To commence the 30-day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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JOSEPH DUDLEY, ELIZABETH DUDLEY, ALEX GADD, JENNIFER GADD, DANIEL SULLIVAN, and ALLYSON SULLIVAN, on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

API INDUSTRIES, INC. d/b/a ALUF PLASTICS,

Defendants.

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ZUGIBE, J.

DECISION AND ORDER

Index No.: 030905/2018

Mot. Seq. #s 5- 9

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RELEVANT PROCEDURAL AND FACTUAL BACKGROUND

This putative environmental class action sounding in nuisance and negligence was commenced by Plaintiffs as against Defendant API INDUSTRIES, INC. d/b/a ALUF PLSTICS (hereinafter "Aluf" or the "facility") via Summons and Complaint on February 20, 2018. *See*, NYSCEF #1.

As per the Complaint, Aluf operates a facility that manufactures industrial liners and other plastic products in Orangeburg, which is located in Rockland County, New York. Through a process known as extrusion, Aluf melts solid plastic into a liquid that is then remanufactured into new plastic products, such as plastic bags. Plaintiffs allege that Defendant's manufacturing processes, specifically extrusion, have caused noxious odors to be emitted from its facility which invade the residences of the adjacent community. Plaintiffs therefore seek to represent a class of persons that includes *at least* one hundred and ninety-five (195) households, members of said households having submitted data/information to Plaintiffs' counsel purporting to attribute "the invasion [of] noxious odors and air particulates to" the Defendant's facility. Specifically, Plaintiffs propose within the Complaint a class defined as "[a]ny and all individuals who owned or occupied residential property at any time beginning in 2015 to present that are located…[o]ne and one-half (1.5) miles to the Northern, Northwestern, Western, Southwestern, and Southern directions of the property line boundary of Defendant's facility." NYSCEF #1, ¶ 23-24. Plaintiffs, in the Complaint, reserved their right to adjust the proposed class and/or proposed subclasses later in the litigation process.

Defendant, in its Answer, generally denied most of the substantive allegations contained in the Complaint, and specifically denied Plaintiffs' alleged entitlement to class certification. *See*, NYSCEF #22. Significant motion practice followed the joinder of issue in this action, as is described more fully herein.

Before the Court are five motions, specifically: (1) Plaintiffs' Notice of Motion, originally filed May 4, 2020, for an order pursuant to CPLR 902 granting class certification, or in the alternative, granting limited issue class certification pursuant to CPLR 906 (Motion Sequence #5); (2) Defendant's Notice of Cross Motion filed June 11, 2020, for an Order excluding from evidence and this Court's consideration Plaintiffs' exhibits #2[1], 17, 18, 34, 37-42, Exhibits 1 -4

[1] Defendant is only seeking to exclude pages 33-44 of Plaintiffs' exhibit #2.

of the Affidavit of Matthew Roman, and the expert reports of Mark Cal and Louis Fow[2] pursuant to CPLR 3124 (Motion Sequence #6); (3) Defendant's Notice of Cross Motion filed June 11, 2020 seeking Summary Judgment pursuant to CPLR 3212 with respect to Plaintiffs' nuisance and negligence claims and dismissing Plaintiffs' class certification claims as moot (Motion Sequence #7); (4) Plaintiffs' Notice of Cross Motion filed June 29, 2020 for an Order excluding from evidence Defendant's exhibit R[3] pursuant to CPLR 3124 (Motion Sequence #8); and (5) Defendant's Notice of Motion filed June 25, 2021 for an Order excluding from evidence Plaintiffs' exhibits A, B1 and B2, C, D1-D5, and L[4] pursuant to CPLR 3124 (Motion Sequence #9).

By way of procedural background, on November 23, 2020, this Court issued an Interlocutory Order for Supplemental Discovery and Briefing with respect to the above referenced pending motions and reserved the decision on same until the completion of the supplemental briefing contemplated by the Interlocutory Order. *See*, NYSCEF Doc. 305. Specifically, the Court requested that the parties address within their supplemental briefs the following four issues: (1) whether it is appropriate in this action based on the record to adjust the class size and/or create subclasses pursuant to CPLR 906(2); (2) whether the record is sufficient to conclude that causation can reasonably be determined for the entire class; (3) whether there is Second Department case law that prohibits the Court from certifying a class in an environmental tort action alleging improper discharge into air or water over a substantial geographical range; and (4) whether the Court can take judicial notice of decisions, orders and records pending in this Court, to the extent same are relevant.

In accord with the Court's Interlocutory Order, all supplemental briefing has been completed, and the Court shall now address each pending application separately herein.

[2] These documents are designated as document numbers 110, 119, 120, 136- 144, and 149 on NYSCEF.
[3] This document is designated as document number 175 on NYSCEF.
[4] These documents are designated as document numbers 309-313 and 321 on NYSCEF.

MOTION FOR SUMMARY JUDGMENT

(Motion Sequence #7)

Presently, there is a pending dispositive motion before the Court, same having been filed by Defendant. Defendant moves for an Order granting summary judgment in its favor, and thereby dismissing Plaintiffs' nuisance and negligence claims. Defendant contends that a private nuisance claim cannot be asserted "on behalf of a large number of residents[.]" Affirmation of Michael G. Murphy, Esq., in Support of Defendant's Motion, NYSCEF Doc. 240, p. 4. With respect to the negligence claim, Defendant argues that it owes no duty to Plaintiffs, and that in any event, Plaintiffs have not alleged any direct, physical injury such that could sustain this claim.

This motion is opposed in its entirety by Plaintiffs. Since this motion, if granted in its entirety, would essentially dispose of this matter, the Court will address same before the other pending motion sequences.

It is well established that once issue has been joined, a motion for summary judgment can be made based on CPLR 3211(a) grounds which have been asserted in the Answer. *See, Vision Accomplished, Inc. v. Lowe Properties, LLC,* 131 A.D.3d 1163, 1164, 16 N.Y.S.3d 840 (2d Dept. 2015). Defendant asserts in its Answer that Plaintiffs failed to state a cause of action pursuant to CPLR 3211(a)(7).

Plaintiffs, in their Complaint, allege two causes of action: "nuisance" and negligence. As per said Complaint, noxious odors emanating from the facility entered the Plaintiffs' property, resulting in the obstruction of their free use of the property and interference with their comfortable enjoyment of same. Plaintiffs allege that Defendant owes them a duty to prevent and abate the interference with their private interests, and that Defendant has failed to reasonably maintain its facility thus unreasonably and/or intentionally causing an invasion of their interests in their ability to use/enjoy their property. Plaintiffs assert that they did not consent to this invasion. As a result, Plaintiffs allege that they have suffered damages relating to their ability to use/enjoy their property, and that their property values have decreased.

Defendant claims that Plaintiffs fail to state a private nuisance claim, or in fact any nuisance claim at all. In so arguing, Defendant cites to a body of case law that indicates private nuisance claims are intended to permit recovery for a nuisance that threatens only one, or relatively few, individuals.

In response, Plaintiffs point out that the claim stated in their Complaint is not limited to "private nuisance" but instead refers to the general term "nuisance" which can encompass liability for both public and private nuisance (referred to sometimes as a "mixed" nuisance claim). Plaintiffs contend that the allegations in the Complaint state a valid claim for both public and private nuisance. In reply, Defendant contends that Plaintiff did not plead a public nuisance claim, and cannot at this juncture now couch their allegations in such a manner as to state public nuisance claim. In any event, Defendant argues that Plaintiffs' fail to state a public nuisance claim, as well. The Court will examine whether Plaintiffs fail to establish viable nuisance claims (both public and private), as well as negligence.

Nuisance

1. Private Nuisance

In order to state a claim for private nuisance, a plaintiff must allege an interference (1) substantial in nature; (2) intentional in origin; (3) unreasonable in character; (4) with a persons' property right to use and enjoy their land; and (5) caused by another's conduct in acting or failing to act. *Taggart v. Costabile*, 131 A.D.3d 243, 14 N.Y.S.3d 388 (2d Dept. 2015). Private nuisance claims can be premised on conduct that is either intentional or negligent in nature. *Lichtman v. Nadler*, 74 A.D.2d 66, 426 N.Y.S.2d 628 (4th Dept. 1980).

The Court is aware of the body of case law indicating generally that a private nuisance only affects a "relatively small number" of people, otherwise it becomes a public nuisance. *Fresh Air for the Eastside, Inc. v. Waste Management of New York, LLC*, 405 F.Supp.3d 408, 441 (W.D.N.Y. 2019). For that reason, some courts have dismissed private nuisance claims where the nuisance is alleged to have impacted many people. The Court is not aware, however, of any binding precedent that would prevent it from allowing the cause of action to survive at this stage simply because there are allegations that many individuals have been impacted by the purported nuisance. In fact, there are courts which have entertained class action or multi-plaintiff private nuisance lawsuits, and that have not determined that they are *per se* prohibited simply based on the premise that too many people are impacted. *See, e.g.*, *Osarczuk v. Associated Universities, Inc.*, 36 A.D.3d 872, 877, 830 N.Y.S.2d 711 (2d Dept. 2007); *Burdick v. Tonoga, Inc.*, 191 A.D.3d 1220, 143 N.Y.S.3d 123 (3rd Dept. 2021); *In re*

Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation, 379 F. Supp.2d 348, 433 (S.D.N.Y. 2005).

Since there does not appear to be any binding authority out of New York State prohibiting class action litigation premised on a private nuisance claim, this Court looked to other jurisdictions for guidance, and in so doing, found that in other states, the Courts explicitly allow class actions based on private nuisance. The Court found the Third Circuit's Decision in *Baptiste v. Bethlehem Landfill Co*. particularly instructive on this point. 965 F.3d 214, 223 (3rd Cir. 2020). The Court noted that the "critical difference" between public and private nuisance "is not the number of persons harmed but the nature of the right affected: a public nuisance requires interference with common *public* rights, while a private nuisance requires only interference with personal or *private* rights." *Id.* at 223 (emphasis in original). The Court, in reversing the lower court's dismissal of the private nuisance claim, determined that since the plaintiffs (both on behalf of themselves and putative class members) alleged "that their private property rights are being significantly and unreasonable infringed by the presence of noxious odors and air contaminants released by" the facility, they in fact stated a private nuisance claim. *Id*. at 224. The Court went on to state that they saw no reason to depart from what they determined to be "longstanding principles that allow individuals to recover private property damages cause by widespread nuisance, especially where, as [there], the number of plaintiffs is not so large as to be 'indeterminate'…but rather is defined and limited to homeowner-occupants and renters within a 2.5-mile radius" from the facility. *Id.* at 227 (internal citation omitted).

Therefore, as Plaintiffs have pled the requisite elements of a private nuisance cause of action, and in light of the early stage of this litigation, the Court denies Defendant's motion with respect to the private nuisance claim.

2. Public Nuisance

Private and public nuisance claims are not mutually exclusive. *See, Black v. George Weston Bakeries, Inc.*, 2008 WL 4911791, at *6 (W.D.N.Y. 2008). One can plead both in the same Complaint, and need not specify whether they are specifically claiming a public or private nuisance. The question, however, is whether Plaintiffs have sufficiently pled a public nuisance claim. This Court determines that they have not.

The historical purpose of public nuisance claims was primarily to protect the public from harm or danger. A public nuisance is considered an offense against the State, and it is subject to "abatement or prosecution on application of the proper governmental agency." *Copart Industries v. Consolidated Edison Co. of NY, Inc*., 41 N.Y.2d 564, 568, 394 N.Y.S.2d 169 (1977). Therefore, the State has standing to commence public nuisance actions in its role as "guardian of the environment". *Chase Manhattan Bank, N.A. v. T&N PLC*, 905 F.Supp. 107, 125 (S.D.N.Y. 1995) (internal citation omitted).

Private plaintiffs are not prohibited from commencing public nuisance actions, however, in order to do so, a private plaintiff must be able to demonstrate that they suffered injuries different in kind from the community at large. As with much of the nuisance case law, this requirement has been interpreted differently by different courts. *In Fresh Air for the Eastside, Inc.*, the U.S. District Court (W.D.N.Y.) determined that the proper inquiry for making this determining is not whether plaintiffs have alleged an injury different in kind from other property owners, but rather, whether they have alleged an injury *different in kind from the community as a whole*. *In Fresh Air for the Eastside, Inc.*, 405 F.Supp.3d at 442-444 (emphasis supplied).

"There is no dispute that noxious odors emanating from [the facility] may qualify as a public nuisance insofar as they interfere with a common right of the public to clean and fresh air." *Davies v. S.A. Dunn & Co., LLC*, 200 A.D.3d 8, 12, __ N.Y.S.3d ___ (3d Dept. 2021). The question then becomes have these Plaintiffs sufficiently alleged injuries that are different in kind from the relevant community at large. The Court determines that even when construing the pleading liberally and in their favor, that they have not.

Plaintiffs assert that the noxious odors emanating from the facility have interfered with their ability to use and enjoy their property and resulted in a diminution of their property values. This alleged harm is the same for all the residents in the nearby vicinity- i.e. the "community at large" – as Plaintiffs detail within the allegations they use to support their request or class certification. Further, though one can infer the possibility that the noxious odors result in a substantial interference with the public's right to clean air or may impact the health of the public at large, the pleading does not contain these allegations[1]. *See, D'Amico v. Waste*

[1] Plaintiffs' Opposition to this motion indicates that they had in fact pled interference with "a common right- the right to breathe uncontaminated and unpolluted air" (Plaintiffs' Memorandum of Law in Opposition, NYSCEF Doc. 259, p. 10) however, the Court does not see thesellegations

Management of New York, 2019 WL 1332575, at *4 (W.D.N.Y. 2019) (dismissal of public nuisance claim when pleading did not provide sufficient factual allegations to substantiate a "substantial interference" with a public right).

Therefore, to the extent that Plaintiff attempt to assert a public nuisance claim, the Defendant's motion to dismiss same is granted.

Negligence

Defendant argues that Plaintiffs' negligence claim must fail as a matter of law because Plaintiffs cannot allege either a cognizable duty extending from Defendant to the putative class members or direct, physical harm to their property.

With respect to the issue of duty, the Defendant contends that "New York has not defined a boundless duty for manufacturers holding state air emissions permits to prevent odors from crossing property lines." Defendant's Memorandum of Law in Support, NYSCEF Doc. 234, p. 8. To hold otherwise, Defendant submits, would "set a dangerous and unworkable standard for industrial operations" throughout the state. *Id.* at p. 10. With respect to the separate issue of damages, Defendant points to the long line of case law that holds economic loss is insufficient as a matter of law, in the absence of physical injury, to recover on a negligence claim. In support, Defendant points to the commonly cited case on this topic, *523 Madison Ave. Gourmet Foods v. Finlandia Ctr*., 96 N.Y.2d 280, 727 N.Y.S.2d 49 (2001). The New York State Court of Appeals held in *523 Madison Ave*. that although "a landowner who engages in activities that may cause injury to persons on adjoining premises surely owes those persons a duty to take reasonable precautions to avoid injuring them . . . a landowner [does not owe] a duty to protect an entire urban neighborhood against purely economic losses." *Id*. at 290.

In opposition to the motion, Plaintiffs point the Court towards a federal case, *D'Amico v. Waste Management of New York, LLC*, *supra*. In *D'Amico*, the District Court, in applying New York State case law, recognized the line of case law cited by Defendant regarding pure economic damages. However, in D'Amico, the Court determined that "stigma damages" are in fact a valid form of damages recognized in this state in environmental cases. *D'Amico*, 2019 WL 1332575, at *5. Stigma damages are defined to include "'the public's perhaps unwarranted fears

anywhere in the pleading. While the Court is able to liberally construe pleadings, it cannot insert allegations into the pleading based on what it surmises or based upon conjecture.

concerning a property' that result in the diminution in that property's value." *Id.* (internal citation omitted). There is a recognition in the case law that these "stigma damages" are economic *in nature,* however they are distinguished from the "'purely economic harm'" that "arises from the loss of intangible financial interests unaccompanied by any tangible intrusion onto the property." *Id*. at *6 (internal citation omitted).

The Court agrees with Plaintiffs, and the case law they cite, that indicate society has a reasonable expectation that manufacturers avoid contaminating the surrounding environment. *See, e.g., Baker v. Saint-Gobain Performance Plastics Corp*., 232 F.Supp.3d 233, 245 (N.D.N.Y. 2017). The Court determines, therefore, that the Defendant does indeed owe a duty of care to surrounding property owners to avoid injuring them and/or their property. *See, Davies v. S.A. Dunn & Co., supra.* The duty is derived from society's reasonable expectation of the care owed combined with an analysis of the wrongfulness of the Defendant's alleged conduct. *See, Baker, supra,* at 245. The determination that this duty of care exists is not tantamount to imposing an unbounded, limitless duty on the Defendant to society in general, and would not, as Defendant contends, "set a dangerous and unworkable standard for industrial operations" throughout the state.

Further, while recognizing the plethora of case law determining that economic losses in and of themselves are not sufficient to plead a legally cognizable injury such that is required to recover on a negligence claim (*see, 523 Madison Ave., supra*) the Court distinguishes cases where "stigma damages" are pled.

By way of brief, limited background, it appears that "stigma damages" are derived from a 1993 Court of Appeals case where the appellant property owners sought direct and consequential market value damages for a high voltage power line easement acquired by the Power Authority of the State of New York over their properties. *See, Criscuola v. Power Authority of the State of New York,* 81 N.Y.2d 649, 602 N.Y.S.2d 588 (1993). The issue that was before the Court of Appeals in *Criscuola* dealt with the property owners' claim for consequential damages premised upon their assertion that "cancerphobia" and the public's perception of a health risk from exposure to electromagnetic emissions from power lines negatively impact the market value of their respective properties. *Id*. at 650. The Court acknowledged that this was a matter of first impression, and that it looked to other jurisdiction's in rendering its decision. *Id.* at 652-53. Ultimately, the Court determined that plaintiff appellants could establish as relevant to their

claim for damages what has been termed "stigma damages" – but that they would bear the burden of establishing "some prevalent perception of a danger emanating from the objectionable condition" through "credible, tangible" evidence. *Id*. at 653.

The concept of "stigma damages" is still relied upon today, and courts have allowed environmental negligence cases against alleged polluters to survive dismissal motions where such damages are alleged to have occurred by reason of the "actual pollution" of the defendant. In *D'Amico, supra,* one of the cases relied upon by Plaintiffs, the Court specifically states that "[w]hether the stigma results from odors, fears of electromagnetic radiation, or industrial chemicals, the resulting economic damages may be sought through a negligence claim so long as the stigma-causing pollutant or emission 'directly affected' a plaintiff's property or imminently risks contamination." *D'Amico*, *supra,* at *7 (internal citation omitted).

Here, although Plaintiffs did not use the word "stigma" in their pleading, they did allege that noxious odors permeate their property and the properties of putative class members and that, as a result, their property values have been diminished. As per *D'Amico*, this is sufficient to pursue a claim for ordinary negligence. *Id.* at *7-8.

The Court recognizes that this position is contrary to the recent Third Department decision in *Davies v. S.A. Dunn & Co., LLC, supra.* However, this Court is not bound by the Third Department. In addition, the Third Department does not address the issue of stigma damages. In *Davies*, the Third Department acknowledges the duty of care owed by the defendant facility to its neighboring landowners, but distinguishes noxious odor cases from water contamination cases on the premise that odors are transient and do not have a continuing physical presence. *Davies v. S.A. Dunn & Co., LLC.* Although this Court acknowledges that noxious odors that resemble the smell of burning plastic may constitute a different type of pollution and nuisance than contaminated soil or water, they are a form of pollution and a nuisance, nonetheless. The odors may come and go, but the allegations in the Complaint indicate that when the odors are present, they are strong enough to force the Plaintiffs indoors where they feel "captive" in their homes. Moreover, Plaintiffs allege that the residents of Orangetown have logged over 100 complaints regarding the smells, community meetings have been held to address the odors, and that the State and Town have issued violations to the Defendant for not complying with pollution performance standards. Community members are aware of the burning plastic odors allegedly emitted by this facility and their impact on neighboring properties. This alleged

contamination, in the Court's determination, is sufficient to allege the existence of stigma damages.

The Court, therefore, declines to grant the Defendant's motion with respect to the negligence claim.

In conclusion, the Defendant's motion for summary judgment with respect to the claim of public nuisance is granted. Defendant's motion for summary judgment with respect to the claims of private nuisance and negligence is denied. The Court shall therefore address the remainder of the pending motions.

MOTION FOR CLASS CERTIFICATION

(Motion Sequence No. 5)

The Plaintiffs' Position

It is indeed well established that the decision to grant class certification rests in the "sound discretion of the trial court." *Globe Surgical Supply v. GEICO, Ins. Co*., 59 A.D.3d 129, 135, 871 N.Y.S.2d 263 (2d Dept. 2008). "Article 9 of the CPLR is to be 'liberally construed' ... in favor of granting the class certification if all of the prerequisites of CPLR 901(a)(1)(5) … are met." *Id*. (internal citations omitted).

These prerequisites include proof that: (i) the class as proposed is so numerous that joinder of all members is not practicable (numerosity); (ii) common questions of law and fact exist which predominate over questions that affect individual members only (commonality); (iii) claims or defenses of the representative parties are typical of those of the entire class (typicality); (iv) the representative parties will fairly and adequately protect the interests of the class (adequacy of representation); and (v) a class action represents the superior method of adjudicating the controversy (superiority). *See generally*, CPLR § 901(a).

In weighing these factors on a motion to certify a class, the primary issue is really whether the claims as set forth in the Complaint can be "efficiently and economically managed by the court on a class wide basis." *Globe Surgical Supply, supra,* at 136-37. The burden of establishing same rests on the Plaintiff. *Id.* at 137.

Plaintiffs in this case contend that all of the necessary elements of class certification have been met, and that therefore, the Court should grant the motion based on their proposed class

definition as contained in the Complaint. The Court will summarize Plaintiffs' contentions with respect to each element.

Numerosity:

Plaintiffs allege that more than 3,000 households within a 1.5-mile radius from the Defendant's facility have been impacted in the same and/or a similar manner as a result of the output from the Defendant's facility and that as of the date of the filing of the motion, more than 267 putative class households had submitted data sheets to Plaintiff's' counsel expressing interest in the case. The mapping of those data sheets evidences, as per the Plaintiffs, that the odors negatively impact residential properties up to 0.5 miles east of the facility, and up to 1.5 miles north, northeast, northwest, west, southwest, south and southeast of the facility.

Commonality:

Plaintiffs allege that they have established the prerequisite of commonality insofar as all of the claims pertain to a "common-source air polluter and revolve around a common course of conduct, which caused common injuries to Plaintiffs and the putative class." NYSCEF Doc. #152, p. 6. The common source of conduct alleged is, as set forth *supra*, the operation of the plastic extrusion facility resulting the emission of "noxious odors into the ambient air surroundings its facility" *Id.* The Complaint, based on the emissions, asserts causes of action sounding in private nuisance and negligence. The alleged common injury relates to property damage suffered by the Plaintiffs and other putative class members that results from the noxious emissions entering their property. The fact that different properties have experienced different exposure levels is an issue that, according to Plaintiffs, pertains to damages, and does not therefore prevent this Court from determining they have met their burden of establishing commonality.

Typicality:

Plaintiffs aver that this element is easily satisfied, as their claims are derived from the exact same practice or course of conduct that gave rise to the claims of the other class members and is based on the same theories of private nuisance and negligence.

Adequacy of Representation:

Counsel for Plaintiffs indicate in their moving papers that the Plaintiffs have been extremely proactive in terms of advancing the litigation, and that they (the attorneys) have successfully litigated similar class actions involving air pollution. Accordingly, they contend there is no reason that the Plaintiffs will not adequately and fairly represent all class members.

Superiority:

To avoid a litany of lawsuits involving same/similar or duplicative claims, and to prevent the chance of inconsistent rulings, Plaintiffs assert that a class action is the most appropriate and efficient way to adjudicate the instant controversy. Class treatment, according to counsel for Plaintiffs, will allow each of the class members to "pursue merits discovery, litigate any further dispositive motions, and adjudicate their claims in a single, efficient proceeding, instead of many hundreds of separate actions." NYSCEF #152, p. 12.

In addition to analyzing the foregoing prerequisites, in deciding a motion to certify a class, the Court must also undertake an analysis of the following feasibility considerations:

> 1. the interest of members of the class in individually controlling the prosecution or defense of separate actions;
> 2. the impracticability or inefficiency of prosecuting or defending separate actions;
> 3. the extent and nature of any litigation concerning the controversy already commenced by or against member of the class;
> 4. the desirability or undesirability of concentrating the litigation of the claim in the particular forum;
> 5. the difficulties likely to be encountered in the management of a class action.

CPLR § 902(1)-(5).

Plaintiffs, in their motion requesting class certification, indicate that class members' interests would not be advanced or furthered by requiring separate actions to proceed, and that to the contrary, their interests will be maximized through class adjudication. Further, Plaintiffs contend it would be largely impracticable for the Court to manage separate actions and therefore to utilize resources to address the repetitive discovery, motion practice and trials that would result from numerous separate actions. Since no other parties have yet commenced litigation for these reasons against the Defendant, according to Plaintiffs, this factor is inapplicable. This would be the appropriate forum, since the Defendant's facility is located in this County, and the

Plaintiffs are all residents, therefore there is no other appropriate forum. Further, Plaintiffs point out that there are no anticipated difficulties that would be associated with managing the class, and that should this change, the Court has procedural safeguards via CPLR §906 and 902 to sever issues, to create subclasses where appropriate, and to "make, alter, or amend any order dealing with procedural matters." NYSCEF #152, p. 15 (internal citation omitted).

In support of their motion, Plaintiffs submit the following exhibits for the Court's consideration[5]:

1: A Decision, Order and Verdict form from the Orangetown Justice Court dated October 31, 2019, determining Defendant was guilty of five counts of violating the Town Zoning Code's objectionable odor ordinance.

2: Affidavit of Plaintiff Allyson Sullivan, sworn to on May 1, 2020. Ms. Sullivan owns a house about 0.5 miles north of the facility. In her affidavit, she describes the nauseating melting plastic odor she frequently smells, which forces her to keep her windows closed and impacts the enjoyment of her property.

3: An Information (i.e. Complaint) filed on behalf of the Town of Orangetown from December of 2016 alleging that Defendant's facility had been "[e]mitting, discharging and/or releasing, into the outside air, a burning plastic odor that was noxious, objectionable, an air pollutant, and/or an emission of offensive or odorous gas or other odorous matter…".

4: The Supporting Deposition of neighboring resident Michael Nordstrom, sworn to on December 6, 2016, wherein he states he smelled a "strong burning plastic odor" on three separate dates in November of 2016.

5: Consent Order between New York State Department of Environmental Conservation ("NYSDEC") and the Defendant dated December 12, 2016 by which Defendant agreed to pay a civil penalty of $50,000 and to take a specified set of remedial actions in order to prevent future violations of the New York State Environmental Conservation Laws and Regulations. This Consent Order was negotiated as a

[5] Defendant has motions pending to exclude from the Court's consideration some of these exhibits. The Court will address these requests in a different section of this Decision. At this point, the Court is simply listing and summarizing the Plaintiffs' supporting exhibits.

compromise following the State's issuance of citations on the Defendant for violations of emission control device standards, ineffective duct work resulting in untreated air entering the atmosphere. It is noted in the Consent Order that the Department [of Environmental Conservation] documented "heated plastic odors" at the location of the facility and "beyond to neighboring streets."

6: Memorandum of the Orangetown Office of Building, Zoning, and Planning Administration and Enforcement ("OBZPAE") to the Orangetown Zoning Board of Appeals ("ZBA") dated March 27, 2018 documenting personal observations of the odors from Town and NYSDEC staff members. These observations are from the time period of November 7, 2017 through March 1, 2018.

7: The Supporting Deposition of an engineer for the Town of Orangetown, Dylan Hofsiss, sworn to on December 20, 2018, wherein he states that on November 20, 2018, while in the vicinity of the facility, he smelled a "strong, objectionable chemical plastic odor emanating" from the facility, consistent with odors he has previously smelled at the facility.

8: Affidavit of Matthew Roman, a paralegal employed by Liddle & Dubin, P.C., sworn to on May 4, 2020. Mr. Roman's responsibilities include the oversight of all public information requests for documents pursuant to the Freedom of Information Law ("FOIL"). Mr. Roman made numerous FOIL requests to the Town of Orangetown and the NYSDEC, which he details in his affidavit, requesting any and all complaints, notices of violation, or violation letters regarding the Defendant facility from June 1, 2015 through November 26, 2019. Mr. Roman also collected 267 data sheets from residents in the vicinity of the facility, said data sheets having been collected by the Plaintiffs' firm during their pre-litigation investigation. After collecting the data, Mr. Roman used Google Earth to map out the locations of the complaints from the data sheets and the documents received in response to the FOIL requests pertinent to the Defendant facility. Based on this data, and information received from InfoUSA, Mr. Roman was able to determine that there are 3,118 households within the 1.5-mile radius Plaintiffs seek to use in their class description, detailed *supra*. Of note, Mr. Roman sets forth that numerous FOIL request were also made seeking odor-related complaints from other potential

sources- and the results of these FOIL requests forms the basis for Plaintiffs' allegation that Defendant's facility is the source of the odor.

9-13: Notices of Violations by the NYSDEC against Defendant citing, among other things, odors of melted and/or burnt plastic. The Notices cite violations on May 9, 2016, May 12, 2016, May 25, 2016, June 7, 2016, August 26, 2016, and September 20, 2019.

14: Letter from the Commissioner of the NYSDEC to Defendant dated January 24, 2018, requesting Defendant provide them with a detailed list of steps taken towards the goal of "eliminating odors" at the facility. The letter indicates that notwithstanding the existence of the 2016 Consent Order (Ex. 5, *supra*) the Commissioner is still receiving written complaints regarding a "recent trend of odors emanating" from the facility.

15: A letter from counsel for the NYSDEC to what appears to be counsel for Defendant (which appears to be undated) indicating that the NYSDEC has been present in the vicinity of the facility since October of 2019 and have monitored the area on a "daily basis" in order to verify continuing complaints regarding odor emissions. As per the letter, the NYSDEC observed "both light and strong odors with variations of duration on numerous days." On days specifically noted in the letter, the NYSDEC observed strong odors continuous throughout the day and noted that that such "continuous emission odors constitute "interference with comfortable enjoyment of life and property." In the letter, NYSDEC requests that the Defendant submit an analysis of additional measures that can be taken to control emissions on or before December 6, 2019.

16: Class Boundary Map depicting the area around the facility and delineating the area that would comprise the proposed class.

17: Seventeen (17) of the data sheets received by Greenspan and Greenspan from residents in households located within the proposed class area detailing how the odors impact their use and enjoyment of their property.

18: A Civil Compromise Agreement (i.e. settlement) between the Town of Orangetown and Defendant dated June 6, 2017 wherein Defendant agreed to pay the Town $12,500 in civil penalties for thirteen (13) Town Zoning Code violations alleged to have taken place between November 17, 2016 and December 12, 2016.

19-23: Affidavits of the remaining named Plaintiffs.

24-27: Excerpts from the deposition of Plaintiffs.

28: Affidavit of Dawn Aponte, sworn to on April 27, 2020, who resides approximately one mile from the facility. The affiant indicated that she smells the burning plastic odor and has had to make multiple complaints to the Town and NYSDEC because the odors interfere with her ability to use and enjoy her property.

29: Affidavit of Sal Valenza, sworn to on April 8, 2020, who resides approximately one mile from the facility. The affiant, like many of the others, indicated that he smells the burning plastic odor at his residence and at other locations in the community. He stated that he has made complaints to the Town and NYSDEC and has detailed how the odors interfere with his ability to use and enjoy his property.

30: Affidavits of Dawn and Patrick Haughey, sworn to on April 20, 2020, who both reside approximately one mile from the facility. The affidavits are similar in terms of substance to those electronically filed as Plaintiffs' Exhibits 28 and 29, *supra*.

31: Affidavit of John Koch, sworn to on April 30, 2020, who resides approximately 1.5 miles from the facility, containing similar statements to the other affidavits.

32: Affidavit of Michael Smith, sworn to on April 27, 2020, who resides 0.3 miles from the facility. Based on the noxious odors he smells on his property, which he attributes to the facility, Mr. Smith stated that he has made 71 complaints to the Town and 61 complaints with the NYSDEC.

33: Affidavit of Bernadette Dell'Accio, sworn to on May 3, 2020, who resides approximately 0.5 miles away from the facility, containing similar statements to the other affidavits.

34: Verified Odor Map- a map designating the locations where either the Town or NYSDEC officials have verified the presence of a burning plastic odor.

35: Plaintiffs' Notice of Exchange of Expert Report of Dr. Mark Cal ("Dr. Cal"). Plaintiffs intend to offer Dr. Cal as an expert in air dispersion modeling. Dr. Cal's Report dated January 9, 2020, and his *Curriculum Vitae* ("CV"), are attached. Dr. Cal uses the

atmospheric dispersion model (AERMOD)[6] to investigate, and ultimately identify, the source of odor complaints. Specifically, Dr. Cal states that the AERMOD model can be used to determine the impact of Defendant's emissions on the putative class if he is retained to apply the model.

36: Plaintiffs' Notice of Exchange of Expert Report of Louis Fow. Plaintiffs intend to offer Mr. Fow as an expert in the plastics industry to establish what (if any) industry standards Defendant violated that result in the emission of the noxious odors that are the subject of this Complaint. Attached to the expert disclosure is Mr. Fow's preliminary report from January 10, 2019, as well as his CV.

37: LD Contact Map demonstrating alleged impacts of the emissions on denoted locations within the prospective class boundaries.

38: Map of the locations of complaints made to the Town of Orangetown.

39-42[7]: Four (4) of the data sheets received by Greenspan and Greenspan from residents in households located within the proposed class area describing the "burning plastic" smell.

44: Another Information filed on behalf of the Town of Orangetown alleging that on December 12, 2018 at approximately 9:10 p.m., the town's Code Enforcement Officer, Jane Slavin, observed an "unpleasant floral and plastic chemical smell" emanating from Defendant's facility which was consistent with that observed from previous inspections. Ms. Slavin noted that she drove to a location about 550 feet southwest of the facility, and that she could still smell the odors.

45: "Affidavit Map" which compiled the geographic data contained in the supporting affidavits reflecting the proximity of the odor complaint locations in reference to the location of the facility.

46: Affidavit of Katie Ouellette, sworn to on May 3, 2020, Ms. Ouellette served as the notary for all of the individuals who supplied supporting affidavits. Ms. Ouellette has submitted this affidavit in her capacity as a notary public to establish that she

[6] Dr. Cal references the fact that the AERMOD model is the required atmospheric dispersion model for local and state environmental departments across the United States. 40 C.F.R. Part 51, Appendix W.
[7] Plaintiffs' Exhibit #43 was blank.

complied with applicable laws, rules and orders in place at the time as a result of the COVID-19 pandemic that impacted taking statements under oath.

47: Summons and Complaint

48: Answer

49: Re-executed versions of the Plaintiffs' affidavits following the end of the lockdown caused by the COVID-19 pandemic.

In order to supplement their application, as required by the Court in the Interlocutory Order, the Plaintiffs submitted additional evidence which they purport establishes the need for class certification as requested in their original motion. Specifically, Plaintiffs offered the following documents.

A: Supplemental Report of Dr. Cal dated February 18, 2021. Dr. Cal's AERMOD data and analysis reflected that the ground level odor intensity for the individuals who Plaintiffs define as "neighbor contacts" was in the 10-60 percentile range, which is above the standard odor nuisance level of 7% odor dilution to threshold ("D/T"). All of the neighbor contacts are within the Plaintiffs' proposed 1.5-mile class area. From this, Plaintiffs contend that they have an objective, measurable basis from which to support causation.

B:267 Data Sheets from the neighbor contacts indicating the existence of noxious odors.

C: Complaints to the Town of Orangetown reporting the odors. The complaints were received by Plaintiffs' counsel through FOIL requests and represent all of the responses received, as per the Supplemental Affidavit of Matthew Roman.

D: Supplemental Affidavit of Matthew Roman, sworn to on June 4, 2021. Mr. Roman used data from Plaintiffs' attorney to create six maps. Map 1 (the "Orangetown Complaint Map") represents the location of all odor complaints (specifically labelled by the complainant as "burnt smell" or "chemical smell") received by the town of Orangetown based on the data attached as Exhibit C, *supra*. Map 2 (the "LD Contact map") represents the location of the odor complaints noted by those who submitted the data sheets which are attached as Exhibit B, *supra*. Map 3 (the "Verified Nuisance Odor Map") maps out the locations f the confirmed off-site odors that were verified by town of Orangetown staff and NYSDEC inspectors. Map 4 (the "Affidavit Map") represents the

location of all the addresses of the residents who claimed to have experienced smelling noxious odors who submitted affidavits in support of this application. Map 5 (the "Master Odor Map") is a compilation of the data contained in Maps 1 through 4, with the results of each being differentiated in a different color. Finally, Map 6 (the "Proposed Subclass Map") proposes possible alternative geographic zones, should the Court elect to utilize subclasses.

E: Supplemental Affidavit of Allyson Sullivan, sworn to on June 2, 2021, providing a list of approximately twenty (20) locations near the facility where she has personally experienced the noxious odors, other than at her residence. She additionally lists six (6) streets in her community where she has experienced the odors, as well. Some of the locations where she has experienced the odors are located more than 1 mile from the facility.

F: Supplemental Affidavit of Elizabeth Dudley, sworn to on June 2, 2021, providing a list of approximately twelve (12) locations near the facility where she has personally experienced the noxious odors other than at her residence.

G-K: Five (5) additional affidavits from putative class members who reside between 1.0 and 1.5 miles from the facility. The affiants all indicate that they smell the burning plastic odor on their property.

L: Affidavit of John Dalkowski, a licensed New York State real estate appraiser, sworn to on February 19, 2021. Plaintiffs seek to offer Mr. Dalkowski as an expert in conducting complex, large scale appraisals. Mr. Dalkowski's Mass Appraisal methodology can, within a reasonable degree of certainty, assess the financial impacts of the impacts the odors have had on the value of residential properties within the proposed class area. Plaintiffs aver that Mass Appraisal is a widely accepted valuation methodology in New York in order to estimate the value of a universe of properties as of a specific date. The methodology purportedly takes into account the individual characteristics of the different properties that are the subject of the appraisal.

This motion is fervently opposed by Defendant. First, Defendant states that Plaintiffs' proposed class definition is fatally overbroad and therefore, Plaintiffs cannot establish the requisite element of numerosity pursuant to CPLR 901. Additionally, the Defendant asserts that issues of causation, injury and damages predominate over common

questions of law or fact. Defendant contends that pursuing this matter as a class action is not the superior method for adjudicating the claims. Defendant also points this Court to Second Department case law that counsel interprets as rejecting altogether environmental tort class actions that allege property damage, such as that which is contemplated by the instant motion.

Before analyzing the substance of Defendant's opposition, the Court must address its pending discovery cross-motions, requesting specifically that the Court not consider a significant number of the aforementioned exhibits in making a determination on the motion for class certification.

DEFENDANT'S DISCOVERY MOTIONS

(Motion Sequences No. 6 and 9)

Before the Court is Defendant's Notice of Cross Motion filed June 11, 2020, for an Order excluding from evidence and this Court's consideration Plaintiffs' exhibits #2, 17, 18, 34, 37-42, Exhibits 1 -4 of the Affidavit of Matthew Roman, and the expert reports of Mark Cal and Louis Fow pursuant to CPLR 3124. Also before the Court is Defendant's Notice of Motion filed June 25, 2021 for an Order excluding from evidence Plaintiffs' exhibits A, B1 and B2, C, D1-D5, and L pursuant to CPLR 3124. The Court hereby decides these motions as follows:

Defendant points out that a motion for class certification must be supported by "competent evidence in admissible form." *Feder v. Staten Island Hospital*, 304 A.D.2d 470, 471, 758 N.Y.S.2d 314 (1st Dept. 2003). Defendant's position is that the complained of exhibits in Plaintiff's initial motion for class certification as well as their supplemental briefings submitted to the Court do not constitute competent, admissible evidence, and therefore the Court should exercise its discretion and not consider same.

Plaintiffs oppose these motions in their entirety. In general, Plaintiffs point to a line of case law that indicates that, although a motion for class certification must be accompanied by admissible evidence, the Court's consideration in granting a motion to certify a class is whether "the claims have merit" *Pludeman v. Northern Leasing Systems, Inc.*, 74 A.D.3d 420, 422, 904 N.Y.S.2d 372 (1st Dept. 2010). The Court's inquiry in this regard is "limited" and "such threshold determination is not intended to be a substitute for

summary judgment or trial" *Id*. "Class action certification is thus appropriate if *on the surface there appears to be a cause of action which is not a sham*." *Id. (emphasis supplied).*

Defendant attaches appendices to motion sequence numbers 6 and 9 which list each specific exhibit they contend is inadmissible, as well as the reason. The Court will summarize same, *infra*, along with the Plaintiffs' points in opposition.

Data Sheets

Defendant contends that the unsworn data sheets constitute unreliable hearsay and cannot be considered by the Court in determining the instant motion for class certification. Defendant distinguishes the data sheets from the sworn affidavits, which are not the subject of the instant motion to exclude.

In their opposition, Plaintiffs contend that the data sheets, though not sworn, are not the only documents submitted in support of their claim, as indeed they also submitted affidavits, as well. Additionally, Plaintiffs point out that the data sheets are not being offered to the Court for truth of their contents, but rather to support their contention that numerosity, commonality, and typicality have been established in their request the court grant a class certification. In other words, Plaintiffs argue that the data sheets reflect that the number of putative class members is sufficient to justify class litigation and that the claims of the putative class members are common/typical to each other, regardless of whether said claims will ultimately be proven at a trial. Finally, counsel for Plaintiffs note that Defendant has not cited one *New York* case that indicates documents that might contain hearsay cannot be considered by the Court in determining whether a plaintiff has satisfied his or her burden on a motion to certify a class.[8]

In reply, Defendant makes the argument that the only way the data sheets could establish the class certification prerequisites is if they are considered based on the truth of the statements asserted therein, namely, to prove that the burning plastic odors were commonly experienced and to demonstrate the proposed class area accurately reflects the areas that were alleged to be affected by the odors from the facility.

[8] Each party refers the Court to cases from other jurisdictions that they contend support their respective positions on this issue.

The Court notes that Defendant is correct- motions for class certification must be supported by admissible evidence. *Feder v. Staten Island Hospital*, *supra,* at 471. The unsworn data sheets are unsworn, out of court statements that the Court cannot consider for the truth of their contents. The Court, therefore, declines to consider Plaintiffs' data sheets as "evidence" of the specific statements made therein.

The Court, can, however, consider the fact that the data sheets exist and that they allege similar common experiences. Plaintiffs' counsel's Affirmation describes with adequate specificity the alleged facts which indicate that the number of putative class members is adequate to support class claims. *See*, NYSCEF Doc. # 103. Specifically, Ms. Sheets affirms that she received 267 data sheets from Defendant's neighboring residential households that indicate the alleged impact of Defendant's odor emissions. The data sheets referenced in her Affirmation reflect that said impact extends up to 0.5 miles to the east, and up to 1.5 miles to the north, northeast, northwest, west, southwest, south and southeast of the facility. The Court need not determine the truth of the contents of the data sheets in order to make a determination as to the appropriateness of class certification. To determine otherwise would be contrary to the well settled case law indicating that "such [a] threshold determination is not intended to be a substitute for summary judgment or trial" *Pludeman*, *supra,* at 422.

Odor Complaints Referenced in the Affidavit of Plaintiff Allyson Sullivan

Plaintiff Allyson Sullivan indicates in her Affidavit (NYSCEF Doc. #s 149-151) that, both as a homeowner living near the facility and as a member of the organization she helped to form called "Clean Air for Orangetown" (hereinafter "CA40" or "Orangetown for Clean Air"), she has worked repeatedly with NYSDEC on the issue of odors in the community, and she has made many appearances in front of the Town and the Zoning Board of Appeals, for that specific purpose. In her Affidavit, she details steps she has taken to work with the Town and CA40, to "advocate for the Town and hold Aluf accountable for the odors and to promote the town to work with the company to implement improvement measures…" and she attaches to her Affidavit many of the documents she received in this regard.

Defendant requests that this Court not consider pages 33-44 of the Sullivan Affidavit. The Affidavit contains, as per Defendant, a "nearly illegible table of odor complaints lacking any indicia of admissibility or reliability." Defendant's Memorandum in Support, NYSCEF Doc. #236, p. 10. These pages specifically pointed out by Defendant's counsel consist of a table of odor complaints which is attached as an Appendix to the January 23, 2019 Town of Orangetown Zoning Board of Appeals Report entitled "Aluf Plastics Odor Review". Appendix "A" of the report is described therein as follows:

> The Town of Orangetown records Odor complaints. A copy of these complaints is included in Appendix A. A substantial number of complaints on the list are being attributed to Aluf.

Affidavit of Allyson Sullivan, Part 2, NYSCEF Doc. #150, p. 11. In opposition, counsel for Plaintiffs argues once again that the complaints are not being offered as proof of their specific contents, but rather to support their contention that numerosity, commonality, and typicality have been established in their request the court grant a class certification.

While it is true that the complaints that appear on the table are hearsay, the Court considers them *to the limited extent* that they establish that the Town has received numerous complaints all reporting similar/common experiences – and that a "substantial number" of said complaints are being attributed to the Defendant's facility. The Court need not determine the truth of the specific contents of each of the complaints that appear on the aforementioned appendix in making a determination as to the appropriateness of class certification.[9]

Moreover, the appendix is part and parcel of an official Town ZBA Report which was prepared by engineers they retained in order to "provide a comprehensive analysis and systematic recommendation to the ZBA in order for the ZBA to make an informed decision and provide, where applicable, direction to ALUF to assist ALUF in the

[9] The Court is aware that Defendant disputes that the odors that are the subject of many of the complaints are actually from the facility. In its opposition, Defendant attaches numerous exhibits devoted to pointing out alternate odor sources in the area, as well as emails between NYSDEC and residents where NYSCEF rules out the facility as the source of some of the odor complaints. However, there is just as much evidence from Plaintiffs that indicates the facility is the odor source. This issue will have to be determined after the conclusion of merits discovery and/or at trial.

requirement to comply with their town ordinances." Affidavit of Allyson Sullivan, Part 2, NYSCEF Doc. #150, p. 10. The report noted based on the table of complaints logged in the Appendix that the Town receives numerous complaints regarding odors. The factual findings regarding the existence of odor complaints logged by the Town and tabled as part of the ZBA report fall under the common law public document exception to the hearsay requirement. *See, Bogden v. Peekskill Community Hosp*., 168 Misc.2d 856, 857, 642 N.Y.S.2d 478 (Sup. Ct., West. Cty., 1996) (unlike conclusions of law, factual findings and inferences that reasonably flow therefrom are admissible under this exception).

Maps and the Table of Town and NYSDEC Complaints

There are a number of maps that Defendant places at issue in the instant motion to exclude. The Court will assess each.

Defendant contends that the maps attached as Exhibits 1, 3, and 4 to the Affidavit of Matthew Roman (Plaintiff's Ex. 8), constitute unreliable hearsay inasmuch as the data upon which the map is based is also unreliable hearsay. For purposes of clarity, it appears that these exhibits to the Roman Affidavit are also separately electronically filed as Plaintiffs' Exhs. 37, 34, and 38, respectively. Additionally, Defendant states that it violates the best evidence rule to consider these maps because they were created by counsel, and the maps interpret and summarize information from unidentified documents.

Attached as Exhibit 2 to the Roman Affidavit is Excel spreadsheet that contains all of the observations of odors verified by the town of Orangetown and NYSDEC officials. For the same reasoning that applies to the map of these observations, Defendant contends the table put together by Plaintiffs' counsel's office is inadmissible and should not be reviewed by the Court in connection with the instant motion.

The map that appears as Exhibit 1 to the Roman Affidavit identifies on a map taken from Google Earth the addresses of the 267 data sheet respondents relative to the location of the facility. This map is referred to as the LD Contact Map. Exhibit 3 to the Roman Affidavit identifies on a map taken from Google Earth the location of the odor complaints that were logged by the town of Orangetown staff and the NYSDEC inspectors relative to the location of the facility. This map is referred to as the Verified

Odor Locations Map. Exhibit 4 to the Roman Affidavit identifies on a map taken from Google Earth the locations of the odor complaints received by the town of Orangetown in response to a FOIL request that was detailed in the affidavit, relative to the facility. This map is referred to as the Odor Complaints Logged by the Orangetown map.

With respect to the maps, the Affidavit of Matthew Roman (Plaintiffs' Exh. 8) details how he created the disputed maps with the data from the data sheets, odor complaints, and other data retried in response to FOIL requests. Plaintiffs contend that these maps are demonstrative in nature, and are only being offered to "visually depict geographic locations across the proposed class area where odor complaints have been made." *See*, Memorandum of Law in Opp., NYSCEF Doc. 270, p. 12. The maps, Plaintiffs contend, are being used as visual aids to justify the class action prerequisites of numerosity, commonality and typicality. Further, Plaintiffs contend that the maps that appear as Plaintiffs' Exhs. 34 and 37 are specially based on data contained in sworn affidavits of officials and thus, should be admitted by the Court for purpose of deciding the class certification motion.

With respect to the maps and the table, the Court determines as follows: the maps depicted as Exhs. 1, 3 and 4 to the Affidavit of Matthew Roman will be considered by the Court. The maps are demonstrative of location of odor complaints from the data sheets, which this Court already determined were admissible, and from the town as a result of official documents received in response to FOIL requests. Additionally, they appear to demonstrate or depict the number and location of odor complaints made that the Court has already ruled it will consider, *supra*. The Court is therefore only considering the maps as a visual aid in determining the location of the complaints made in reference to the location of the facility.

The Court will not consider as part of its analysis the table depicted as Exh. 2 to the Affidavit of Matthew Roman. The best evidence of the Town of Orangetown and NYSDEC officials' observations come from the affidavits themselves. There is no need for counsel to table or summarize them for the Court. Unlike the maps, they do not demonstrate to the Court a visual scope of the area from where complaints have been made such that would be a relevant inquiry in determining the scope of the class.

Maps from the Supplemental Briefing

Attached to the Supplemental Affidavit of Matthew Roman are additional maps that Defendant seeks to exclude on the basis of their purported inadmissibility. Mr. Roman affirms that he created these maps to produce a visual overlay of the proposed class area as defined in the Complaint and Dr. Cal's isopleths indicating a D/T value of 10 or higher. The first four maps the Court will reference are not new- they are nearly duplicative of those submitted in connection with the original motion for class certification, with the exception of the newly added overlay of the isopleths. Specifically, the map now designated as D-1 plots the addresses from the responses received from the Town of Orangetown (referred to as "Orangetown Complaint Map"). The map designated as D-2 plots the addresses from the 267 Data Sheets (referred to as "LD Contact Map"). The map designated as D-3 plots the addresses from the odors that were verified by the Town of Orangetown and NYSDEC staff (referred to as "Verified Nuisance Odor Map"). The map designated as D-4 plots the addresses from the individuals who submitted affidavits in support of the motion for class certification (referred to as the "Affidavit Map"). Finally, the map designated as D-5 is a compilation of all the data from maps D-1 through D-4. Each data set has been assigned its own color. Map D-5 is referred to as the "Master Odor Map".

For the same reasons set forth *supra*, Defendant requests that the Court exclude these maps from its consideration on the motion for class certification. Defendant contends that the underlying data Mr. Roman relied upon in making the maps is either unreliable hearsay, or violates the best evidence rule. With respect to the newly added overlay of isopleths, Defendant contends that Plaintiffs have misconstrued Dr. Cal's findings, and contends that this renders the newly doctored maps misleading and prejudicial.

The Court agrees with counsel for Defendant. The Court denied Defendant's motion to exclude the initial versions of these maps submitted in connection with Plaintiffs' initial motion for class certification. The Court's rationale was expressed earlier in this Decision. Plaintiffs have taken these maps, and extrapolated thereon what they contend represent Dr. Cal's findings. The modified versions of these maps could in fact be very misleading, and the Court is not in a position at this early stage in the

litigation to determine if they accurately reflect Dr. Cal's preliminary findings. Therefore, the Court grants this portion of Defendant's motion, and excludes the maps designated as Exhibits D-1 through D-5 from its consideration in connection with the motion for class certification.

Civil Compromise Order

Defendant contends that Plaintiffs' exhibit 18, the June 6, 2017 Civil Compromise Agreement between the Town of Orangetown and Defendant, should be excluded because it reflects a settlement made in response to a disputed claim and cannot be offered to establish liability. Additionally, Defendant argues it is highly prejudicial. In the settlement agreement, the Defendant agreed to pay the Town $12,500 in civil penalties for thirteen (13) Town Zoning Code violations alleged to have taken place between November 17, 2016 and December 12, 2016, however the Defendant made no admission of liability.

In opposition, Plaintiffs contend that the Court can take judicial notice of the Civil Compromise Agreement, as same is publicly filed. Additionally, Plaintiffs contend that, in accord with CPLR 4547, they are not relying on the document to establish Defendant's liability, but rather to "demonstrate that Plaintiffs' nuisance claims can be proven based on common issues of fact and that the class mechanism provides appropriate means for trying those issues." Plaintiffs' Memorandum of Law in Opposition, NYSCEF Doc. #270, p. 15.

As part of this Court's Interlocutory Order, counsel were asked to brief whether the Court can take judicial notice of decisions, orders and records pending in this Court, to the extent same are relevant. Plaintiffs contends that this Court may consider court documents in other court actions where the cases are closely connected, so long as the cases have at least one party in common. Defendant contends that the document contains controverted facts for which judicial notice cannot be taken. Further, Defendant argues that the record at issue cannot be used for the purpose Plaintiffs seek- specifically, to demonstrate the requirement of commonality, for the only thing arguably demonstrated by the document is that "ALUF emitted odors on five days in non-residential areas." Defendant's Supplemental Memorandum of Law, NYSCEF Doc. 343, p. 19.

In New York, courts have the authority to "'take judicial notice of a record in the same court of either the pending matter or of some other action[.]'" *Allen v Strough*, 301 A.D.2d 11, 18, 752 N.Y.S.2d 339 (2d Dep't 2002) (internal citation omitted). The Court acknowledges that just because it can take judicial notice of court records does not mean that it should, especially since it is fairly common knowledge that Court files and records commonly contain documents with controverted facts and opinions. Courts may therefore only properly "'apply judicial notice to matters of common and general knowledge, well established and authoritatively settled, not doubtful or uncertain. The test is whether sufficient notoriety attaches to the fact to make it proper to assume its existence without proof[.]'" *Walker ex. rel. Velilla v. City of New York*, 46 A.D.3d 278, 282, 847 N.Y.S.2d 173 (1st Dept. 2007) (internal citation omitted).

The document at issue is an official court record labelled as "Court Agreement-Civil Compromise" and is signed by the Town of Orangetown Town Attorney, the Defendant, and counsel for Defendant. The Agreement is 'So Ordered' by the Town Justice who presided over the matter. It includes a statement by the Defendant indicating it pled no contest to any of the alleged violations set forth therein. Indeed, the document itself lists the violations as only having "alleged" to have occurred. There are no controverted facts contained therein. The Orangetown Justice Court matter, in this Court's opinion, is related to the instant matter and the Civil Compromise absolutely appears to be a public document. The Court can take judicial notice of same and denies the request to exclude it from consideration on this motion for class certification.

Expert Submissions (Cal, Fow and Dalkowski Reports)

1. Dr. Cal

Defendant argues that Dr. Cal's submission constitutes inadmissible hearsay because it is based only on speculation. In other words, Dr. Cal had not yet, as of the date of the submission, conducted any modeling using the AERMOD method described briefly above to support the proposed class definition. Instead, his report is phrased in such a way as to indicate how he intended *to perform* the AERMOD and what data he *may receive* in response. Therefore, Defendant contends Dr. Cal improperly assumes that Aluf is the odor source. Defendant also indicates that AERMOD is not generally

accepted by the relevant scientific community as an appropriate means of determining impacts of odors on properties within a proposed class area and is a poor predictor of emission concentrations under certain specific conditions with a potential for erroneous results. The Defendant's position is that the AERMOD method is inadmissible under the *Frye* standard.

In opposition, Plaintiffs provide case law from other jurisdictions where the AERMOD air dispersion model has been approved to produce expert evidence and aid expert testimony. As set forth, *supra*, AERMOD has been adopted by the EPA as their "preferred near-field dispersion modeling system." 40 CFR Part 51, Appendix W, pg. 5182. Further, Plaintiffs indicated that the Cal report was only meant to be a preliminary report and that pursuant to the scheduling order, the parties *agreed* that discovery would be bifurcated—thus, initially, discovery was only intended to take place on the issue of class certification and not on the merits of the entire action. Therefore, Dr. Cal's preliminary report was only intended to be just that—a synopsis prepared in anticipation of full-scale merits discovery.

In reply, Defendant states that the EPA's use of AERMOD has no bearing on whether or not the model is generally accepted as reliable in determining individual odor impacts in an action such as the case presently before the Court.

As part of Plaintiffs' supplemental briefing, they provided a supplemental report from Dr. Cal. *See*, NYSEF Doc. 309. Dr. Cal's supplemental report is also the subject of one of Defendant's motion to exclude, and therefore shall be addressed in this section of the Court's Decision.

In his supplemental report, Dr. Cal indicates that he conducted AERMOD data collection, mapping, and analysis to measure Defendant's emissions from their facility's five vertical stacks. The odors from each stack were assigned an odor dilution to threshold value which were then scaled to normalize output concentrations to a maximum value of 100. As per Dr. Cal, this calling allows the determination of an affected area with ground level intensities ranging from 0-100 D/T. Dr. Cal concluded based on his data collection as described more fully in his report that the residents who reported noxious odors (referred to previously as the "LD contacts") are in the path of "odor transport" from the Defendant's facility. Dr. Cal stated in this supplemental report that

he could, *if the case continues to discovery on the merits*, extend his analysis of odor exposure levels of nearby residents against a standard odor nuisance level of 7 D/T or greater, which is a typical community odor standard.

As part of Defendant's supplemental briefing, they include a supplemental report from their expert, Dr. Mark Yocke. *See*, NYSCEF Doc. 343. Dr. Yocke asserts that AERMOD is not an accepted means of evaluating causation across a proposed class, as it is used by the EPA when evaluating regulatory applications in order to determine whether emissions exceed air quality criteria based on the highest potential offsite impact of a potential source. To support this contention, Defendant points out that there is caselaw out of the Superior Court of California (Santa Clara County) that denied a motion to certify a class based, in part, on AERMOD's apparent inability to factor in variables such as proximity, location, terrain and other environmental or topological factors in order to provide results for different homes or areas. *Ng, et al. v. Republic Services Inc*., Case No.: 1-12-CV-228591 (Sup. Ct. Santa Clara Cnty. 2015). The Court specifically noted that this deficiency in AERMOD impacts more than just the measure of damages since the trier of fact would ultimately need to rely on the results in deciding "a cut-off point at which an odor impact threshold can no longer objectively be said to cause annoyance [or] discomfort." *Id.*[10]

Further, Defendant points out numerous alleged deficiencies in Dr. Cal's report, specifically his "scaling" of the odor measurements from the stacks, and his failure to distinguish between all of the compounds and their varying emission rates. Essentially, Defendant is using their expert to poke holes in the methodology employed by Plaintiffs' expert.

The Court determines it will consider Dr. Cal's submissions in deciding the instant motion for class certification. The Court does not agree with Defendant's contention that the report does not meet the *Frye* standard of admissibility. The Frye test determines whether an expert's "'accepted techniques, when properly performed,

[10] The Court recognizes that there exist similarities between this case and the present case, but notes that this does not constitute binding precedent here in New York. Further, Plaintiff also cites cases in their opposition to the motion from other jurisdictions where AERMOD has been recognized as a reliable air dispersion model. *See*, NYSCEF Doc. 355, p. 5.

generate results accepted as reliable within the scientific community generally'" *Parker v. Mobil Oil Co*., 7 N.Y.3d 434, 446, 824 N.Y.S.2d 584, 589 (2006) (internal citation omitted). This is a completely separate and distinct inquiry from whether there exists a proper foundation to determine whether the method used was appropriately employed in a given case. "'The focus moves from the general reliability concerns of *Frye* to the specific reliability of the procedures followed to generate evidence proffered and whether they establish a foundation for the reception of the evidence at trial[.]'" *Id*. at 447 (internal citation omitted).

AERMOD in and of itself is not novel scientific evidence. The EPA's use of this methodology as an air dispersion model is compelling in this regard. To the extent the use of this methodology for *this* specific purpose is novel, the same can be addressed at a *Frye* hearing before trial. The real question for the Court at this stage, therefore, is whether the methodology was appropriately employed and can provide a reliable causation opinion- in other words, is there an appropriate foundation laid by Plaintiffs to consider the report for purposes of a class action certification motion? This Court determines that there has been.

Dr. Cal has, for purposes of a class certification application, demonstrated that residents in the proposed class area of 1.5 miles from the facility are in the path of odor transport from the facility. The Court will therefore consider the Cal reports as part of the evidence proffered by Plaintiffs to demonstrate commonality and typicality. The Court does not discount some of the points raised by Defendant in its motion to preclude. Defendants will have every ability to refute this opinion by way of their expert at a later stage in the litigation.

2. <u>The Fow Report</u>

As indicated, *supra*, Plaintiffs intend to offer Mr. Fow as an expert in the plastics industry to establish what (if any) industry standards Defendant violated that result in the emission of the noxious odors that are the subject of this Complaint.

Defendant requests that this Court not consider the Fow Report based on its contention it will not aid the Court in its decision on class certification. Further, as with the initial Cal submission, Defendant contends that the submission is merely speculative in nature- it addresses what standard of care analysis Fow could perform during the

merits phase of the litigation. Plaintiffs, in response, essentially concede that the substance of the report is really only intended to supplement the rest of the evidence presently before the Court. Nonetheless, Plaintiffs indicate that it goes towards Defendant's breach of the duty of care on the underlying action and further demonstrates the existence of common issues of fact and law that predominate over any potential individual issues that may exist.

The Court tends to agree with Defendant. There is no need to consider the Fow report at this stage in the litigation. This, of course, does not bear on the admissibility of any supplemental report Fow may issue if and when he is retained to do so.

3. The Dalkowski Report

Plaintiffs seek to offer Mr. Dalkowski as an expert in conducting complex, large scale appraisals. They contend that his Mass Appraisal methodology can, within a reasonable degree of certainty, assess the financial impacts of the impacts the odors have had on the value of residential properties within the proposed class area. Plaintiffs aver that Mass Appraisal is a widely accepted valuation methodology in New York in order to estimate the value of a universe of properties as of a specific date.

Defendant contends that the Court should disregard or exclude the Dalkowski report because mass appraisals have been "soundly rejected as an acceptable means for determining the commonality of property value impacts." NYSCEF Doc. 351, p. 9. In support of this contention, Defendant cites to cases in other states where mass appraisal analyses were determined to be inadmissible for purposes of class certification. Further, Defendant points out that Mr. Dalkowski has not in fact conducted the mass appraisal analysis – he only indicates how he will do so if retained for purpose of merits discovery in the underlying action. Defendants submit that this constitutes "cutting corners".

In opposition to the motion, Plaintiffs also point to cases from outside this jurisdiction that indicate that the mass appraisal methodology contemplated by Dalkowski is in fact a recognized and accepted methodology. The report submitted indicates that "individual characteristics of the different properties would be considered as part of the analysis, but these characteristics would not prevent the ability to quantify the impact, if any, that the facility's emissions would have on the value of the neighboring residential properties.

It does not appear that mass appraisal methodology is a novel one such that would trigger the need for a *Frye* hearing. There are courts that have relied upon it in this context, and others that have not. In any event, the cases cited in support of and in opposition to this motion all come from other jurisdictions, and have their own distinguishing facts. In any event, Dalkowski is credentialed as a real estate appraiser with extensive experience in complex valuations, which Defendant seemingly does not challenge. The fact that he has not yet performed the valuation is irrelevant to the Court at this stage where merits discovery has not yet taken place. It would, in fact, be cost prohibitive for Plaintiffs seeking a class certification to engage in this exercise should the motion be denied.

Further, Dalkowski indicates that the methodology can take into account the individual characteristics of each affected property, and opines that a mass appraisal would in fact be a better gage of damages inasmuch as it "would more likely reflect the damage more accurately…as it considers the affected area as a whole [which would] allow for easier detection patterns to ascertain the impact of residing in a neighborhood with a documented emitter of noxious odors, if any, rather than being limited to viewing an individual property in isolation." NYSCEF Doc. 358, p.7.

Based on the foregoing, the Court will consider the Dalkowski report in connection with the instant application for class certification. As with the Cal reports, Defendant will have every ability to refute this opinion (and any supplemental opinion that may come during merits discovery) at a later stage in the litigation.

This concludes the Court's decisions on the Defendant's motions to preclude. The Court reminds the parties that these rulings are only applicable to the instant motion. Should this matter proceed to trial, or should any evidentiary hearings take place, each party retains the right to make any evidentiary objections it deems necessary or appropriate at that time.

Defendant's Position/Opposition to the Class Certification Motion

As indicated *supra*, Defendant strenuously opposes the Plaintiffs' motion for class certification. First, Defendant contends that the Plaintiffs' class definition is speculative and overbroad. Defendant takes the position that Plaintiffs' – even after supplemental briefing was

allowed by the Court- have failed to establish through reliable evidence a reasonable relationship between their proposed boundaries and the allegedly harmful activity.

Defendant further contends that Plaintiffs' motion also falls far short of establishing most of the specific prerequisites required to support a class action. The Court will review Defendant's positions below:

Numerosity:

Defendant avers that the proposed class is too numerous, as it includes residents who have not detected odors in their homes. Defendant's position is that each and every individual in the proposed class must be harmed in order to satisfy this requirement. Defendant posits that even if subclasses are designated based on distance from the facility, as Plaintiffs suggest, the issues regarding numerosity still exist—namely, that the classes include individuals not harmed by the "wrongful conduct" and therefore, they are overbroad.

Commonality:

As per the Defendant, individual questions of causation, injury and damages predominate over common questions of law, even after the supplemental briefing was ordered by this Court. In terms of causation, Defendant points out that Dr. Cal's supplemental report indicates that he did not perform the AERMOD analysis to a D/T threshold, but instead "modeled to an arbitrary, nonstandard 0 to 100 scale." This, as per Defendant, constitutes a deviation from the methodology. In any event, Defendant's position is that AERMOD is not even an accepted means of evaluating causation across a proposed class. Defendant's Supplemental Memorandum of Law in Opposition, NYSCEF Doc. 343, p. 10. In addition, Defendant contends that Mr. Dalkowski's report does not actually provide any conclusions, but rather merely speculates as to what a mass appraisal methodology could establish, if he ends up retained to perform one. The Defendant argues that subclasses do not cure these defects.

Further, in terms of damages, Defendant contends that no mass appraisal model exists that could analyze the extent of the damages or to what extent class members experienced a loss of use or enjoyment of their respective properties. These analyses, as per Defendant, are too individualized to justify class litigation. Bifurcation of damages would not solve these issues.

Typicality:

For the same reasons set forth above that individual inquiries are required to be made regarding causation and damages, the Defendant contends that the Plaintiffs cannot establish Plaintiffs' claims are typical of the entire proposed class. As per Defendant's expert Jennifer Pitts, the Plaintiffs' homes are representative of only one type of property designation of the six that are present in the class area (i.e. single family homes) and are all located north and only 0.5 miles from the facility so they are therefore "subject to different environmental disamenities and locational influences than [the rest of] the putative class." Defendant's Memorandum of Law in Opposition, NYSCEF Doc. 210, p. 18.

Superiority:

Class-wide adjudication of these claims is impossible, as per the Defendant. The individualized issues referenced by Defendant, *supra*, will allegedly necessitate the Court having to preside over "hundreds or thousands" of individual hearings to resolve, which is why, as per the Defendant, the Second Department has consistently held that these individual hearings preclude a finding of superiority in environmental tort actions alleging property damage. Defendant points out that denial of class certification will not preclude the putative class members from suing individually, which counsel for Plaintiffs proffers that they are all prepared to do in the event their current motion is unsuccessful.

In support of its position opposing class certification, Defendant submits the following exhibits for the Court's consideration[11]:

A: Two maps showing potential alterative odor sources located in Orangetown in the vicinity of the facility.

[11] Plaintiffs have a motion pending to exclude from the Court's consideration one of these exhibits, specifically Defendant's Exhibit "R". The Court will address this request in a different section of this Decision. At this point, the Court is simply listing and summarizing the Defendant's exhibits, as it did with Plaintiffs' exhibits previously herein.

B: An e-mail dated January 25, 2018 from the EPA to *Orangetown for Clean Air* attaching certain files pertaining to Aluf and another facility, and indicating that high methane levels were detected near local sewage treatment plant.

C: Notice of Expert Disclosure and Expert Report from Dr. Mark Yocke ("Dr. Yocke") indicating that methane is a "volatile organic compound" ("VOC"), and while it is generally odorless, it can signify the presence of hydrogen sulfide, which has a very strong odor.

D: Email chain between the EPA and *Orangetown for Clean Air* from December of 2017.

E: NYSDEC Notice of Violation to Avery Dennison sewage treatment facility[12] dated on or about July 5, 2017 regarding VOC emissions.

F: NYSDEC Warning Notice issued to Avery Dennison dated on or about September 23, 2016 regarding a violation of air pollution control requirements.

G: NYSDEC Notice of Inspection Results of Rockland County Sewer District No. 1, located in Orangeburg, New York, dated December 15, 2016. The Notice indicated that the facility was inspected for air emission points.

H: E-mail chain between NYSDEC and *Clean Air for Orangetown* from August of 2017 reporting an odor complaint.

I: Notice of Expert Disclosure and Expert Report from John Kind, PhD. John Kind is a toxicologist whose CV is attached to his report. John Kind's report addresses, *inter alia*, how individual factors impact an individual's response to odors, nuisance odor regulation and policy, the appropriateness of the proposed class, and the appropriateness of AERMOD modeling and other models.

J: A "relevant excerpt" from an e-mail chain between NYSDEC and Clean Air for Orangetown from April of 2018.

K: Town of Orangetown "Memorandum" to the community dated October 11, 2017 indicating that NYSDEC is still receiving odor complaints regarding the facility. The Town indicates that as a result, their attorneys requested from NYSDEC certain documents as listed in the Memorandum from the facility and "possibl[e] other sources near" the facility, as also listed in the Memorandum.

[12] Defendant acknowledges in its opposition papers that this sewage treatment facility has been closed since the end of 2017.

L-M: E-mail chains from October and December of 2017 between residents/members of the *Clean Air for Orangetown* organization and NYSDEC documenting an odor complaint.

N: A "relevant excerpt" from an e-mail chain from October of 2017 between NYSDEC and Plaintiff Allyson Sullivan wherein a NYSDEC employee indicates that "90% of the odors" are coming from the Defendant, but acknowledges other odor sources exist.

O: E-mail from November 28, 2016 between a resident and NYSDEC, wherein an employee from NYSDEC attributes an odor complaint to a sewage treatment facility.

P: E-mails from 2016 and 2017 with town officials, County officials and NYSDEC describing *sewer* odor issues.

Q: E-mail from NYSDEC dated December 10, 2019 with a subject of: "Letter sent to Orangetown residents re: odor from Aluf Plastics." The e-mail details the resources expended on monitoring emissions and air quality at/near the facility. As per the e-mail, all air sampling indicated results at "background levels" only. The e-mail also indicates that there will be follow up with the Defendant to ensure they implement the required system upgrades.

R: Affidavits from a number of residents who live near the facility indicating they do not smell the odors that are the subject of this litigation.[13]

S: Thirteen (13) data sheets from residents who indicated that they did not smell the odors that are the subject of this litigation.

T: Internal NYSDEC e-mail dated June 10, 2019 indicating that Defendant's facility was shut down at the time of an odor complaint and that they will have to investigate the source.

U: E-mail chain from October of 2017 expressing an odor complaint. NYSDEC responded that the Defendant's facility was closed at the time the odor was present.

V: A continuation from the October 2017 e-mail chain attached as Exhibit "U" to the Defendant's opposition papers. A NYSDEC employee states in the e-mail in response to the odor complaint that "a stack test demanded by [the] community … shows compliance with [their] [r]egs …..[and] an EPA survey that shows hits at Avery and the sewage treatment plant but nothing at Aluf…". Additionally, the e-mail indicates that the employee has talked with people who do not detect the odors.

[13] It is unclear to the Court from the Affidavits how far each affiant resides from the facility, and in what direction. This exhibit is also the subject of a motion to exclude filed by Plaintiffs. The motion will be addressed separately in this Decision.

W: Odor Complaint and responding e-mail dated October 19, 2019 wherein NYSDEC, in response to the complaint, e-mails Defendant and asks if they are closed.

X: E-mail chain from September 16, 2017 wherein a resident (and a plaintiff herein) makes an odor complaint. In response, NYSDEC states that the Defendant's facility is not the the source of the odor.

Y: NYSDEC Notice of Inspection Results from Aluf Facility dated November 21, 2019 conducted in response to an odor complaint indicating Defendant was not the source of the odor.

Z: Excerpts from an e-mail chain from November of 2016 between NYSDEC and a resident indicating that while NYSEC is working with Defendant to control odors resulting from adding "scents" to their plastic bags, the odor complained about on that occasion was not attributable to the Defendant's facility, as the facility was closed that day.

AA: E-mail chain from September of 2017 between a resident and NYSDEC regarding an odor complaint. NYSDEC indicates in their response that Defendant's facility is not the source of the odor, but rather it is Avery Dennison sewage treatment facility.

BB: E-mail chain from April of 2019 between NYSDEC and one of the Plaintiffs wherein NYSDEC indicates that no odors were coming from the Defendant facility during the time period when an odor complaint was made.

CC-EE: Odor complaints from March, April and July of 2019. In some instances the complaints are made long after the odor was detected. In others, residents are making complaints on behalf of other residents.

FF: E-mail dated March 1, 2018 between the Town and residents (including a plaintiff herein) indicating that they are creating a new system to track odor complaints and that, in general, odor complaints are hard to track because "smells often shift within minutes."

GG: E-mail chain from April of 2018 between the Town's Air Quality Review Committee and residents, some of whom are plaintiffs herein, acknowledging the difficulty in "air [quality] monitoring."

HH: E-mail chain from October of 2017 between NYSDEC and a resident regarding an odor complaint wherein a NYSDEC employee tells the resident that the Defendant's "stack test results" show that they are "in compliance with all State regulations."

II-MM: Excerpts from the depositions of Plaintiffs.

NN: Notice of Expert Disclosure and Expert Report from Jennifer Pitts, CRE, on the subject of real property analytics. Ms. Pitts' report indicates that the properties within the proposed class are too diverse in physical attributes and other characteristics to support a class wide claim of property diminution.

PP: Town of Orangetown December 6, 2017 Zoning Board of Appeals meeting minutes wherein a Plaintiff indicates his concern over the impacts that the Linen Choice facility project would have his property value, and on the issue of air pollution.

QQ: August 2019 Odor Control Assessment Summary completed by Ramboll, a consultant independently retained by Defendant in order to "evaluate the effectiveness of recently installed retail production odor controls." NYSCEF Doc. 202.

RR: A document purporting to be an "Aluf Plastics Canister Sampling Report" prepared by NYSDEC. The Court notes that the document is undated and does not appear on NYSDEC letterhead.

SS: An Air Quality Assessment Report dated February 6, 2017 prepared by Langan Engineering, Environmental Surveying & Landscape Architects, who was retained by the Town to complete "air testing in several locations on the east side of town." NYSCEF Doc. 204. The findings did not "identify air quality issues on the days outlined in the report."

TT: An Air Quality Report entitled "Orangetown Sampling Report: VOCs in Short Duration Samples" dated December 21, 2017 prepared by TRC Environmental Corporation ("TRC"), who was also retained by the Town "to conduct an air quality monitoring program in two phases; including ambient air sampling in the vicinity of [Defendant] and meteorological monitoring in Orangeburg, NY." NYSCEF Doc. 205.

UU: Letter from TRC to the Town dated March 21, 2018 regarding TRC's Phase 2 Air Monitoring Results including a human health risk assessment.

VV: TRC's Emissions Evaluation Report dated April 2018. TRC used the AERMOD methodology as indicated in the report. The results as set forth in the report indicated that the "maximum impacts of all sources combined is greater than the 7 D/T threshold with a maximum combined odor impact of 76.09 D/T for all sources." NYSCEF Doc. 207. The report concluded that the areas where impacts were greater than 7 D/T extended "at maximum" 400 meters from the facility's property line and included mostly commercial areas, as well as a bike path and some residential areas to the northwest, southeast, and west of the property. *See, Id.*

WW: Toxic Pollutants Impact Analysis dated September 2017 prepared by Aspen Outlook, LLC ("Aspen"). The Defendant retained Aspen to take the data from the previously conducted stack assessments in order to "determine whether facility emissions had the potential to impact nearby receptors." NYSCEF Doc. 208. Aspen concluded based on their analysis that the "maximum ground level concentrations estimated over five years of meteorological data are below the NYSDEC short term and annual guideline concentrations…for all pollutants."

XX: Summary of the TRC and Aspen air modeling results prepared by Defendant in conjunction with others as specified in the report. This report appears to be dated September 21, 2018.

As per the Interlocutory Order wherein the Court ordered the parties to supplement their written submissions, the Defendant submitted additional documents in opposition to the motion for class certification. Specifically, Defendant offered the following additional documents:

YY: Supplemental Report of Dr. Yocke dated April 16, 2021.

ZZ: Supplemental Report of Dr. Kind dated April 16, 2021.

AAA: Supplemental Report of Ms. Pitts dated April 16, 2021.

BBB-OOO: Odor Complaints dating between October of 2020 and May of 2021. The Defendant investigated these complaints and determined that none of the odors were attributable to them.

PPP: Five (5) additional data sheets from residents who indicated that they did not smell the odors that are the subject of this litigation.

Before analyzing the parties' substantive arguments on the motion for class certification, there is one additional discovery related motion to address.

PLAINTIFFS' DISCOVERY MOTION

(Motion Sequence No. 8)

Plaintiffs filed a motion to exclude Defendant's Exhibit "R" submitted in opposition to the class certification motion from the Court's consideration. Defendant's Exhibit "R" consists of affidavits from a number of residents who live near the facility indicating they do not smell the odors that are the subject of this litigation.

As per the Plaintiffs, these affiants are members of the putative class, and were obtained by counsel for Defendant "through misleading and coercive methods and tactics that render the

affidavits utterly unreliable and irrelevant…" Plaintiffs' Affirmation in Support, NYSCEF Doc. 245, p. 4. The motion is supported by affidavits from some of the putative class members which detail the manner in which they were approached and the statements that were made to them. Plaintiffs further contend the affidavits are irrelevant at this stage based on the theory that not each putative class member needs to suffer the exact same amount/extent of damages in order for a Court to grant a class certification motion.

In opposition, Defendant disputes the affidavits were coerced or wrongfully obtained, and indicates that there is no legal impediment to informal interviews of putative class members before class certification. Defendants also have affidavits submitted on their behalf in opposing this motion both from the investigators who took the statements of the affiants whose statements are at issue, and of one of the affiants indicating that he did not feel coerced or pressured into signing the statement.

The Court grants the Plaintiffs' motion to exclude at this stage in the litigation. These affidavits may end up relevant later in the proceedings, subject to any evidentiary rulings made at the appropriate time. At this time, however, without making any determination on the assertion the affidavits were obtained in an inappropriate or unethical manner, the Court notes that they are not presently relevant or necessary for the Court in its consideration of the class certification motion.

ANALYSIS ON CLASS CERTIFICATION MOTION

(Motion Sequence 5)

In connection with the motion for class certification, the Court has reviewed all the documents considered in connection with the above motions, with the exception of those specifically excluded on motion sequences 6, 8, and 9. The Court has also considered all written submissions of the parties, and the oral argument which took place on the record on September 3, 2020. Based on all of the foregoing, the Court hereby determines as follows:

Numerosity:

The Court determines that Plaintiffs have established the numerosity requirement. As per the Complaint, more than 3,000 potential households are located in the putative class area. Further, the Court has considered that Plaintiffs received at least 267 data sheets from putative

class members expressing interest in the case based on their alleged impact from similarly described noxious odors.

Commonality:

Whether the Plaintiffs have established that questions of law and fact common to the proposed class predominate over individual questions of law and fact is a more difficult inquiry for the Court, and the Court would be remiss to say this has been an easy determination.

Defendant has done an excellent job of pointing to other odor sources in the community, and establishing that there have been numerous odor complaints made by residents that cannot be attributed to its facility. However, notwithstanding, the overwhelming evidence from the Plaintiffs indicates that the private nuisance and negligence causes of action involve claims that are similar enough in nature such that uniformity is essential. All of the Plaintiffs' claims revolve around a common source air polluter. The evidence submitted by Plaintiffs that the Court has considered in rendering this Decision establish that Defendant's emissions and the resulting noxious odors are well documented and have been a source of significant attention from both the Town and the NYSDEC for years. In fact, Defendant has been cited numerous times for air pollution and odor issues, and has admittedly made efforts to reduce odor emissions from their facility. Nearly all the documents allege a common fact- the smell of burning plastic in the air that is detected in locations near the facility. Sometimes, when the Defendant is running "scents" the resulting odors are different. However, the burning plastic smell is nearly universally noted by Plaintiffs and the putative class members who responded to Plaintiff's counsel's inquiry.

Further, to the extent that Defendant is alleged to have been negligent in its maintenance of the facility, thus resulting in the emission of the burning plastic odors, it is the same theory of negligence that would apply to each Plaintiff and putative class member. It is alleged in the Complaint and many of the supporting documents that the odors are such that the Plaintiffs are prevented from the full use and enjoyment of their properties. Further, though the term "stigma" is not used specifically, the Complaint alleges generally that the proximity to the facility, along with the well known and documented odor issues resulting therefrom, have led to the diminution in value of their respective properties. As set forth, *supra*, the pleading read in a light most favorable to the Plaintiffs pleads the existence of stigma damages. The Defendant's defenses

will be common to each Plaintiff and class member, as well. Clearly, the Plaintiffs and putative class members' claims all stem from common facts.

The question then becomes do individual questions of law and fact override those that are common to the proposed class? The Court is aware, and does not think Plaintiffs will dispute, that there are other odor sources in the vicinity of the facility. Defendant submits numerous e-mails along with their opposition for the purpose of establishing same. However, nothing submitted by Defendant indicates that the other odor sources emit the smell of burning plastic. Further, Defendant does not dispute that they have had to take steps over the past years to remediate issues in order to reduce the odors coming from their facility. NYSDEC seems to be intimately aware of the issues regarding the odors, as it has acted as a middleman, if you will, between complaining residents and the Defendant for a number of years. It is clear from the e-mails the level of frustration on the part of all those involved.

Plaintiffs have proffered the report of an expert, Dr. Cal, which this Court has already determined it would consider for purposes of deciding the instant motion. Dr. Cal has, for purposes of a class certification application, demonstrated that residents in the proposed class area of 1.5 miles from the facility are in the path of odor transport specifically from the Defendant's facility. Dr. Cal's Supplemental Report concluded based on his data collection as described more fully in his report that the residents who reported noxious odors (referred to previously as the "LD contacts") are definitively in the path of "odor transport" from the Defendant's facility. Dr. Cal stated in this supplemental report that he could, *if the case continues to discovery on the merits*, extend his analysis of odor exposure levels of nearby residents against a standard odor nuisance level of 7 D/T or greater, which is a typical community odor standard.[14]

The Court recognizes that the manner in which an individual perceives an odor can be subjective. It is for this reason that Defendant's expert opines that both causation and damages in this type of a case can be impossible to assess as a result. However, the Court also has before it a competing expert report that indicates that the methodology he seeks to employ will be able to account for this. Indeed, the fact that there are other odor sources in the area adds a layer of

[14] The Court is acutely aware that Defendant disputes this conclusion and the scaling of the results employed by Dr. Cal. These issues with Dr. Cal's report, however, will have to be vetted at a later stage in the litigation.

complexity to the Plaintiffs' purpose, but the Court cannot say at this juncture that it renders fatal the class action application. At this stage, the Court is not in a position to determine one expert's opinion is more credible than another's. This is especially true considering merits discovery has not taken place, and Dr. Cal has not yet been retained by Plaintiffs to perform a full-scale air modeling analysis. Once retained, it may be that Dr. Cal cannot establish that the emissions are of sufficient concentrations to legally constitute a nuisance. However, the Plaintiffs do not need, at this stage in the litigation, to prove their case; rather, they need to meet their burden of establishing commonality of proposed class members as a prerequisite to class certification.

This case is distinguishable from *Osarczuk v. Associated Univs., Inc.*, 82, A.D.3d 853, 918 N.Y.S.2d 538 (2d Dept. 2011). In *Osarczuk*, the Second Department held the lower court should have denied the application for class certification. The proposed class included "all persons who lived, owned property, or worked within a 10-mile radius" of the Defendant. *Id.* at 854. The Court determined that although there were common questions to all of the proposed class members, the individualized issues were of such a significant nature that class treatment was not appropriate. *Id.* at 855-56. The Court reasoned that "questions of whether the emissions of various toxic materials, over several decades, from various sources and in various ways, caused injury to the individual properties and economic loss to the property owners, cannot be resolved on a class-wide basis[.]" *Id*.

In the case at bar, the proposed class is more limited and defined. Further, here, Plaintiffs have experts who have provided the Court with proposed methodologies by which they can distinguish between the odor source alleged and other sources in resolving the individual issues on a class-wide basis. It is unclear in *Osarczuk* whether the plaintiffs in that case had any similar expert opinions, as the decision was silent on this issue. Therefore, the record before this Court is apparently distinguishable from that in *Osarczuk*. In *Osarczuk*, the lower court's determination to certify the class was reversed. Interestingly, however, it is worth noting that once the action was back before the trial court, "189 plaintiffs were permitted to intervene" in the litigation, which spanned in total over a twenty-year period. *Osarczuk v. Associated Univs., Inc.,* 2016 WL 7627952, at *1 (Sup. Ct. Suffolk Cty. 2016).

In sum with respect to the prerequisite of commonality, there can be no question that there are issues that require individualized analyses—however, the question is whether those issues preclude a finding that common questions of law or fact predominate. This Court

determines that those individualized inquiries do not prevent a finding that common questions of law and fact predominate. In so determining, this Court has assessed the elements of the claims alleged in the Complaint, the similar theories of liability and defenses, the mutual interest of the putative class members in resolving all of the common questions central to all of their claims, and the fact that a class action with a uniform result would be the more efficient procedure than multiple individualized actions.

Typicality:

"Typicality does not require identity of issues and the typicality requirement is met even if the claims asserted by class members differ form those asserted by other class members." *Pludeman v Northern Leasing Sys, Inc.*, 74 A.D.3d 420, 423, 904 N.Y.S.2d 372 (1st Dept. 2010). Rather, if it can be established that the plaintiffs' claims are derived from the "'same practice of course of conduct . . . and is based upon the same legal theory. . . [the typicality] requirement is satisfied[.]'" *Id.* (internal citation omitted).

For the reasons explored in the commonality section, *supra*, this Court finds that the claims asserted by the Plaintiffs seeking to represent the class, as well as the defenses proffered by Defendant, are typical of the claims made by and defenses asserted against the proposed class members.

Adequacy of Representation:

This Court determines that Plaintiffs will fairly and adequately represent the class members.

Superiority:

In considering whether Plaintiffs have established this prerequisite to class certification, the Court has also analyzed the feasibility considerations required by CPLR § 902(1)-(5).

The Court predicts that this litigation will be complex regardless of whether it proceeds as a class action or as potentially numerous individualized lawsuits. However, the Court determines that class treatment will be the most judicially economical pathway, as it will prevent same/similar or duplicative claims, and the chance of inconsistent rulings. Further, it will allow each of the class members to "pursue merits discovery, litigate any further dispositive motions,

and adjudicate their claims in a single, efficient proceeding, instead of many hundred of separate actions." NYSCEF #152, p. 12. Compare this to *Osarczuk*, *supra*. Class certification may have been denied, but pursuing litigation with nearly 200 intervening plaintiffs over the course of twenty years of litigation is no small feat, either.

Defendant asserts that the Court could be forced to conduct numerous mini-hearings or separate trials in order to contend with the complex individual issues that they contend prevent a finding of commonality. However, the Court may have to contend with these issues regardless- and the potential of having numerous individual lawsuits pending could lead to inconsistent results. The Court agrees with Plaintiffs that it would be largely impracticable for the Court to manage separate actions and therefore to utilize resources to address the repetitive discovery, motion practice and trials that would result from numerous separate actions. Moreover, should the Court experience difficulties that would be associated with managing the class, procedural safeguards exist in the CPLR to sever issues, to create further subclasses where appropriate, and/or to make, alter, or amend any order dealing with procedural matters. CPLR §§ 902, 906, and 907.

Therefore, based on the foregoing, the Court determines that Plaintiffs have met their burden in establishing the prerequisites required for class certification, and motion sequence number five (5) is therefore granted, subject to the following class definition.

THE CLASS DEFINITION

The Court, in reviewing the initial submissions of the parties regarding the class certification motion, asked the Plaintiff to propose potential subclasses. Defendant's position was that the class, as initially proposed, was overbroad inasmuch as individuals who have suffered no injury would be included in the class.

In response, Plaintiffs acknowledged that a class cannot be defined so broadly as to encompass individuals with little or no connection to a case, however, Plaintiffs contend that they need not at this early stage in the litigation establish that every single individual who is within the proposed class has suffered an actual injury. Rather, Plaintiffs contend that their class definition should be narrow enough so that it does not include individuals who definitively *could not have been* harmed by the conduct at issue. Defendants have not demonstrated that there are

individuals in the proposed class who definitively could not have suffered an injury similar to that alleged in the Complaint.

At this point, based on the evidence the Court has indicated it will consider such as the demonstrative maps, it appears that the proposed class asserted in the Complaint is sufficient to be utilized in this litigation. In other words, the proposed class can be identified. All of the proposed class members reside within the class definition. Numerous noxious odors of a similar nature have been logged by verifiable sources within the 1.5-mile distance from the facility. The proposed class radius excludes residences due east, northeast or southeast from the location of the facility, since the odors are not documented or reported to have been emitted in those directions.

The Court does not see a need, at this juncture, to create subclasses based solely on mileage from the facility. However, as the parties are aware, the Court has the right to revisit this later if the circumstance so warrant, based on mileage from the facility or other characteristics of the properties.

Therefore, the class definition shall be described as follows: "[a]ny and all individuals who owned or occupied residential property at any time beginning in 2015 to present that are located…[o]ne and one-half (1.5) miles to the Northern, Northwestern, Western, Southwestern, and Southern directions of the property line boundary of Defendant's facility." NYSCEF #1, ¶ 23-24.

CONCLUSION

This was not a simple decision to make, by any means. The Court spent a great deal of time considering the parties' papers and submissions. The Court is also cognizant that there is a long road ahead. In rendering this decision, the Court has kept in mind the current stage of this litigation and the general premise that Article 9 of the CPLR was intended to be a liberal remedy and to be given broad construction by the Court. *See, Burdick v. Tonoga, Inc*., 179 A.D.3d 53, 57, 112 N.Y.S.3d 342 (3rd Dept. 2019). The Plaintiffs need not prove their claims at this time. Rather, they need to establish the prerequisites for certification such that the Court can, in its discretion, determine whether the claims set forth "can be efficiently and economically managed by the court on a class wide basis." *Globe Surgical Supply v. GEICO Ins. Co*., 59 A.D.3d 129,

137, 871 N.Y.S.2d 263 (2d Dept. 2008). This Court determines that Plaintiffs have carried their burden.

Based on the foregoing, it is

ORDERED, that Defendant's motion for summary judgment is denied; and it is further

ORDERED, that Plaintiffs' motion for class certification is granted, based on the class definition set forth *supra*, and it is further

ORDERED, that consistent with this determination, Plaintiffs shall submit to the Court a proposed "Notice of Pendency of Class Action" for its consideration in accordance with CPLR § 904 on or before January 14, 2022; and it is further

ORDERED, that counsel shall appear virtually before the Court via Microsoft Teams on ***Thursday, January 20, 2022 at 3:00 p.m.*** for a conference. The Clerk of the Court shall send out the link for the appearance.

Dated: New City, New York
January 3, 2022

Hon. Thomas P. Zugibe, J.S.C.

To: *All counsel of record with NYSCEF*