as it may deem necessary for further proceedings.

Finally, this Court **DIRECTS** the Clerk of this Court to send certified copies of this *Order* to the following counsel of record:

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Counsel for Plaintiff

ENTER:

THOMAS A. BEDELL, Judge

STATE OF WEST VIRGINIA
COUNTY OF WOOD, TO-WIT:

I, CELESTE RIDGWAY, CLERK OF THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA, HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND COMPLETE COPY OF AN ORDER ENTERED IN SAID COURT, ON THE 17 DAY OF JUNE 2021, AS FULLY AS THE SAME APPEARS TO ME OF RECORD. GIVEN UNDER MY HAND AND SEAL OF SAID CIRCUIT COURT, THIS 22 DAY OF JUNE, 2021.

Celeste Ridgway
CLERK OF THE CIRCUIT COURT OF
WOOD COUNTY, WEST VIRGINIA
BY: _____
DEPUTY