IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Respondent/Plaintiff

v. **Docket No. 19-1006**

SURNAIK HOLDINGS OF WV, LLC, A West Virginia Limited Liability Company,

Petitioner/Defendant

RESPONSE TO PETITION FOR WRIT OF PROHIBITION

Respectfully Submitted,

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TABLE OF CONTENTS

Page

QUESTIONS PRESENTED 1, 2, 3

SUMMARY OF ARGUMENT 3

STATEMENT REGARDING ORAL ARGUMENT AND DECISION 9

ARGUMENT 9

I. Surnaik's argument in support of its first question presented fails because the class as defined does not include any uninjured class members 9

A. The invasion of property by smoke, without more, is an injury and form of property damage 10

B. The jury can decide what levels of air pollution and particulate matter are compensable and the class definition cannot and does not need to anticipate a jury's decision 13

C. Plaintiff/Respondent alleges that 3 $\mu g/m^3$ of $PM_{2.5}$ is a tangible and actionable injury to property 16

D. 100 $\mu g/m^3$ of TSP is a tangible and actionable injury to property 17

E. That these invasions and injuries to property may be small in terms of likely compensatory damage awards weighs strongly in favor of class certification, not against it 17

II. Surnaik's argument in support of its second question presented fails because single accident or release cases are particularly well-suited to class resolution 19

A. Federal courts around the country recognize that cases involving single episode or single accident releases are particularly well-suited to class action treatment 19

B. The circuit court's class certification decision falls squarely in line with the "common answers" approach to commonality taken by the United States Supreme Court in *Wal-Mart v. Dukes*, adopted by this Court in *Gaujot*, and applied in the unpublished decision from Kentucky on which Surnaik so heavily relies 25

C. The West Virginia Mass Litigation Panel is not an alternative to class action litigation 27

III. Paul Snider's claims and injuries are typical of the class 29

IV. The class members are ascertainable 34

V. The circuit court's analysis was sufficiently thorough and detailed 37

CONCLUSION 38

TABLE OF AUTHORITIES

Cases

Amchem Prods. v. Windsor, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)) 5, 18, 29

Crutchfield v. Sewerage and Water Board of New Orleans, 829 F.3d 370, 378 (5th Cir. 2016) 8, 19

Gaudin v. Saxon Mortgages Services, Inc., 297 F.R.D. 417, 426 (N.D. Cal. 2013) 33, 34

Good v. Am. Water Works Co., 310 F.R.D. 274, 297 (S.D.W. Va. 2015.....5, 18, 21, 29

Harless v. Workman, 145 W. Va. 266, 114 S.E.2d 548 (1960) 11, 12, 13

Hill v. City of New York, 136 F. Supp.3d 304, 355 (E.D.N.Y. 2015) 34

Hurd v. Monsanto Co., 164 F.R.D. 234 (S.D. Ind. 1995) 24

Mejdrech v. Met-Coil Sys. Corp., 319 F.3d 910 (7th Cir. 2003) 7, 13, 14, 15, 16, 19, 21

Modern Holdings, LLC v. Corning, Inc., 2018 WL 1546355, 2018 U.S. Dist. LEXIS 52559 (E.D. Ky. Mar. 29, 2018) 7, 8, 25, 27

In re MTBE Products Liability Litigation, 241 F.R.D. 435 (S.D.N.Y. 2007) 20

In re Oil Spill by Oil Rig Deepwater Horizon, 295 F.R.D. 112, 141 (E.D. La. 2013) 20, 24

Perrine v. E.I. du Pont de Nemours & Co., 225 W. Va. 482, 694 S.E.2d 815 (2010) 25

Puerto Rico v. the M/V Emily S., 158 F.R.D. 9 (D.P.R. 1994) 24

Rinehart v. Stanley Coal Co., 112 W. Va. 82, 82, 163 S.E. 766, 766 (1932) 11

Simpson v. Fireman's Fund Ins. Co., 231 F.R.D. 391, 396 (N.D. Cal. 2005) 34

State ex rel. W. Va. Univ. Hosps., Inc. v. Gaujot, 829 S.E.2d 54 (2019) 26, 27

State of West Virginia ex rel. Municipal Water Works v. Swope, 2019 WL 5875966, 2019 W. Va. LEXIS 519 (October 2, 2019) 8, 32, 38

Sterling v. Velsicol Chemical Corp., 855 F.2d 1188, 1197 (6th Cir. 1988) 7, 22, 25

Terazosin Hydrochloride Antitrust Litig., 220 F.R.D. 672, 687 (S.D. Fla. 2004) (quoting Newberg on Class Actions sec. 18:8 (4th ed. 2002) at 29) 33

In Re Three Mile Island Litigation, 87 F.R.D. 433 (M.D. Pa. 1980) 21, 24

Velsicol in doubt, *Modern Holdings, LLC v. Corning, Inc.*, 2018 WL 1546355, 2018 U.S. Dist. LEXIS 52559 (E.D. Ky. Mar. 29, 2018) .....8 , 23

Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349–50 (2011) 25, 26

Watson v. Shell Oil Co., 979 F.2d 1014 (5th Cir. 1992) 20

Statutes

West Virginia Code § 55-7-27 35

West Virginia Code § 55-7-28 35

Rules

West Virginia Rules of Civil Procedure Rule 23.....1

West Virginia Rules of Civil Procedure Rule 23(a).....33

West Virginia Rules of Civil Procedure Rule 23(b)(3) 5

West Virginia Rules of Civil Procedure Rule 23(c)(2) 2, 6, 36

West Virginia Rules of Civil Procedure Rule 23(c)(3) 2, 6, 36

West Virginia Trial Court Rule 26.04(a) 28

Corpus Juris Secundum.....*12*

QUESTIONS PRESENTED

The following questions are taken verbatim from the Petition for Writ of Prohibition presented by Surnaik Holdings of WV, LLC ("Surnaik"), and presented here because Rule 16(g) technically appears to require this section in the Response as well. Most of them cannot be answered as originally drafted.

1. According to Plaintiffs own expert, as many as 90% of the class members are *without injury.* Did the Circuit Court err when it certified a class in which 90% of the class is likely to be uninjured ?

Respondent's answer: This predicate is factually incorrect, and therefore the question is not applicable.

2. Because certain cases are particularly ill-suited for class treatment—in particular, toxic tort and mass accident cases in which no single proximate cause equally applies to each potential class member—Rule 23 requires courts to consider whether a class action is superior to other methods for the fair and efficient adjudication. W. Va, R. Civ. P. 23. Is the West Virginia Mass Litigation Panel a more suitable forum for this alleged mass accident case?

Respondent's answer: This predicate statement does not apply to single event class actions—which are universally recognized as being well-suited to class treatment. The West Virginia Mass Litigation Panel and Rule 23 are also not mutually exclusive. The Mass Litigation Panel can preside over a class action or even multiple class actions. The Mass Litigation Panel's purpose is to aggregate many different (i.e., separately filed) civil actions, and resolve them efficiently and fairly, respecting the rights of all, which may include the use of Rule 23 class actions. To the extent Petitioner means to ask whether a superior alternative to Rule 23 certification would be for class members to incur the expense and labor costs associated with

filing individual cases—which could then be overseen by the Mass Litigation Panel—respondent's answer is no, because the filing and service fees and labor associated with drafting and filing a complaint alone would exceed the expected recovery of most of the claims at stake in the instant class action, and would discourage many meritorious claims from being brought.

3. Despite his admission that he did not sustain any property damage, Plaintiff Paul Snider was appointed to represent a class of individuals seeking to recover for property damage. Do the requirements of standing and typicality preclude Plaintiff from representing a class of which he is not a member?

Respondent's answer: This predicate statement is also false. Paul Snider did not admit that he sustained no property damage. He testified that his house was invaded by smoke, that the smoke was noxious, unpleasant, and that he suffered a loss of use and enjoyment during the fire, all of which is property damage. The question could be re-drafted to reflect the facts, and it would read: Do the requirements of standing and typicality preclude a person who suffered the same invasion of his property by noxious smoke as a class of others—but did not notice any ash on surfaces around his home following the fire—from representing a class of persons and businesses whose property was also invaded by noxious smoke, even though some of those other persons and businesses may have observed visible ash on surfaces around their homes after the fire and expended some amount of effort wiping off those surfaces around their homes? No.

4. In order to determine who will receive notice, share in a recovery, and be bound by a final judgment, Rule 23 requires that the class and its members be readily identifiable with reference to objective criteria. Did the Circuit Court err when it certified a class whose membership can only be ascertained *after* Phase I of the trial, if at all?

Respondent's answer: Again, the predicate is simply false. The actual class members can be ascertained easily from the description at the outset of the circuit court's order (App. 130–31), and all such class members are bound by any judgment issued in Phase I of the trial, which is what it means to be a "class member." *See* W. Va. R. Civ. P. 23(c)(2)–(3). That the jury may reach a different conclusion in the Phase I trial than Plaintiff's experts concerning the geographical area impacted by the smoke invasion is one of the main points of having a classwide Phase I trial, not an argument against it.

5. A class action may only be certified if the trial court is satisfied, *after a thorough analysis,* that the prerequisites of Rule 23 have been satisfied. Is the Circuit Court's order granting class certification deficient for failure to conduct a thorough analysis of each applicable Rule 23 requirement?

Respondent's answer: No.

SUMMARY OF ARGUMENT

Several of the arguments contained in Defendant Surnaik Holdings of WV, LLC's ("Surnaik's") Petition for Writ of Prohibition ("Petition") are premised on a fundamental misunderstanding of basic legal terms of art and concepts. The primary example is Surnaik's misunderstanding of the meaning of the legal terms "injury" and "property damage," a basic error that permeates and undercuts Surnaik's analysis with respect to its first and third Questions Presented. Surnaik treats these two terms as requiring bodily injury or noticeable alterations to property. However sensible that understanding of those words may seem to non-lawyers, "injury" and "property damage" are legal terms of art that include having one's home invaded by noxious and hazardous smoke from a hostile fire, so long as the presence of that smoke interferes with the occupant's use and enjoyment of that property—even if the smoke does not cause the

occupant to suffer from a *bodily* injury such as an asthma or heart attack, and even if the smoke does not leave behind a noticeable residue of ash. Such an invasion by smoke still constitutes "property damage" and a legal "injury." The invasion may or may not be actionable as a nuisance in the *absence* of negligence, but it is *always* an actionable injury where the fire and subsequent smoke invasion were avoidable but for the negligence of another.

In the most simple terms, the class as defined by the Circuit Court includes only those persons, businesses, and government agencies who occupied real property within the geographical area that has been identified and described by Plaintiff's/Respondent's experts as the area that suffered an invasion of noxious and potentially harmful (to health) smoke from the fire. In other words, the geographical area adopted by the Circuit Court in its class definition is not only the area where, according to Plaintiff's experts, individuals may have suffered bodily injury like an asthma or heart attack, an important fact in itself because it permits the resolution of critical issues related to liability and punitive damages in one trial for all such individuals. Critically, with respect to Surnaik's first and third Questions Presented, it is also the geographical area where, according to Plaintiff's/Respondent's evidence, occupants suffered a loss of the use and enjoyment of their property from the invasion of noxious smoke. Surnaik may offer different evidence or argue this evidence differently, and the factfinder may agree with one party or the other, or decide upon a different geographical area based on all of the evidence, but the class definition represents the geographical area that Plaintiff and Class Counsel submit, based on their evidence, was the area of legal injury—again, the area where *all* occupants suffered a loss of the use and enjoyment of their property from the noxious smoke invasion.

Whether, as a practical matter, an individual homeowner or business—or an attorney representing an individual homeowner or business—would be likely to undertake the labor and

incur the expenses associated with filing and prosecuting individual actions to recover money damages for an injury from a single fire and invasion of noxious smoke that lasted a week is another question entirely. The answer is almost certainly no, but this is exactly why the class action mechanism exists, and exactly where the class action mechanism proves most useful. Recently, United States District Court Judge Copenhaver, in certifying another single event class action with many minor injuries, explained that access to justice for those with relatively small claims is one of the distinct advantages of the class action device. *See Good v. Am. Water Works Co.*, 310 F.R.D. 274, 297 (S.D.W. Va. 2015) ("[A]bsence of the class device would surely discourage potentially deserving plaintiffs from pursuing their rights under the circumstances here presented."). The United States Supreme Court itself has explained that 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." *Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace* v. *Van Ru Credit Corp.,* 109 F.3d 338, 344 (7th Cir. 1997)). "A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." *Id.*

Surnaik's second basic misunderstanding relates to what it means to be included as a "class member" within a class action such as the instant one, which the Circuit Court certified under Rule 23(b)(3) of the West Virginia Rules of Civil Procedure. App. 132. This misunderstanding of basic class action mechanics and terminology accounts for a significant portion of Surnaik's erroneous analysis with respect to its fourth and fifth Questions Presented. There, Surnaik claims (Petition at 22, 24) that the Circuit Court's trial plan—which includes the use of follow-on causation and damages trials if the class prevails in whole or part in the unitary,

common-issues trial—proves that "class members are impossible to identify without extensive and individualized fact-finding or mini-trials." Surnaik is simply confused. The term "class member" is not confined only to those who ultimately prevail and receive some monetary award from the factfinder. Rather, the term "class member" refers to *everyone who is bound by the factfinder's decision, whether favorable or not.* The class members are those whose cases are at stake, so to speak, in the class action.

That group of persons, businesses, and government agencies who together make up the class has been very clearly and adequately described in the Circuit Court's order. App. 130–31. Prior to the trial, that group will also be described in easy-to-understand lay terms in the notice that must be sent out under Rule 23(c)(2), and everyone to whom that notice is directed will be bound by whatever decision results from these class action proceedings, unless they request exclusion. *See* W. Va. R. Civ. P. 23(c)(2); W. Va. R. Civ. P. 23(c)(3). The possibility that some class members may prevail while others do not does not mean, as Surnaik argues (Petition at 22), that the class members—those who are bound by the factfinder's decisions—are not objectively ascertainable until completion of those proceedings.

Surnaik's other arguments and analyses are similarly flawed. Surnaik erroneously claims (Petition at 14), in support of its second Question Presented, that "many federal courts have recognized that class actions in cases such as this are inappropriate." That statement is false. Almost all federal courts have recognized that class certification in cases actually like the instant one—that is, cases stemming from a single accident or single release at a single location by a single defendant at a single point in time (or over days rather than over years)—is appropriate, at the very least for determination of the common issues of liability and the boundary of the area of contamination. For example, in *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910 (7th Cir. 2003),

Judge Posner, writing for the Seventh Circuit panel, 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 he concluded, "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.

Sumaik supports its contrary position by including in "cases such as this" cases involving multiple releases over many years, usually by multiple defendants, and by ignoring the actually similar cases involving a single release by a single defendant at a single point in time. In its Petition (at 16), Sumaik relies heavily on the unpublished decision of the United States District Court for the Eastern District of Kentucky in *Modern Holdings, LLC v. Corning, Inc.*, 2018 WL 1546355, 2018 U.S. Dist. LEXIS 52559 (E.D. Ky. Mar. 29, 2018). The very first sentence of the *Modern Holdings* opinion shows that, in critical respects, it is not a "case such as this," because the *Modern Holdings* lawsuit alleged that *multiple* defendants, "the successive owners of a glass manufacturing plant located in Danville, Kentucky, intentionally or negligently released toxic chemicals and substances during the sixty years of the plant's operation." Sure enough, the district court in *Modern Holdings* rejected class certification because different putative class members had different injuries, caused by different releases of different substances occurring at different points in time across those sixty years. Thus, in that situation, even the liability questions require different facts and evidence and, most importantly, are likely to have different answers. 2018 U.S. Dist. LEXIS 52559 at *23 ("Plaintiffs here present too many potential substances and potential injuries to elicit common answers.").

Actual "cases such as this" are easy to identify, having been defined recently and reasonably precisely by the United States Court of Appeals for the Fifth Circuit in *Crutchfield v.*

Sewerage and Water Board of New Orleans, 829 F.3d 370, 378 (5th Cir. 2016), in which the panel noted 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." The overwhelming weight of authority supports class certifications in an actual case such as this, involving a single episode or single release by a single defendant.

Lastly, in answer to Surnaik's fifth Question Presented, the Circuit Court's order is sufficiently thorough, detailed, and specific to satisfy this Court's recent holding in syllabus point 11 of *State of West Virginia ex rel. Municipal Water Works v. Swope*, 2019 WL 5875966, 2019 W. Va. LEXIS 519 (October 2, 2019). The arguments Surnaik makes in support of its fifth question are mostly a rehash of the fundamentally flawed arguments it made for its third and fourth questions. Surnaik first argues that the Circuit Court did not explain how class representative Paul Snider's claims could be typical of the claims of the class where the class alleges property damage but (erroneously) Surnaik claims that Paul Snider himself does not allege any property damage. Petition at 23–24. Surnaik then erroneously argues that the Circuit Court's analysis of the ascertainability issue is inadequate because Surnaik erroneously believes that the class is not the plainly and obviously objective and easily identified group of individuals, businesses, and government agencies described at the outset of the Circuit Court's order (App. 130–31), but, rather, some undefined mass that will not be known or knowable until the proceedings are complete and the factfinder has finished determining who is entitled to an award of money damages. Petition at 24 (erroneously claiming that under the Circuit Court's order class members "will be identified later at Phase II").

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Plaintiff/Respondent submits that the instant Petition may be resolved and disposed of without oral argument.

ARGUMENT

I. Surnaik's argument in support of its first Question Presented fails because the class as defined does not include any uninjured class members

Surnaik devotes considerable energy in its Petition (at 8–12) to a discussion of putative class action cases involving other kinds of alleged injuries—antitrust, consumer deception, and the like—where courts have struggled with the prospect that a class, as proposed, defined, or certified, might contain some members who are not injured. Surnaik's entire discussion is premised on a misunderstanding the nature of the proposed class action and the injury to property at the root of it—i.e., the injury that binds the class and keeps it cohesive is not the suffering of inflammation or bodily injury, or the presence or absence of noticeable ash deposits following the smoke invasion, but that each class member's home or business was invaded by tangible and significant airborne particulate matter (smoke), at levels that interfered with the use and enjoyment of that property. Surnaik's arguments about the permissible and impermissible percentages of uninjured class members simply do not apply. All putative class members suffered the injury to property of having their homes invaded by smoke.

A. The invasion of property by smoke, without more, is an actionable injury and form of property damage

The invasion of property by noxious smoke that interferes with the use and enjoyment of property, even temporarily, is an actionable injury to property. Surnaik challenged this contention in its motion to dismiss, and the Circuit Court rejected Surnaik's challenge in denying the motion to dismiss, a ruling that Surnaik has not challenged—or even included in the Appendix—as part of its instant Petition. Simply put, smoke in dwellings and other structures

that interferes with personal comfort—and therefore the use and enjoyment of property—is a well-recognized injury to private property, plainly actionable in a negligence claim, and, depending on the circumstances surrounding the smoke-emitting conduct and the severity of the interference with the use and enjoyment of property from the smoke, may even be sufficient to support a claim for nuisance. Cases dealing with a temporary invasion of smoke, dust, or fumes onto another's property are much less common than cases dealing with a permanent or intermittent invasion of smoke. This fact can be attributed simply to the fact that such temporary cases are not economically viable except in cases like this, where the class action mechanism can be invoked to aggregate a relatively large number of claims. Cases dealing with permanent or intermittent invasions of another's property by smoke, dust, or fumes are quite common. While the outcome of cases under nuisance depends heavily on the circumstances surrounding the smoke emissions (whether the activity was appropriate to the location, whether the emissions were avoidable, whether the defendant's conduct was negligent, and so on), there is not a single case from the West Virginia Supreme Court or published decision from any other jurisdiction that holds that a *negligent* emission of smoke onto another's private property and private air space that interferes with the enjoyment of that property is not actionable as negligence.

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.").

In upholding the trial court's decision in *Harless*, the Supreme Court canvassed the prior decisions of the West Virginia Supreme Court, the holdings of other courts with respect to dust and smoke invasions, and legal treatises. One of the cases discussed in *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 reads: "An owner is liable for negligently using his property to the injury of another."

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)). The *Harless* Court also cited with approval and quoted the following 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)).

The Supreme Court 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).

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.

B. The jury can decide what levels of air pollution and particulate matter are compensable and the class definition cannot and does not need to anticipate a jury's decision

It is essentially settled law that one of the issues that is *most* appropriate for class-wide resolution in geographically-based, single accident or single release class actions is the actual area of contamination. *See Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910, 910 (7th Cir. 2003) (affirming district court's decision to certify class for purpose of determining "whether or not and to what extent [the defendant] caused contamination of the area in question"). In other words, it is entirely appropriate to certify a geographically contiguous class for the very purpose of determining whether all members, no members, or only some members suffered a legally cognizable invasion of their properties from a single, accidental episode or release. That the jury may ultimately determine that whole swaths of the geographically contiguous area proposed by Plaintiff as the class boundary did not suffer any actual or actionable invasion of their property does not defeat class certification—it is one of the main points of it. As the Seventh Circuit observed in *Mejdrech*:

> 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 question 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.

Id. at 911 (emphasis added). That some portion of the certified class members may ultimately be found by the jury or factfinder not to have suffered any property invasion or legally compensable

harm does not defeat the case for class certification. *See id.* at 910 (affirming district court's decision to certify class even though "not only the amount but the fact of damage might vary from class member to member"); *id.* (affirming district court's decision to certify class even though district court recognized that "[w]hether a particular class member suffered any legally compensable harm and if so in what dollar amount" were questions that would need to be "reserved for individual hearings"). In other words, the certified class definitions and boundary can be rejected by the jury or ultimate factfinder, and different boundaries set by the factfinder at trial.

This is not to say that the class definition or geographical boundary is irrelevant or can be set completely arbitrarily. The proposed boundary—or at least the certified boundary—has to satisfy two basic prerequisites. First, membership within the certified class has to be ascertainable. This is essential for the class members' own due process rights. Class members who get the notice of class action need to be able to determine whether they are in or out of the class boundary in order to know how to exercise (as by objecting or opting out) or preserve (as by filing their own civil action) their own rights. Critically, these absent class members need to know whether they will be bound by the jury's ultimate determination of the issues to be tried, including the factfinder's ultimate determination of the boundaries around the area of contamination. In *Mejdrech*, this requirement was satisfied because "[t]he class members' homes occupy a contiguous area the boundaries of which are known precisely." *Id.* at 911. The class boundary as proposed by Plaintiff/Respondent is also precisely defined, and whether any individual's home or business or government agency is inside or outside that boundary is completely and precisely ascertainable. Plaintiff/Respondent submitted an entire expert report—purposely omitted from Petitioner's glaringly deficient Appendix—that describes in detail the

mechanism by which any individual property owner (or lessee or occupant) can determine whether or not the individual's property is inside or outside of the class boundary. See Supplemental Appendix ___.

Second, the proposed boundary should be rational and reasonable in light of the data and evidence to be presented, not arbitrary. Ideally, it should follow some reasonable or meaningful criteria, and encompass all or almost all who potentially have significant claims (for the benefit of the defendant). That is exactly what Plaintiff has done by taking the boundary—based on expert William Auberle's model—where the invasion of individual homes and businesses by particulate matter released from Surnaik's fire reached levels that are capable of causing measurable disease, even death, in sensitive human beings, and of causing discomfort in a much larger percentage. *See* App. 51–54; App. 176–80. That a jury or other factfinder may consider all of the evidence presented at trial and determine that only a portion of the class members within that boundary deserve compensation—whether because the jury disagrees with Plaintiff's expert's engineering opinions about the amount of particulate matter that invaded certain portions of the class area or because, in the exercise of discretion, the jury determines that only higher levels of particulate invasion warrant compensation—does not mean that the proposed boundary is unsuitable for certification. Certification of *some* area is necessary in order for a jury to make that determination. *See Mejdrech*, 319 F.3d at 911 (finding class certification appropriate because "[t]he class members' homes occupy a contiguous area the boundaries of which are known precisely" and "[t]he question [to be decided on a class-wide basis] is whether this area or some part of it overlaps the area of contamination.")

C. Plaintiff/Respondent alleges that 3 $\mu g/m^3$ of $PM_{2.5}$ is a tangible and actionable injury to property

Juries, in individual cases as well as in class actions, are empowered not only to resolve disputed facts, but also to make judgment calls from undisputed facts about whether, for example, conduct rises to the level of negligence, or whether a tangible invasion of property or interference with the use and enjoyment of property is sufficiently significant to warrant compensation. With respect to invasions of property resulting from negligence, the law at most requires that an invasion be tangible, which any invasion by particulate matter by definition is.

Given the testimony of Plaintiff's/Respondent's expert, Michael McCawley, Ph.D., App. 51–54; App. 176–80, Plaintiff/Respondent alleges that an invasion of property from the negligent release of smoke and particulate matter of 3 $\mu g/m^3$ of $PM_{2.5}$ is a tangible and actionable injury to property, and an interference with the use and enjoyment of property whether bodily injury resulted or not. Those levels of $PM_{2.5}$ 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 physical discomfort in a but much larger percentage of individuals, if not everyone. App. 178–79 (noting that statistics show that only a small percentage of people die from these low levels of $PM_{2.5}$, but estimating based on expected distribution curves that another "10% were feeling sick" and "another 20% were feeling uncomfortable").

It goes without saying that a jury may hear the testimony of Dr. McCawley and Paul Snider's other expert witnesses and disagree with their opinions, but still conclude that some portion of the class had their homes invaded by levels of particulate matter that warrant compensation. It also goes without saying that Surnaik is free to argue to the jury that even if they believe and agree with every word of Dr. McCawley's testimony and the testimony of Paul Snider's other experts, those levels of particulate matter invasion should not warrant compensation, and the jury just might agree. None of this defeats class certification, nor does it

in any way suggest that Plaintiff/Respondent has not alleged and supported with credible, admissible evidence (in the form of expert testimony) an injury in fact to property for all class members as the class is defined. Property invasions do not have to send homeowners to the hospital complaining of chest pain in order to interfere with their use and enjoyment of the property or be actionable. Ultimately, the question of how much invasion is necessary to warrant compensation is a jury question.

D. 100 $\mu g/m^3$ of TSP is a tangible and actionable injury to property

Similarly, even though it does not form the basis for Plaintiff's proposed class boundary, Plaintiff/Respondent submitted evidence generated by expert William Auberle, PE, showing that everyone within the proposed class boundary (based on 3 $\mu g/m^3$ of $PM_{2.5}$) also was invaded by, at one point or another during the fire, at least 100 $\mu g/m^3$ of total suspended particulate, or TSP, which is between three and five times the background amount of total particulate. App. 122–27. This invasion is also tangible, and, Plaintiff alleges, actionable.

E. That these invasions and injuries to property may be small in terms of likely compensatory damage awards weighs strongly in favor of class certification, not against it

To be sure, class members who suffered death, a heart attack, or some other conspicuous disease or outcome as a result of Surnaik's negligence and willful disregard of its fire safety system have more conspicuous injuries than those who only experienced minor discomfort, or "a bad smell" as Surnaik puts it, or an unpleasant darkening of the air on their properties from the smoke invasion. One would expect that a jury won't award as much in damages to someone who merely suffered discomfort or loss of enjoyment in his or her home for several days as a jury would award to someone who had a heart attack. But this makes class certification more appropriate, not less.

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." The United States Supreme Court itself 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 groups 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)).

Cases involving small damages to property (annoyance and inconvenience, loss of enjoyment) resulting from smoke from a negligent fire are seldom brought. That does not mean that the injury is insufficient to justify class certification. It means or suggests the opposite: The challenges and cost of proving liability are not warranted except in cases where large numbers of relatively small claims for damages can be aggregated under Rule 23. As Judge Copenhaver recognized in *Good*, this makes the case for class certification stronger, not weaker.

II. Surnaik's argument in support of its second Question Presented fails because single accident or release cases are particularly well-suited to class certification and class resolution

A. Federal courts around the country recognize that cases involving single episode or single accident releases are particularly well-suited to class action treatment

Contrary to Surnaik's repeated claim that the weight of federal court decisions is in favor of rejecting class certification in "mass tort" cases or "cases such as this," the great weight of federal authority falls in favor of class-wide treatment and resolution in single accident cases, particularly of property–based classes, and particularly for the resolution of the common issues surrounding liability. One of the leading cases is from the Seventh Circuit Court of Appeals in *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910 (7th Cir. 2003), in which Judge Posner, writing for the panel, 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 he concluded, "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, and it has been repeated across the United States. *See, e.g., Crutchfield v. Sewerage and Water Board of New Orleans*, 829 F.3d 370, 378 (5th Cir. 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 a 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."). In fact, a review of the actual holdings and decisions in several of the cases that Surnaik quotes from demonstrates the distinction perfectly between cases and classes where

class certification has been deemed appropriate—typically involving area of contamination claims from single events—and cases and classes that have been rejected, which typically involve more complex liability scenarios or personal injuries.

The first case cited in this section of Surnaik's brief is *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. Petition at 13–14 (cited for the proposition that "proximate causation often cannot be resolved on a class-wide basis in the case of exposure to a chemical"). 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, the 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.

For the *MTBE* court, the key distinction between the subclasses alleging property damage due to the release and the subclass alleging personal injuries due to the release was the difference in the proximate causation inquiry. *Id.* While proximate cause of property damage due to contamination from a release follows from proof of the release and the area of contamination—both of which are common issues well suited to class-wide adjudication—proof of proximate cause for personal injuries resulting from that contamination requires an individualized inquiry

into the nature of the person's exposure, health history, and background risks. *Id.* The only individual issues in the property damage classes are the extent and amount of damages, while proximate causation itself is an individual issue where personal injuries are involved. In reaching this decision, the MTBE court relied heavily on the holdings and reasoning of Judge Posner in *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910 (7th Cir. 2003). *See MTBE*, 241 F.R.D. at 448.[1]

The same reasoning applies to the instant case, where the issues of liability and proximate cause are identical for all members of this property class as defined, with the important caveat that persons who allege personal injury resulting from the fire should be included within the class solely for the resolution of the liability issue, and only that issue. In so holding, the Circuit Court followed the more recent and pertinent decision by Judge Copenhaver in 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) which certified a class for resolution of the liability issues under Rule 23(c)(4) that included personal injuries as well as property damage arising from a single disaster. Otherwise, the holding and reasoning of the MTBE court provide an excellent model to follow in the instant case. Indeed, because Plaintiff's primary chosen method of proof of property damage and proof of the area of contamination turn on air modeling of particulate dispersion from the fire and materials consumed in the fire itself—rather than being based on sampling or measurements of chemicals or particulate in and around the properties of class members, which conceivably could be attributed to other sources—the proximate cause of the resulting air pollution and particulate

[1] The district court in *In Re Three Mile Island Litigation*, 87 F.R.D. 433 (M.D. Pa. 1980), another case cited and relied upon by Surnaik, *see* Def.'s Resp. at 13 n. 12, reached a similar decision—certification of property subclasses but denial of certification for personal injury subclass, although Surnaik only mentions the denial of the proposed personal injury subclass in its footnote, not the approval of the property subclasses.

deposition is embedded in the very nature of the proof of contamination. If the jury finds Plaintiff's expert's model to be credible and reliable, there can be no question about where the particulate that invaded class members' homes shown in the model came from or what caused it to get there. On the other hand, an individual who claims to suffer asthma that developed as a result of exposure to particulate from the fire might have to develop individualized proof of sufficient exposure to the pollution—i.e., that the person's home was not only invaded but that he or she stayed around enough to breathe sufficient quantities—and at least rule out alternative causes.[2]

In its circuit court briefing, Sumaik also relied on and quoted heavily from *Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988). App. 70. Sumaik abandoned that reliance—apparently after recognizing that neither the holding nor the opinion supports their position—for the instant Petition, and now argues that there are "serious doubts about the continuing vitality of [*Velsicol*]" in light of a recent unpublished decision from a district court in the same circuit. Petition at 16. A review of the actual holding and reasoning of the *Velsicol* decision by the Sixth Circuit Court of Appeals shows that it 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

[2] Again, note, however, that the liability issue is the same even for class members alleging personal injuries.

> 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 1196–97.

The *Velsicol* court then concludes: "[W]here 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. The facts of the instant case very plainly resemble that latter circumstance—"because the cause of the disaster is a single course of conduct which is identical for each of the plaintiffs"—where "a class action may be the best suited vehicle to resolve such a controversy." *Id.* The instant case does not resemble the circumstance described by the *Velsicol* court where class certification should be question, where "no one set of operative facts establishes liability," because, in the instant case, one set of operative facts very clearly does establish liability.

The balance of the cases cited and relied on by Surnaik in the main text similarly either support the case for class certification or are distinguishable. A review of the cases cited in Surnaik's footnote 7 (Petition at 14) reveals similar distinctions. For example, *Hurd v. Monsanto Co.*, 164 F.R.D. 234 (S.D. Ind. 1995), is patently distinguishable from the instant case because it "involves continuing exposure over as many as twenty years" and was deemed therefore to be "[u]nlike . . . cases [that] involve a single set of operative facts used to establish liability." 164 F.R.D. at 239. In another case cited in Surnaik's footnote 7, *In Re Three Mile Island Litigation*, 87 F.R.D. 433 (M.D. Pa. 1980), the district court actually certified the property subclasses but denied certification for the personal injury subclass.

Another published case cited in the main text by Surnaik is *Puerto Rico v. the M/V Emily S.*, 158 F.R.D. 9 (D.P.R. 1994). The holding in this case, from the United States District Court for the District of Puerto Rico, can be easily distinguished on the basis that the only injury alleged was personal injury, and, while it arose from a single (offshore) accident, it did not involve a geographically defined boundary of contamination or proposed property class. It should also be pointed out that contrary results have been reached in other cases involving offshore oil spills. *See, e.g., 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 a 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.").

Lastly, of course, it should be pointed out that none of the cases relied upon by Surnaik are from the Supreme Court of West Virginia. 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 Pont de Nemours & Co.*, 225 W. Va. 482, 694 S.E.2d 815 (2010). The *Perrine* case, interestingly, even involved a course of conduct and releases spanning many years. The argument for predominance and superiority in the instant case is even stronger.

B. The Circuit Court's class certification decision falls squarely in line with the "common answers" approach to commonality taken by the United States Supreme Court in *Wal-Mart v. Dukes*, adopted by this Court in *Gaujot*, and applied in the unpublished decision from Kentucky on which Surnaik so heavily relies

With respect to the unpublished case from a district court within the Sixth Ciruit that Surnaik claims (Petition at 16) puts the continuing validity of *Sterling v. Velsicol Chemical*

Corp., 855 F.2d 1188, 1197 (6th Cir. 1988), in doubt, *Modern Holdings, LLC v. Corning, Inc.*, 2018 WL 1546355, 2018 U.S. Dist. LEXIS 52559 (E.D. Ky. Mar. 29, 2018), that decision is perfectly in line with the original holding of *Velsicol*, because the *Modern Holdings* case involved releases of different substances by different defendants over some 60 years, so plainly "no one set of operative facts" could establish liability for all putative plaintiffs. In the last analysis, the *Modern Holdings* court—relying primarily on the holding of the United States Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–50 (2011), which shifted the commonality analysis away from the mere presence of common *questions* in favor of a focus on the "capacity of classwide proceedings to generate common *answers* apt to drive the resolution of the litigation"—determined that "Plaintiffs here present too many potential substances and potential injuries to elicit common answers." *Modern Holdings*, 2018 U.S. Dist. LEXIS 52559 at *23.

The critical difference between the instant set of facts—a single episode of smoke released from an allegedly negligent and reckless fire—and the facts in *Modern Holdings* and *Wal-Mart* is that classwide proceedings in the instant case can generate *common answers* to the liability and punitive damages questions, for all class members, whatever their injuries, and those common *answers* are apt to drive the resolution of the litigation. The common questions that will have common answers are the very questions driving the Circuit Court's certification order and trial plan in the instant case. App. at 140–41. Surnaik was either negligent in failing to maintain a fire protection system on its warehouse or not, and nothing about any individual class member's position or injury will change the answer to that common question. App. 140. Similarly, Surnaik was either reckless in its failure to maintain the fire protection system, believing that it would receive an insurance windfall from a total loss of the warehouse to fire.

App. 140–41. On the other hand, common *answers* could not be generated for any common questions in *Modern Holdings*, because it involved different injuries to individuals caused by different releases of chemicals over 60 years of releases by different defendants of different substances, some of which may have been negligent, some of which may have constituted trespass, others might not have, and all of which involved at least slightly different facts and evidence. Similarly, common answers could not be generated in *Wal-Mart* itself, which involved a class of employees and former employees who allegedly suffered statistically provable employment discrimination, because even the liability issue with respect to each putative plaintiff would turn, at least in part, on the specific facts of that person's employment history and particular employment decision.

Finally, Surnaik's Petition includes no discussion of this Court's recent decision in *State ex rel. W. Va. Univ. Hosps., Inc. v. Gaujot*, 829 S.E.2d 54 (2019), which adopted the analytical framework for "commonality" of *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011), focusing not on the existence or absence of common *questions* but on whether the classwide proceeding is capable of generating common *answers* that will advance the litigation. *See* syl. pts. 2 and 3, *Gaujot*, 829 S.E.2d 54. The plaintiffs in *Gaujot* appeared to assume that because the hospital at issue charged the same search fee for all records searches, the common question—was that a reasonable fee?—would generate a common answer. This Court correctly noted, however, that the hospital had submitted evidence and argument tending to show that just because the fee charged was the same for all class members, the reasonableness of the fee might vary among class members depending on the nature of the search effort and the location of the class member's records. *Id.* at 63–64. In other words, the defendant argued that the question common to all class members might have different answers depending on facts peculiar to each.

The circuit court had not addressed the issue, and therefore this Court held that the circuit court had not addressed a central issue in certifying a class action, vacated the circuit court's certification order, and remanded.

Like *Modern Holdings* and *Wal-Mart* itself, this Court's decision in *Gaujot* does not in any way undercut the Circuit Court's grant of class certification in the instant case. Surnaik does not, has not, and cannot allege that the central liability questions—the ones the Circuit Court singled out for classwide resolution (App. 140–41)—do not have common answers, or that the answer to those questions might depend on facts peculiar to any plaintiff. Whether Surnaik was negligent in failing to maintain its fire protection system and whether Surnaik was reckless are common questions that have common answers. The answers are the same for every class member regardless of where the class member is located or the extent of the class member's injuries.

C. The West Virginia Mass Litigation Panel is not an alternative to class action litigation

There are a couple of problems with Surnaik's argument (Petition at 18) that the West Virginia Mass Litigation Panel ("MLP") is a superior alternative to a class action. First and foremost, the MLP is an alternative venue for the management of multiple civil actions, not an alternative procedural mechanism. The MLP is not, and never has been, precluded from using the class action device itself to handle matters or portions of matters committed to its purview. Given that, at the time of the filing of the motion for class certification at least, the only civil action pending in any Circuit Court in the State of West Virginia was Paul Snider's, the case did not even meet the minimal criteria for being sent to the MLP. *See* W. Va. Tr. Ct. R. 26.04(a) (requiring "two or more civil actions"). Had the case met the criteria—or if it now meets the criteria, given that the motion for class certification was filed less than two years following the

outbreak of the warehouse fire—Surnaik would have been, and maybe is now, free to seek a transfer to the MLP. The same class certification questions and issues are sure to arise in the MLP, where class actions are a procedural mechanism commonly employed. So when Surnaik advocates for the MLP, it is not at all clear that Surnaik actually means the MLP itself, which would change very little.

It is likely, however, that what Surnaik means when it claims that the MLP is superior to a class action is that lots of individual cases are superior to a class action, and, never fear, those individual cases can be aggregated before the MLP so they don't overwhelm any individual circuit court. In other words, Surnaik is arguing that it would be better—and doubtless it would, for Surnaik—to impose a requirement of attorney labor, a circuit court filing fee, service of process fees, and potentially court reporter and expert witness fees, as well as a host of other potential costs and expenses, on anyone wishing to hold Surnaik to account for causing a small amount of damage to very many people through its own sheer negligence and recklessness in failing to maintain a fire protection system at its warehouse. The reason that many *individual* cases were not filed, even initially[3]—which likely would have led to the cases being aggregated before the MLP—is that most of the individual injuries (a week of noxious smoke invading one's home, for example) are small enough that, on such an individual basis, the cases are classic "negative value" cases. In other words, the cases cost more to file, serve, and prosecute than the likely recovery.

This is a circumstance where the class action mechanism shines. *See Amchem Prods. v. Windsor*, 521 U.S. 591, 617 (1997) ("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

[3] To the best of Paul Snider's counsel's knowledge, all five cases filed initially were filed as (essentially competing) class actions.

to bring a solo action prosecuting his or her rights."); *id.* ("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 groups of people who individually would be without effective strength to bring their opponents into court at all."); *Good v. Am. Water Works Co.*, 310 F.R.D. 274, 297 (S.D.W. Va. 2015) (holding, in certifying a single episode class action, that "absence of the class device would surely discourage potentially deserving plaintiffs from pursuing their rights under the circumstances here presented"). The MLP is a good venue for aggregating many civil actions and removing the burden of many civil actions involving the same or similar occurrences on the circuit courts, but it is not an alternative to a class action. The MLP itself has no rule against, or aversion to, the class action mechanism. Class action treatment is clearly superior to the filing of individual, negative value cases.

III. Paul Snider's claims and injuries are typical of the class

Surnaik's third Question Presented is a straw question—"Do the requirements of standing and typicality preclude Plaintiff from representing a class of which he is not a member?"—based on the patently faulty premise that Paul Snider admitted that "he did not sustain any property damage." Petition at 2. Paul Snider sustained property damage in the form of the loss of the use and enjoyment of his property because it was invaded by Surnaik's noxious smoke.

Paul 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, mostly in the deposition pages (pp. 93–101 of the transcript) omitted from the Appendix prepared by Surnaik. See App. 88–89 (skipping from deposition page 89 to page 102). The entirety of Mr. Snider's deposition transcript was admitted into evidence by agreement of

the parties at the Circuit Court's evidentiary hearing held on July 8, 2019, and was duly submitted, according to the docket sheet, on July 18, 2019. App. 188. The transcript of that July 8, 2019, evidentiary hearing, at which Mr. Snider appeared and testified, was also omitted from Surnaik's Appendix.

According to Paul Snider's own testimony, during the eight days of the fire, his "house was full of smoke." *See* Supplemental Appendix ("Suppl. App.") at ___ (Dep. 94). He and his wife got breathing masks to cover their nose and mouth and "couldn't take the masks off" at 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.* (Dep. 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.* (Dep. 93), during the fire he and his wife "tr[ied] to stay away from the house . . . because of smoke and stuff." *Id.* (Dep. 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.* (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.*

This is 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 enjoyment—when he was there it was unpleasant, it smelled bad, "[i]t was awful"—of real property. 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. Id. (Dep. 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 from asthma—is sufficient, by itself, to confer standing on Paul Snider to file this suit. The standing argument is a complete non-starter. The only remaining question raised by Surnaik would be one of typicality under Rule 23(a)(3) of the West Virginia Rules of Civil Procedure.

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 it is also totally and completely typical of the injuries suffered by other class members, and there is zero evidence to the contrary. Surnaik has offered absolutely no evidence that anyone else's experience with the fire was different in any material respect from Paul Snider's. Instead, Surnaik 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. What evidence has Surnaik offered that others in the class even had visible ash deposits on surfaces following the fire, other than Mr. Snider's own allegations in his complaint? All of the evidence submitted by Mr. Snider in connection with class certification—which is all of the evidence, period, because Surnaik did not call a single witness, expert or lay, of its own—related to the presence, extent, and characteristics of the smoke invasion in the geographical area around the warehouse fire, as well as the potentially harmful characteristics of the small particles present in the smoke.

Assuming, however, 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 allegation *was* included in the Complaint and has *not*

been abandoned—that "factual variation" does not come anywhere close to defeating typicality under the standard established and recently affirmed by this Court in *State of West Virginia ex rel. Municipal Water Works v. Swope*, 2019 WL 5875966, 2019 W. Va. LEXIS 519 (October 2, 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*, 2019 WL 5875966, 2019 W. Va. LEXIS 519. 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. Check: The event and course of conduct are the warehouse fire and Surnaik's negligent, reckless, and willful failure to maintain its fire protection system. Second, the representative's claims must be based on the same legal theory. Check: All claims are based on negligence.

This Court's most recent syllabus point includes some additional instructions to circuit courts, all of which support the Circuit Court's ruling 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, this Court 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 other words, where 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.

This Court's 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 Litig.*, 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).

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).

There is no question that Paul Snider's interest in vindicating his own right to damages from the smoke that invaded his home for eight days—by proving Surnaik'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 perfectly aligned. Typicality is satisfied.

IV. The class members are ascertainable

Interestingly, Plaintiff submitted an entire expert report with his motion for class certification that was specifically addressed to the ascertainability of this geographically defined class, which was then omitted from Surnaik's Appendix. That report, by expert Seward Gilbert, PE, focuses on how absent class members who receive notice will be able to determine whether, geographically speaking, their property lies inside or outside the class boundary. It is included in the Supplemental Appendix (at ___).

Surnaik's ascertainability argument first focuses (Petition at 21) on an alleged ambiguity in the term "lawful possessors" of real property, which was used by the Circuit Court (App. 130) in describing one of two requirements for class membership. There is no meaningful ambiguity in the term "lawful possessors," or at least no more ambiguity than a skilled lawyer might be able to find with any term. The West Virginia legislature has used the precise term—"possessor of real property"—in two separate, recent statutes, both of which refer to and limit the "liability of possessors." *See* W. Va. Code § 55-7-27; W. Va. Code § 55-7-27. The West Virginia legislature succinctly defined the term as follows: "A possessor of real property, including *an owner, lessee or other lawful occupant . . .*" *See id.* There you have it. The term "lawful possessor" of real property is simply another way of saying "an owner, lessee, or other lawful occupant" of real property, and this can be spelled out easily in the notice required under Rule 23(c)(2). There are always gray areas to every simple rule—is the adult nephew who has been sleeping on the couch for the last two months a "lawful occupant"?—and these can be anticipated and addressed to the

extent possible in the long form notice, but not always eliminated. The definition, nonetheless, is obviously sufficiently precise to satisfy the requirement. The term is simply not vague.

Nor is the term "business operations," used by the Circuit Court (App. 130) in describing the other requirement for class membership. To be a class member, one must have been a "lawful possessor" of property within the geographical boundary used in the definition, and one must have resided, conducted "business operations," or conducted government operations on the property within the class area that they lawfully possess. The term "business operations" might be considered vague or imprecise if the question arose as to what constitutes "business operations" on someone else's property—for example, do sales calls count?—but not in this context. In the Circuit Court's order, the term business operations is simply used to refer to one of three kinds of uses—residential, private business, government business—that qualify for class membership. Determining whether or not one is using one's own property for "business operations" very simple, much easier than determining what constitutes business operations generally, because it shifts the focus to the use of the property and away from the trivial acts involved in operating a business. Mainly, the question is, was the property you possessed (owned, leased, or occupied) vacant or being put to use? There can be no interference with the use and enjoyment of property in circumstances where it isn't being used. In practice, it is difficult to imagine a close case, but one may come up—they always do, with every definition. The term—really the use of it to say the property can't just have been vacant—is certainly not so ambiguous as to defeat ascertainability.

Surnaik's other ascertainability argument—that class members cannot be identified "until after the Phase I trial, if at all" (Petition at 22)—is premised on a very fundamental lack of understanding of what a class action is or what it means to be a "class member." The class

members can be identified based on the definition set forth plainly at the outset of the Circuit Court's order (App. 130–31), simply by identifying those persons, businesses, and government agencies that owned and resided or operated in real property located within the boundaries depicted on the maps attached to the class certification order. The two phases of the trial are for determining whether those class members win, and, if so, how much, not for determining who is a class member and who is not. Simply put, all persons who meet the criteria set forth at the outset of the Circuit Court's order—where it says, "The class is defined as follows:" (App. 130–31)—are class members and, unless they opt out, will be bound by whatever judgments issue, favorable or not, and whatever determinations are made in the course of the proceedings in this case. *See* W. Va. R. Civ. P. 23(c)(2)–(3).

V. The Circuit Court's analysis was sufficiently thorough and detailed

Surnaik's arguments in support of its fifth and final question, whether the Circuit Court's order was "deficient for failure to conduct a thorough analysis of each applicable Rule 23 requirement," are mostly a rehash of its other arguments under a different guise. In key instances, Surnaik's claims regarding the order's shortcomings are objectively and demonstrably false. For example, Surnaik's main grievance (Petition at 23–24) with respect to the Circuit Court's discussion of typicality is that the Circuit Court's order "does not even address the obvious infirmity with regard to typicality: Plaintiff purports to represent individuals and businesses claiming property damage, despite his concession that he sustained no such injury." In fact, the Circuit Court on multiple occasions rejected Surnaik's claim that Paul Snider had not suffered property damage, explained multiple times that invasion of a home by smoke is a legally cognizable injury, and ruled accordingly. In paragraph 5.e (App. 132), the Circuit Court explained that the class representative sought damages for annoyance and inconvenience from

having his home invaded by smoke, and that these claims are typical of the property damage claims of absent class members—and, indeed, they are. In paragraph 12 (App. 136–37), the Circuit Court explained that "the universe of legally cognizable injuries is not so narrowly defined" as Surnaik argues, and that, as in ruling on the motion to dismiss, the Circuit Court finds 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." In paragraph 13 (App. 137), the Circuit Court again explained the Paul Snider's testimony that he his house was invaded by noxious smoke, that he had to wear a dust mask, and that it was unpleasant shows that he suffered a "legally cognizable injury, sufficient to confer standing on Paul Snider."

With respect to the Circuit Court's allegedly insufficient discussion of the ascertainability issue (Petition at 24), several points stand out. First is that "ascertainability" is, strictly speaking, not a Rule 23 requirement at all. *See* W. Va. R. Civ. P. 23. The word itself—nor any variation of it (e.g., ascertainable, ascertain)—does not appear in this Court's recent and thorough discussion of thorough the requirement for thorough analyses in class certification orders. *See State of West Virginia ex rel. Municipal Water Works v. Swope*, 2019 WL 5875966, 2019 W. Va. LEXIS 519 (October 2, 2019). Second, Surnaik correctly notes that the Circuit Court referred to "the proposed methodology for identifying the class boundary and those businesses and individuals who work or live there," but then failed to include that "proposed methodology"—the expert report addendum by Seward Gilbert, PE (Suppl. App. ___)—in their Appendix, creating the misimpression that the proposed methodology is just a punt rather than a specific and well articulated plan created by a professional engineer to solve any issues. Third, Surnaik again displays its woeful misunderstanding of class actions, erroneously claiming that the Circuit Court "suggest[ed]" that injured class members will be identified later, when all class

members—all of whom Plaintiff alleges have suffered injuries and are therefore "injured"—are identified at the outset of the order. *See* App. 130–31.

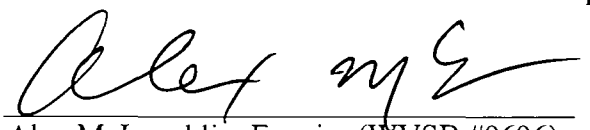
In short, a careful review of the Circuit Court's order shows that it is thorough, detailed, specifically addresses all of Surnaik's arguments, and specifically addresses all of the Rule 23 requirements.

CONCLUSION

The Petition for Writ of Prohibition should be denied.

PAUL SNIDER, on behalf of himself and a class of others similarly situated;
RESPONDENT

By Counsel



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