IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HOLLY LLOYD, on behalf of herself and all others similarly situated, Plaintiff, vs. COVANTA PLYMOUTH RENEWABLE ENERGY, LLC, Defendant.	) Case No. 2:20-cv-4330-HB) JUDGE HARVEY BARTLE III) **PLAINTIFF'S MOTION FOR CLASS CERTIFICATION**

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PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

PLEASE TAKE NOTICE that Plaintiff Holly Lloyd, by and through her counsel, hereby moves for a Class Certification Order under Federal Rule of Civil Procedure 23(c), permitting class treatment of Plaintiff's claims on behalf of the proposed class as defined in Plaintiff's Complaint. In support of this Motion for Class Certification, Plaintiff states as follows:

1. Plaintiff Holly Lloyd, an individual residential property holder who resides at 505 Hillcrest Road, Conshohocken, Pennsylvania instituted this action on September 3, 2020.

2. Defendant Covanta Plymouth Renewable Energy, LLC operates a commercial municipal waste incinerator in Conshohocken, Pennsylvania located at 1155 Conshohocken Road (the "Facility").

3. The operative complaint[1] alleges counts of (1) Private Nuisance and (2) Public Nuisance against Defendant because Defendant's Facility has, and continues to, repeatedly emit substantial and unreasonable noxious emissions into the ambient air, which invade Plaintiff's private property and cause property damages.

4. On March 2, 2021, the Court held a status conference with the Parties and ordered that Plaintiff submit a motion for class certification, prior to commencement of class discovery. [ECF No. 25]. A supplemental brief providing the detailed legal and factual arguments supporting this motion will follow.

5. In accordance with the order of the Court, Plaintiff submits this Motion for Class Certification and requests that the Court grant certification of the class as proposed below.

[1] On February 3, 2021, the Court entered a Memorandum and Order striking Plaintiff's prior Count III for Negligence from the Complaint. [ECF No. 21, 22].

FACTUAL BACKGROUND

6. Defendant's Facility processes approximately 1,216 tons of municipal solid waste per day, which is converted into saleable energy in the form of refuse-driven fuel.

7. The Facility includes a municipal waste storage pit, an auxiliary fuel storage tank, two Municipal Waste Incinerators (MWIs), two auxiliary burners, and other equipment.

8. The Facility's principal commercial activity involves burning municipal waste, and Defendant is required to maintain its combustion chamber at temperatures at or above 1800°F in order to ensure proper combustion and control emissions.

9. The Facility has an emission stack for each MWI, through which it releases its waste byproducts into the ambient air.

10. The raw materials and chemicals utilized by Defendant in its waste incineration process are noxious and highly odiferous and create an obvious, serious, and foreseeable risk that—if not properly maintained and operated—the Facility could cause nuisance odors to be emitted off-site into the ambient air and adversely impact neighboring properties.

11. A properly operated, maintained, and constructed MWI will utilize proper odor mitigation, capture, and control technologies and processes to ensure that noxious odors are not emitted off-site and into surrounding residential areas.

12. Defendant has repeatedly and knowingly failed to properly construct, operate, and maintain the Facility and thereby prevent causing off-site nuisance odor impacts.

13. As a result, on frequent, recurring, and intermittent occasions too numerous to list individually, Plaintiff's property, and the properties of the proposed class, has been physically invaded by noxious odors.

14. Defendant has long known about its odor emissions, as the Facility has been the subject of frequent complaints from residents in the nearby residential area and legal violations issued by the Pennsylvania Department of Environmental Protection ("DEP").

15. Defendant's emission violations were repeatedly cited by the DEC, which issued Notices of Violation (NOV) to Defendant for confirmed offsite nuisance odor emissions. These confirmed violations include, but are not limited to, NOVs dated October 17, 2019; October 24, 2019; December 23, 2019; and June 24, 2020.

16. Defendant's repeated and unreasonable malodors released into public spaces and the neighboring residential area prompted numerous residents to complain to governmental entities, including the Borough of Conshohocken, Plymouth Township, and the Pennsylvania Department of Environmental Protection ("DEP"). These complaints illustrate the depth to which Defendant's pervasive and offensive odors have interfered with the lives of private residential property owners throughout the proposed Class Area defined below. These complaints include the following:

a. On December 30, 2018, the DEP and emergency personnel for Plymouth Township, among others, were alerted of substantial amounts of steam and noise coming from the facility. The DEP's report noted that neighboring residents reported "a burning plastic smell[.]" It was reported to the DEP that "the building [was] 'smoked out.'"

b. On January 3, 2019, numerous complaints by nearby residents to the DEC reported "a terrible burning plastic smell in the entire area."

c. On June 11, 2019, the DEC and the Borough of Conshohocken received, and attributed numerous malodor complaints to Defendant.

d. On October 15, 2019 through October 19, 2019, the DEC received numerous citizen odor complaints regarding Defendant's facility. The overwhelming number of complaints related to the "smell of burning plastic."

e. On June 15, 2020 at approximately 7:30 a.m., Defendant's facility experienced a power failure that caused both incinerator units and all of its air pollution control devices to become non-operational, and uncontrolled air pollution and fugitive emissions were spewed into surrounding residential neighborhoods. At 9:35 a.m. on the same day, Defendant again experienced an electrical failure that shut down the facility and all its air pollution control devices. Numerous local residents complained to the DEC regarding noxious odors invading their properties. The DEP verified numerous violations resulting from Defendant's malfunction, which constituted "unlawful conduct and a public nuisance."

f. Between June 10, 2019 and January 4, 2020, the DEC received at least 163 citizen complaints regarding Defendant's facility. The complaints overwhelmingly related to noxious odors.

g. Additional odor complaints have been made to the DEC throughout 2020, which the DEC characterized as "ongoing issues" relating to Defendant's facility.

17. In addition to the hundreds of complaints lodged with public entities, more than 30 putative class members, including Plaintiff, have submitted written statements to Plaintiff's counsel detailing the impact Defendant's odorous emissions have had on their lives and their ability to use and enjoy their homes and properties.

18. Plaintiff Holly Lloyd reported persistent noxious odors that frequently interfere with the use and enjoyment of her property, including the ability to use her yard. A very small

sampling of the written reports from members of the putative class to Plaintiff's Counsel include the following:

a. Carl Augustine reported on August 3, 2020 that "[o]dors are so offensive that you cannot breathe, open windows, or go outside."

b. Peter and Joanne D'Alessandro reported on February 13, 2020 that because of the smell they are "unable to sit on patio or porch at times."

c. Gina Folds reported on January 21, 2020 that Defendant's odors force her "to close the windows & turn on the A/C. I also am not able to enjoy the front porch or back patio. I also may not walk the dog on smelly days. Worry about resale value."

d. Travis Manson and Stephanie Daniel reported on January 27, 2020 that they are prevented from going "outside on deck or driveway." They frequently have to keep their windows closed at times because of Defendant's odors.

e. Wayne Masters reported on January 29, 2020 that he has been prevented from going "out to play with my great granddaughter, also can not barbecue outside with family members."

f. Hayden McCall reported on February 14, 2020 that because of the odors, "[e]ntertaining outside just hasn't been possible. Opening windows isn't possible."

19. Numerous media reports have been published regarding Defendant's nuisance odor emissions.

20. A group of citizens organized an online community group, which has at least 797 members, entitled "Covanta Plymouth Trash Incinerator – Community Information and Action."

21. A June 23, 2020 letter was submitted by at least 42 affected neighboring residents demanding voluntary cessation of Defendant's operations or denial of Defendant's 2022 application for permit renewal because of the Facility's noxious emissions.

22. Despite clear knowledge of its odor emission problem, Defendant repeatedly continued to frequently emit severe fugitive off-side noxious odors into the ambient air outside its property.

23. The foul odors emitted from the facility are offensive, would be offensive to a reasonable person of ordinary health and sensibilities and have caused physical property damages.

24. Plaintiff's property has been and continues to be physically invaded by noxious odors that have interfered with the use and enjoyment of that property, resulting in damages.

25. The invasion of Plaintiff's property and that of the Class by noxious odors has deprived Plaintiff of the full value of her property and/or reduced the value of that property, resulting in damages.

26. The Class Area and Montgomery County are home to a wide range of commercial and recreational activities including but not limited to dining, industry, construction, retail trade, parks, and education.

27. Plaintiff and the Class are a limited subset of individuals in Montgomery County and the Class Area that includes only owner/occupants and renters of residential property who live within the Class Area and fit within the Class Definition. Plaintiff and the putative class are not coterminous with the general public.

28. Members of the public in the Class Area and Montgomery County, including but not limited to businesses, employees, commuters, tourists, visitors, minors, customers, clients, and students, have experienced and been harmed by the fugitive noxious odors emitted from the

Facility into public spaces; however, unlike Plaintiff and the Class, members of the public who are outside of the Class Definition have not suffered damages of the same kind, in the form of diminished private property values, deprivation of the full value of Plaintiff's private property, and/or loss of use and enjoyment of their private property.

29. Plaintiff and the Class have suffered damages different in kind that are not suffered by the public at large because their injury is an injury to private property.

30. The odors caused by Defendant's facility have been and continue to be dispersed across public and private land throughout the Class Area.

THE PROPOSED CLASS

31. Plaintiff Holly Lloyd brought this action for private and public nuisance individually and on behalf of all others similarly situated.

32. Plaintiff now moves this Court for an order pursuant to Fed. R. Civ. P. 23(c) certifying the following class:

> ***All owner/occupants and renters of residential property within a 1.5-mile radius of the Covanta Plymouth Renewable Energy Facility.***

Excluded from this Class are Defendant and its affiliates, predecessors, successors, officers, directors, agents, servants, or employees, and the immediate family members of such persons.

33. In support of this Motion for Class Certification, Plaintiff provides the attached map visually depicting the proposed Class Area. (**Ex. A**, Class Area Map).

ARGUMENT IN SUPPORT OF CLASS CERTIFICATION

34. Plaintiff Holly Lloyd is an owner of residential property located within the proposed Class Area and her claims for property damage are typical of the claims of the putative class and there are no known conflicts of interest between Plaintiff and other members of the proposed class.

I. The Proposed Class is Sufficiently Numerous to Warrant Class Certification.

35. "The numerosity prerequisite requires a plaintiff to show by a preponderance of the evidence that the proposed class is so numerous that joinder of all absent class members would be impracticable." *King Drug Co. of Florence v. Cephalon, Inc.*, 309 F.R.D. 195, 203 (E.D. Pa. July 27, 2015) (citations and internal quotations emitted). This analysis largely "depends on the circumstances surrounding the case and not merely on the number of class members." *Jackson v. SEPTA*, 260 F.R.D. 168, 185-86 (E.D. Pa. 2009). While there is no precise number required to satisfy the numerosity requirement, the Third Circuit has made the following observations:

> [w]hile there are exceptions, numbers under twenty-one have generally been held to be too few. Numbers between twenty-one and forty have evoked mixed responses and again, while there are exceptions, numbers in excess of forty, particularly those exceeding one hundred or one thousand have sustained the requirement."

Weiss v. York Hosp., 745 F.2d 786, 808 n.35 (3d Cir. 1984) (citing 3B J. Moore, Moore's Federal Practice ¶ 23.05[1], at 23-150 (2d ed. 1982)).

36. There are in excess of 7,900 residential households within a 1.5 mile radius of the Facility. Accordingly, the members of the Class are so numerous that joinder of all parties is clearly impracticable.

II. There Are Overwhelmingly Common Issues of Law and Fact that Merit Class Treatment of Plaintiff's Claims.

37. "Rule 23(a)(2) requires a party seeking class certification to prove that the class has common 'questions of law or fact.' The claims at issue "must depend upon a common contention of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2545 (2011). To demonstrate commonality, "[t]he bar is not high; [the Third Circuit] [has] acknowledged commonality to be

present even when not all members of the plaintiff class suffered an actual injury when class members did not have identical claims, and, most dramatically, when some members' claims were arguably not even viable. In reaching those conclusions, we explained that the focus of the commonality inquiry is not on the strength of each class member's claims but instead on whether the defendant's conduct was common as to all of the class members." *In re Cmty. Bank of N. Va. Mortg. Lending Practices Litig., PNC Bank NA*, 795 F.3d 380, 397 (3d. Cir. 2015) (quotations and citations omitted).

38. Here, Defendant has engaged in a uniform and common course of misconduct towards members of the proposed Class, involving allegations that involve a common source of air pollution, giving rise to overwhelmingly common questions of law and fact to all class members. These common issues include, but are not limited to:

a. Whether and how Defendant intentionally, knowingly, negligently, and/or recklessly failed to construct, maintain, operate, and/or design the facility;

b. Whether Defendant owed any duties to Plaintiff;

c. Which duties Defendant owed to Plaintiff;

d. The way in which the facility's odors were dispersed over the proposed Class Area;

e. Which steps Defendant has and has not taken in order to control its emissions through the maintenance and/or operation of its facility;

f. Whether it was reasonably foreseeable that Defendant's failure to properly maintain, operate, and/or construct the facility would result in an invasion of Plaintiff's property interests;

g. Whether the degree of harm suffered by Plaintiff and the class constitutes a substantial annoyance or interference; and

h. The proper measure of damages incurred by Plaintiff and the Class.

III. The Nuisance Claims of Plaintiff Holly Lloyd Are Typical of the Claims of the Proposed Class.

39. "The typicality inquiry is intended to assess whether the action can be efficiently maintained as a class and whether the named plaintiffs have incentives that align with those of absent class members so as to assure that the absentees' interests will be fairly represented." *King Drug Co. of Florence v. Cephalon, Inc.*, 309 F.R.D. 195, 207-208 (E.D. Pa. 2015) (citation and internal quotations omitted). To establish typicality, it is sufficient that a plaintiff's claim "arises from the same event, practice or course of conduct that gives rise to the claims of the class members." *Marcus v. BMW of N. Am.*, LLC, 687 F.3d 583, 598 (3d Cir. 2012). Therefore, "factual differences will not render that claim atypical if it is based on the same legal theory as the claims of the class." *Id.*

40. Here, Plaintiff has the same interest in this matter as all other members of the Class, and her claims are typical of all members of the Class. If brought and prosecuted individually, the claims of each Class member would require proof of many of the same material and substantive facts, utilize the same complex evidence including expert testimony, rely upon the same legal theories, and seek the same type of relief.

41. The claims of Plaintiff and the other proposed Class Members have a common origin and share a common basis. The claims originate from the same failures of the Defendant to properly design, maintain, operate, and/or construct the facility, causing noxious emissions from a common source air polluter.

42. All proposed Class members have suffered injury in fact as a result of the invasion of their properties by noxious odors emitted by Defendant. The noxious odors emitted by

Defendant, interfere with their ability to use and enjoy their homes and has adversely impacted property values throughout the proposed Class Area.

IV. Plaintiff Holly Lloyd Will Fairly and Adequately Protect the Interests of the Proposed Class.

43. "The adequacy requirement primarily examines two matters: the interests and incentives of the class representatives, and the experience and performance of class counsel." *In re Cmty. Bank of N. Virginia Mortg. Lending Practices Litig., PNC Bank NA*, 795 F.3d 380, 392 (3d Cir. 2010). Further, Class counsel must be "qualified, experienced, and generally able to conduct the proposed litigation" and "the plaintiff must not have interests antagonistic to those of the class." *King Drug Co. of Florence v. Cephalon, Inc.*, 309 F.R.D. 195, 208 (E.D. Pa. 2015). (citing *Wetzel v. Liberty Mut. Ins. Co.,* 508 F.2d 239, 247 (3d Cir. 1975)).

9. Plaintiff's claims are sufficiently aligned with the interests of the absent members of the Class to ensure that the Class claims will be prosecuted with diligence and care by Plaintiff as representatives of the Class. Plaintiff will fairly and adequately represent the interests of the Class and do not have interests adverse to the Class.

44. Further, Plaintiff has retained the services of counsel who are experienced in complex class action litigation, and in particular class actions stemming from invasions of private property by industrial emissions. Plaintiff's counsel will vigorously prosecute this action and will otherwise protect and fairly and adequately represent Plaintiff and all absent Class members.

V. Common Questions of Law and Fact Common to Proposed Class Members Predominate over any Questions Affecting Only Individual Members.

45. The predominance element of Rule 23 "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *In re Cmty. Bank of N. Va.*, 795 F.3d at 399 (citation and internal quotations omitted). "Common issues predominate in air

pollution cases when the paramount issue concerns whether a plant's emissions are substantially interfering with the local residents' use and enjoyment of their real and personal property." *Stanley v. U.S. Steel Co*., 2006 U.S. Dist. LEXIS 16582, *21, 2006 WL 724569 (E.D. Mich. Mar. 17, 2006). The mere existence of individual issues does not mean that common issues do not predominate. *See Neale v. Volvo Cars of N. Am., LLC*, 2015 U.S. App. LEXIS 12629, *38-39 (3d Cir. N.J. July 22, 2015). "If issues common to the class overwhelm individual issues, predominance should be satisfied." *Id.* (citations omitted). "When conducting a predominance inquiry, the court must consider the elements of the underlying cause of action." *King Drug Co.*, 309 F.R.D. at 209.

46. The common issues relating to Defendant's conduct, the dispersion of Defendant's alleged emissions, and the impacts to the community substantially overwhelm any individual issues that may exist. There is substantial evidence that the Class Area has been commonly impacted by a common source air polluter, and to a similar degree, rendering individual issues of minimal relative importance.

VI. Class Treatment of Plaintiff's Claims Is the Superior Method of Adjudication

47. "The superiority requirement asks a district court to balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication." *In re Cmty. Bank of N. Va.*, 795 F.3d at 409 (citation and internal quotations omitted). The list of factors included in Rule 23(b)(3) is non- exhaustive. *Id.* "In establishing superiority, a plaintiff must demonstrate that resolution by class action will '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.'" *King Drug Co*., 309 F.R.D. at 214 (citation and internal quotations omitted).

48. For numerous reasons, a class action is superior to other methods of litigation under the circumstances and will provide a fair and efficient method for adjudication of the controversy because:

a. Individual claims by the Class members would be impracticable as the costs of pursuit would far exceed what any one Class member has at stake;

b. Little or no individual litigation has been commenced over the controversies alleged in this Complaint and individual Class members are unlikely to have an interest in separately prosecuting and controlling individual actions;

c. The concentration of litigation of these claims in one forum will achieve efficiency and promote judicial economy; and

d. The proposed class action is manageable.

VII. The Proposed Class Is Ascertainable.

49. "[A]scertainability entails two important elements. First, the class must be defined with reference to objective criteria. Second, there must be a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir. 2013) (citation omitted).

50. The proposed Class here is readily ascertainable. The Class is defined with reference to objective criteria in the form of ownership and residency within a limited geographic area of one and one-half mile radius from the Facility located at 1155 Conshohocken Road, Conshohocken, Pennsylvania. *See Byrd v. Aaron's Inc*., 784 F.3d 154, 169 (3d Cir. 2015) (abuse of discretion to find that class of "household members" was not ascertainable.) The claims at issue arise from damage to real property, the locations of which are part of the very definition of the Class. In order to determine whether a given person is a member of the Class, all that is required

is to determine whether that person's home is located within the Class Area boundary and/or whether they are an owner/occupant or renter of real property in that Class Area. (*See* **Ex. A**).

CONCLUSION

For the foregoing reasons, and the reasons to be discussed at greater length through the subsequent briefing to follow class certification discovery, Plaintiff respectfully requests that the Court grant this Motion for Class Certification and enter an order pursuant to Fed. R. Civ. P. 23(c) certifying the proposed class, appointing Plaintiff Holly Lloyd as Class Representative, appointing Plaintiff's Counsel as Class Counsel, and ordering that notice be disseminated to the Class consistent with due process requirements.

Dated: March 17, 2021

Respectfully submitted,

/s/ Nicholas A. Coulson

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served this 17th day of March via the Court's CM/ECF system, which will provide electronic notifications of such filing to all counsel of record.

Dated: March 17, 2021

/s/ Nicholas A. Coulson
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