IN THE IOWA DISTRICT COURT IN AND FOR MUSCATINE COUNTY

LINDA GOREHAM; GARY GOREHAM; GARY BOYSEL; BECKY BOYSEL; KELCEY BRACKETT; SHARON MOCKMORE; LAURIE FREEMAN; BOBBIE WEATHERMAN Plaintiffs, v. GRAIN PROCESSING CORPORATION Defendant.	CASE NO. LACV021232 RULING ON MOTION FOR CLASS CERTIFICATION

Plaintiffs Linda Goreham, Gary Goreham, Gary Boysel, Becky Boysel, Kelcey Brackett, Sharon Mockmore, Laurie Freeman, and Bobbie Weatherman ("Plaintiffs") filed a Motion for Class Certification on April 20, 2015. Defendant, Grain Processing Corporation ("GPC"), filed "Defendant's Resistance to Plaintiffs' Motion for Class Certification" on June 22, 2015. Plaintiffs filed a Reply in Support of Motion for Class Certification on August 14, 2015.

The Court held oral argument on the matter on Tuesday, September 8, 2015. Attorneys James Larew, Scott Entin, and Sarah Siskind appeared for Plaintiffs. Attorney Michael Reck appeared for Defendant. The court has considered counsels' briefs, the parties' exhibits, and the applicable law. In light of the aforementioned factors, the Court rules as follows:

BACKGROUND FACTS AND PROCEEDINGS

The eight individually named Plaintiffs all reside within one and one-half miles of GPC's facility in Muscatine. Plaintiffs seek to represent a class described as follows: "persons who resided within 1.5 miles of Grain Processing Corporation's corn wet milling plant in Muscatine, Iowa (excluding uninhabited and non-residential areas to the plant's south and east) during the

period since April 24, 2007." GPC conducts corn wet milling operations at its Muscatine facility. The residents claim the operations at GPC's facility cause harmful pollutants and noxious odors to invade their land, thereby diminishing the full use and enjoyment of their properties. The proposed class encompasses approximately 2,000 households. Plaintiffs seek damages for the lost use and enjoyment of their properties. Plaintiffs focus their claims on common law and statutory nuisance. Plaintiffs seek formulaic lost-use-and-enjoyment damages for themselves and their neighbors within one and one-half miles of the GPC plant.[1]

Plaintiffs commenced this lawsuit on April 23, 2012 alleging nuisance, negligence, and trespass by GPC. According to Plaintiffs' petition,

> wet milling is a production method and process that transforms corn kernels into products for commercial and industrial use. The plaintiffs allege the corn wet milling operation at GPC's facility creates hazardous by-products and harmful chemicals, many of which are released directly into the atmosphere. The plaintiffs allege these by-products include: particulate matter, volatile organic compounds including acetaldehyde and other aldehydes, sulfur dioxide, starch, and hydrochloric acid. They assert the polluting chemicals and particles are blown from the facility onto nearby properties. They note particulate matter is visible on properties, yards, and grounds and various chemical pollutants are also present. Compounding these adverse effects, according to the plaintiffs, GPC has used, continues to use, and has failed to replace its worn and outdated technology with available technology that would eliminate or drastically reduce the pollution. The plaintiffs assert these emissions have caused them to suffer persistent irritations, discomforts, annoyances, inconveniences, and put them at risk for serious health effects.

Freeman v. Grain Processing Corp., 848 N.W.2d 58, 63-64 (Iowa 2014).

[1] Plaintiffs are not currently seeking injunctive relief. GPC represented to Plaintiffs that renovations to its Muscatine facility are scheduled to be completed later this year. The planned renovations will modernize GPC's Muscatine facility including installment of a new Feed Recovery dryer system, conversion to natural gas, and decommissioning of the original high-emitting dryers. According to GPC, these renovations will "nearly eliminate" the smoke, odor, and haze that has concerned the residents of Muscatine. Taking GPC at its word, Plaintiffs assume for purposes of their Class Certification Motion a damages period running from April 24, 2007 (five years before this case was filed) to the present, and assume injunctive relief will not be required.

On December 20, 2012, GPC moved for summary judgment. In support of its motion, GPC asserted that the residents' common law and statutory claims were preempted by the Federal Clean Air Act ("CAA"). Alternatively, GPC claimed Plaintiffs' common law claims were preempted by Iowa Code chapter 455B (2013), which is Iowa's statutory companion to the CAA. GPC also argued the issues raised by the residents amounted to political questions involving complex policy and economic issues that cannot and should not be resolved by the judicial process. The district court granted summary judgment in favor of GPC on all three theories and dismissed the lawsuit. The Muscatine residents appealed.

On appeal, the Supreme Court of Iowa reversed and remanded the district court's grant of summary judgment. *See Freeman v. Grain Processing Corp.*, 848 N.W.2d 58 (Iowa 2014). The Supreme Court of Iowa held the residents' state law claims against an in-state source of pollution were not preempted by the CAA because 1) the CAA anticipated cooperative federalism, 2) the CAA's citizens' rights savings clause, 3) the CAA's states authority savings clause, and 4) preemption would be inconsistent with the principle that states may impose more stringent limitations on pollution than required by federal law. *See Id.*at 83-5. The Supreme Court also held Iowa Code chapter 455B did not impliedly repeal application of Iowa Code chapter 657 to air pollution claims or preempt Iowa common law. The Supreme Court emphasized "the nuisance and common law actions in this case are based on specific harms to the use and enjoyment of real property that are different from the public interest generally in controlling air pollution." *Id.*at 89. Further, the Supreme Court of Iowa held the residents' lawsuit was not subject to dismissal under the political question doctrine because there is no textual constitutional commitment of the issues raised in this case to another branch of government, and

there is no need for an initial policy determination by another branch of government. *See Id.* at 93-4.

Following remand, Plaintiffs filed a Motion for Class Certification on April 20, 2015. Plaintiffs assert their Motion satisfies the Iowa class action rules for the following reasons: (1) the approximate 4,000 individuals in the proposed class are numerous; (2) GPC's conduct and the scope of its impacts raise common issues of fact and law; (3) Plaintiffs have a manageable plan for adjudicating their claims in a single trial that is fair and efficient; (4) the named Plaintiffs are committed to deliver relief for the class and have retained experienced class action counsel. The Court will now examine these reasons in greater depth.

First, Plaintiffs contend the proposed class is numerous. Plaintiffs estimate, according to 2010 Census data, that the proposed class is comprised of 4,000 individuals. (Def. Res. P.24 n.11). Defendant argues this is a mere fraction of the class because Plaintiffs fail to account for anyone moving in and out of the class during the eight-year class period. (Def. Res. P.24 n.11). According to both parties, the proposed class includes at least approximately 4,000 individuals. The size of the proposed class speaks for itself.

Second, Plaintiffs assert GPC's conduct and the scope of its impact raise common issues of fact and law. According to Plaintiffs, common issues of fact establish GPC knowingly created a neighborhood nuisance. To bolster this claim, Plaintiffs attached numerous exhibits to their Motion for Class Certification. According to Plaintiffs, the attached exhibits demonstrate: (1) GPC has been operating with only antiquated pollution controls—and, in many cases, no controls at all; (2) GPC knew it was creating a nuisance for its neighbors; (3) GPC knew equipment was available to abate its emissions and had the financial means to acquire such equipment; (4) GPC chose to maximize its business interests at the expense of the property rights

of its neighbors; (5) GPC's emissions dispersed throughout the proposed class area; (6) GPC's emissions created nuisance-level impacts on the residents' use and enjoyment of their homes.

Plaintiffs allege these common issues of fact resolve dispositive questions of law common to the class. According to Plaintiffs, the common questions of law are whether GPC acted reasonably in operating its Muscatine plant, whether GPC violated its duty of care, whether the haze, odor, and smoke emitted from GPC are the product of negligence, and whether such emissions constituted nuisance or unlawful trespass. Plaintiffs note Iowa has an objective standard for determining whether a nuisance exists. Thus, Plaintiffs assert the facts resolving these issues are the same for, and central to, the claims of all plaintiffs and class members. According to Plaintiffs, the common issues of fact and law render this case perfectly suited to litigation by class action. Indeed, Plaintiffs contend class action adjudication will circumvent hundreds of individual trials and an "administrative nightmare."

Third, Plaintiffs allege class certification is appropriate because they have a manageable plan for adjudicating their claims in a single trial that is fair and efficient. Plaintiffs' trial plan has three basic components. Plaintiffs intend to begin their presentation with common evidence showing Defendant knowingly created a neighborhood nuisance. This evidence includes Defendant's public admissions, testimony from inspectors, engineers, and Defendant's managers. Subsequently, Plaintiffs intend to present evidence showing GPC was responsible for class-wide harm. This evidence includes expert testimony, scientific models, and illustrative testimony from named plaintiffs and class members who reside throughout the class area. Plaintiffs will ask the jury (1) to find that their witnesses are "normal persons living in the community," and (2) to infer from the conditions their witnesses' describe that conditions at properties in close proximity are largely the same. After presenting evidence concerning the

existence of a nuisance and fact of harm, Plaintiffs intend to conclude their presentation with a formulaic proof to approximate damages. Notably, Plaintiffs' damages formula accounts for wind direction and relative pollutant concentrations at each residence in the proposed class area. In light of this, Plaintiffs assert their trial plan resolves manageability problems and makes class action far superior to other means of adjudicating the claims and defenses.

Fourth, Plaintiffs contend that the named Plaintiffs are committed to deliver relief for the class and have retained experienced class action counsel. Plaintiffs assert the representative parties have no conflict of interest in the maintenance of the class action because there is a high degree of commonality. Plaintiffs note further that the complexity of this litigation and potential recovery for individuals render separate suits impracticable. Plaintiffs have retained experienced class action counsel at Miner, Barnhill & Galland, P.C.

On May 11, 2015, Plaintiffs filed an amended Memorandum in Support of Motion for Class Certification.[2] The amended Memorandum discusses Plaintiffs' proposed scientific evidence and formula to approximate class-wide damages. Plaintiffs assert their scientific evidence will (1) map the spread of the pollutants throughout the class boundary, and (2) approximate the number of hours pollutants emitted from Defendant directly hit each property.

Dr. Rosenfeld, Plaintiffs' purported expert, plotted the dispersion of pollutants emitted from Defendant. Dr. Rosenfeld used AERMOD, an EPA-approved modeling algorithm, to estimate where the wind blew particulates, VOCs, and SO_2 discharged from Defendant. Ex. M (Rosenfeld Decl. at ¶3 and Ex. 3, Ex. 5 at 1-2). Additionally, Dr. Rosenfeld's AERMOD results

[2] At the time Plaintiffs filed their Motion for Class Certification, the parties had pending cross motions based on a disagreement regarding the admissibility of Plaintiffs' Alternative Damages Model. Defendant contended the model should be excluded from consideration as untimely disclosed. Plaintiffs disagreed. Given the pending cross Motions on the admissibility of the alternative damages model, Plaintiffs' Memorandum in Support of Class Certification referred to, but did not discuss, that model. On May 5, 2015, the Court entered an Order granting the parties' Joint Motion to Dismiss Cross Motions on Plaintiffs' Proposed Alternative Damages Model as Moot and to Modify Class Certification Phase Briefing Schedule. The modified briefing schedule permitted Plaintiffs to amend their Motion for Class Certification to add discussion of the Alternative Damages Model.

reveal the concentration of pollutants dispersed throughout the proposed class area. Ex. M (Rosenfeld Decl., Ex. 2 at I, Ex. 3, Ex. 5 at 2, 4-5). To address variation, Dr. Rosenfeld created a 5-minute animation based on AERMOD to depict, visually and over time, where the pollutants were blown in the class area, and how often. *Id.* at 3-4 (explicating the animation). According to Plaintiffs, the animation reveals Defendant's emissions were repeatedly and persistently present throughout the proposed class area over a period of years. *Id*. at 4. Dr. Rosenfeld also developed a "wind rose" analysis, which is based on the sixteen cardinal wind direction ranges, to quantify the number of direct hits each property received. *Id.* at 4-5. In combination with the animation, Plaintiffs contend this data estimates the number of hours that each property was directly hit by pollutants emitted from Defendant.

On account of Dr. Rosenfeld's analysis, Plaintiffs assert two different formulae can approximate damages in the event liability is established. First, Plaintiffs propose using the simple per diem formula approved as reasonable in *Miller v. Rohling*, 720 N.W.2d 562 (Iowa 2006). Second, Plaintiffs developed an Alternative Damages Formula. The Alternative Damages Model refines the *Miller* per diem because it accounts for wind variability and relative pollutant concentrations at each property in the class area. Whereas the per diem formula approved in *Miller* generally used the same per hour value and the same sixteen hours per day for each plaintiff, Plaintiffs' Alternative Damages Formula apportions relative harms at each property by (1) limiting property-specific damages to the number of hours the property is directly downwind of the plant, and (2) prorating damages based on AERMOD estimates of the major pollutant concentrations at each property.[3]

[3] The prorations are based on AERMOD estimates for particulate matter (PMs), volatile organic compounds (VOCs) and sulfur dioxide (SO_2) as respective surrogates for the observed smoke, odor and haze. According to Plaintiffs, Defendant's own witnesses testified that particulates make up the smoke that shoots out of its stack (Pltfs' Reply App., Ex. VV (Chrisman Dep. At 71)); VOC's cause the odor that "concerned the Muscatine residents for some

The Alternative Damages Formula is comprised of four elements. The first element—the "direct-hit" hours at each property—is based on the estimated "wind-rose" counts developed by Dr. Rosenfeld. Exhibit RR (Rosenfeld supplement explicating alternatives damages formula at 2). According to Plaintiffs, Dr. Rosenfeld's "wind-rose" analysis accurately estimates the time each property was downwind from Defendant's emissions. The second element averages and then sums hourly pollutant concentrations that contribute to the smoke, odor and haze at each property. *Id.* at 2-3. The third element—adjustment percentage—takes the summed concentrations for each property and converts them to a percentage of the worst hit properties (*i.e.*, the properties with the highest concentrations). This calculates the relative amount of Defendant's pollution present at each property throughout the class boundary, over time. *Id.* at 3-4. The fourth element—the $10-$15 value for each "direct-hit" hour—generates the range of values Plaintiffs intend to propose to the jury as reasonable compensation for the loss use and enjoyment at each property. *Id.* at 4-5.

Mechanically, the Alternative Damages Formula divides the class area into standard wind petals (W, WNW, NW, NNW, N and NE), calculates the number of direct-hit hours from Defendant for each petal, and then prorates the totals based on "concentration percentages" by comparing each property's pollutant concentrations to a baseline. The result is a relative "GPC pollution quotient" for each property. According to Plaintiffs, all the jury needs to do is find an hourly value for the discomfort, irritation and annoyance caused by the nuisance.

Although Plaintiffs' model does not account for class members' presence within the 1.5 mile boundary, Plaintiffs assert the Supreme Court of Iowa approves approximation of damages in this sort of case. Plaintiffs assert further that damages must be approximated because the

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time" (Pltfs' Reply App., Ex. XX (Durham Dep. At 131-32)); and sulfur dioxide "forms" the haze that Defendant emits (Pltfs' Reply App., Ex. XX (Durham Dep. At 156)).

unpredictability of wind creates unavoidable variability. Plaintiffs allege their alternative damages formula adequately accounts for this variability due to the formula's third element—"the adjustment percentage." Further, Plaintiffs allege demonstrative freeze frames' (Rosenfeld Reply Decl. at Exs. 2-7) reveal—as one would expect—similarities in degrees of harm for properties in close proximity.[4] Because the Alternative Damages Formula yields results one would expect, Plaintiffs assert that their formula is reasonable. According to Plaintiffs, applying the direct-hit hours and relative concentration proration generates an approximation of damages that fairly compensates class members for the lost use and enjoyment caused by Defendant's emissions.

Defendant filed a Resistance to Plaintiffs' Motion for Class Certification on June 22, 2015. According to Defendant, Plaintiffs seek certification of an overwhelmingly broad and diverse class. Defendant asserts that the principle issue before the Court is whether this case can be tried without addressing the idiosyncrasies of individual class members and their respective properties. Defendant objects to certification for the following reasons: (1) Plaintiffs' claims are inherently individual; (2) Due Process requires both GPC and absent class members to present their individual claims and defenses; (3) Plaintiffs' Alternative Damages Model is not viable; (4) representative parties will not fairly nor adequately protect class interests. The Court will now examine these reasons in greater depth.

First, Defendant asserts Plaintiffs' claims are inherently individual. Defendant notes that trespass does not encompass odors, which fall under nuisance law, but, instead, requires actual

[4] For example, Sharon Mockmore's "Concentration Total" is 317.21. At the time she gave her declaration, declarant Darla Olinger resided roughly 200 meters from plaintiff Mockmore's residence. Ms. Olinger's "Concentration Total" is 316.02, reflecting a similarity in the amount of pollution experienced by each parcel. The similarity is reflected at the edge of the class boundary, as well, where Weatherman's "Concentration Total" is 81.94 and the closest residing declarant, Kevin Smith, whose residence is roughly 240 meters away, has a "Concentration Total" of 71.50. *See* Pltfs' Reply App., Ex. WW (Rosenfeld Reply Decl., ¶9).

physical invasion. Defendant asserts further that the mere fact emissions from a plant, car, or human reach a property does not constitute trespass. Instead, Plaintiffs must show something trespassed on his or her property and "actual interference with a party's exclusive possession of land including some observable or physical invasion." *Freeman*, 848 N.W.2d at 67.

Defendant asserts class-wide proof of an actual physical invasion is not possible because Plaintiffs have varying descriptions of the particulates depositing on their land.[5] Plaintiffs' descriptions include: black soot, white/grey ash, yellow dust, sticky residue, reddish-brown dust, dust that looks like fur, green dust-looking matter, red silky particulates, small black pellets like peppercorns, corn hulls. According to Defendant, Plaintiffs' varying descriptions reveal multiple sources of emissions. Indeed, Iowa State University confirmed the complained-of-particles on one plaintiff's land were bug droppings. (App. at 1578-79). Thus, according to Defendant, there cannot be class-wide proof of trespass.

Similarly, Defendant alleges Plaintiffs' negligence claims present inherently individual issues that cannot be addressed class-wide. Defendant admits that its Muscatine facility emits and those emissions disperse. Defendant notes, however, industrial plants emit and create odor when not negligently run. Thus, without knowing the source within GPC creating emissions or odors hitting a particular property on a particular day, Defendant asserts a jury cannot know whether the emitting equipment or process operated negligently or just as it should but with

[5] Although Plaintiff's expert, Dr. Rosenfeld, modeled the dispersion of pollutants emitted from GPC, the model does not reveal whether GPC deposited *physical* particles on homes or cars throughout the area. Rosenfeld Dep. At 208-09 (App. At 573). Instead, the model reveals how a microgram of emission moves in the wind, and that air on a particular parcel had molecules from GPC. Rosenfeld Dep. At 17 (App. At 559); Rosenfeld Dep. At 341 (App. At 585). One could take, however, any emission source at a level low enough and show emissions dispersing on the wind similar to Dr. Rosenfeld's animation. Rosenfeld Dep. At 404-05 (App. At 590-91). Having established no benchmark for harm, Defendant asserts Plaintiffs have not demonstrated that every time wind blows toward property, emission concentrations cause harm or nuisance. Therefore, Defendant asserts Plaintiffs must establish class-wide trespass via testimony.

inevitable emissions. Accordingly, Defendant asserts that Plaintiffs' negligence claims require individualized analysis.

Likewise, Defendant alleges Plaintiffs' nuisance claims present inherently individual issues. Defendant asserts *Perkins v. Madison County Livestock & Fair Ass'n*, 613 N.W.2d 264 (Iowa 2000) mandates the Court to "examine each plaintiff's claim independently of the other plaintiffs' claims so that a plaintiff's claim will succeed or fail on the basis of that plaintiff's particular circumstances." *Id.* at 273. In *Perkins* only one plaintiff met the nuisance standard despite each plaintiff claiming interference with use and enjoyment. *See Id.* Thus, according to Defendant, determining whether emissions reaching a property are of a type or quantity sufficient to constitute a nuisance is an individual issue.

Defendant also notes Iowa's nuisance test involves balancing factors, including the reasonableness of GPC's conduct and priority of location. Because residents arrived at various times to various conditions, with different knowledge and expectations, Defendant asserts the reasonableness of its conduct will vary location-by-location and person-by-person. As a result, Defendant asserts that a nuisance claim requires individualistic inquiry.

Second, Defendant asserts Due Process requires both GPC and absent class members to present their individual claims and defenses. The problem posed by class certification, according to Defendant, is fairly deciding individual claims and defenses in a class-wide trial. Accordingly, Defendant asserts Plaintiffs must provide a workable trial plan explaining how they can address individual issues without prejudicing defendants or absent class members. Defendant avers that Plaintiffs have failed to do so because they framed the common questions of fact and law at a level of abstraction. Defendant asserts its Muscatine facility's activities, in and of themselves, do not reveal class members have suffered the same injury. Defendant

contends that if its emissions satisfy the commonality standard, then every case satisfies commonality because determining whether the defendant committed the alleged wrongdoing is always a common issue.

Further, Defendant alleges numerous individual questions predominate over common ones, thereby rendering certification improper. According to Defendant, individual questions include: (1) Plaintiffs alleging inherently, and legally, individual causes of action that must be evaluated, as a matter of law, property-by-property; (2) the jury determining whether each class member traded convenience for a lower price and, thus, already was compensated for any inconvenience of living near GPC;[6] (3) the jury evaluating if each property suffered sufficient impact to constitute a nuisance given its nature, location, neighborhood, exposure, history and so forth;[7] (4) the jury examining each individual's habits, experiences, exposures, and intended uses of his/her property; (5) the jury determining causation for individual plaintiffs alleged harm.

According to Defendant, just addressing one of these issues—the individual knowledge for 4,000+ buyers and sellers—would require one jury to sit for years. In light of this, Defendant asserts that proceeding as a class action requires a choice: violate due process by ignoring individual issues or conduct thousands of mini-trials, which renders certification inefficient and unmanageable.

Third, Defendant alleges that Plaintiffs' Alternative Damages Model is not viable because it ignores key individual issues. Rather than address the variability posed by class-wide

[6] Some Plaintiffs recognized the smell from GPC in the 1950s, yet still moved to the area thereafter. R. Boysel Dep. At 21 (App. At 140); Mockmore Dep. At 55-56 (App. At 162-63). In contrast, a Plaintiff insists he overlooked odors before purchasing his home. Brackett Dep. At 135, 235 (App. At 927, 935). Defendant asserts every sale or rental transaction whereby a class member came to the area must be examined to see if the purchase or rental price reflected inconveniences of living in an industrial area. *See* Dent Report at 28-29 (App. At 56-57).

[7] Defendant alleges proving GPC, as opposed to other sources, harmed a resident requires individual inquiry. Alternative sources of harm in the proposed class area include a sewage treatment plant, HNI, Muscatine Power & Water, Cargill, Musco Lighting, Union Tank Car, Muscatine Metals, Potters Industries, railroad tracks, farmland and the Mississippi River among others. Brackett Dep. At 113 (App. At 923); Freeman Dep. At 60 (App. At 946); Weatherman Dep. At 83 (App. At 955); *see* Daugherty Report – Exhibit 0 (App. At 551-53).

idiosyncrasies, Defendant asserts that Plaintiffs' Alternative Damages Model accounts for one factor—wind direction. Defendant notes wind blowing towards a home does not equate with nuisance, negligence or trespass. According to Defendant, not all "direct hit hours" are created equal: a resident may be sleeping, on vacation or at work. Moreover, Defendant asserts that wind direction does not reveal whether emissions bothered someone, which is an inherently personal claim. Defendant emphasizes that Dr. Rosenfeld did not tie any concentration of emissions to a specific impact or harm. Rosenfeld Dep. At 136-38, 233-34, 340-41 (App. At 566-66a, 577-78, 584-85).

Moreover, Defendant avers that Plaintiffs set forth no support for assumptions underlying the Alternative Damages Formula. In particular, Defendant alleges Plaintiffs' reliance on a concentration percentage is misplaced. Defendant notes that Plaintiffs assume damages are linearly related to concentration percentage (i.e., 75% of "concentration total" results in 75% as much loss of use and enjoyment). Notwithstanding, a lower concentration percentage might result in no loss of use and enjoyment. Indeed, Dr. Rosenfeld's model measures emission concentrations that may not even be perceivable. Rosenfeld Dep. at 155, 186 (App. at 568, 570). Thus, Defendant asserts that Plaintiffs' Alternative Damages Formula unscientifically assumes any concentration total causes harm.

Fourth, Defendant objects that class counsel will fairly and adequately protect class interests. Defendant asserts that Plaintiffs' counsel, in trying to present a class to be certified, abandon medical and property damage claims. This decision, according to Defendant, creates a risk of claim preclusion or waiver for named Plaintiffs and other putative class members. Moreover, Defendant asserts that potential class members who claim harm do not want class counsel to represent them. To bolster this claim, Defendant alleges that Plaintiffs' former

counsel, Andrew Hope, currently represents a portion of Plaintiff's potential class members.[8] (App. At 1796-97).

Defendant also challenges the adequacy of class representatives. Defendant alleges class representatives cannot address individual issues presented. In support, Defendant notes that class representatives admit they cannot speak for their neighbors.[9] This, according to Defendant, destroys their ability to serve as class representatives and testify to common effects among all class members. Additionally, Defendant asserts numerous conflicts infect the class, including (1) wildly varying claims due to different emission levels; (2) those who previously lived in the area have different incentives than those who still do; and (3) class members disagree about the outcome they seek.[10] In light of this, Defendant asserts class counsel and class representatives will not fairly nor adequately protect class interests.

On August 14, 2015, Plaintiffs filed a Reply in Support of Motion for Class Certification. Plaintiffs retort: (1) Defendant mischaracterizes the predominance element of Iowa's class certification laws; (2) class certification will not violate GPC's Due Process rights; (3) Plaintiffs, and their counsel, adequately represent the class; (4) the mechanics of the Alternative Damages Formula are viable. The Court will now examine Plaintiffs' responses in greater depth.

First, Plaintiffs rebut Defendant's contention that thousands of individual issues make the case difficult for the Court to manage. Plaintiffs allege that relevant federal cases reject this

[8] Plaintiffs contend that less than one percent of the absent class has retained Hope. Defendant alleges that despite a door-to-door campaign, the majority of the class never asked Plaintiffs' counsel to represent them. According to Defendant, of those who made a choice, the majority have elected Hope as their representative.

[9] R. Boysel Dep. At 86 (App. At 149) ("I can't talk for my neighbors. I don't know what they feel."); Weatherman Dep. At 151 (App. At 962) ("Actually I'm concerned with my property and my inconvenience at this time. I can't speak for anyone else."); Mockmore Dep. At 185 (App. At 170) ("I have no idea. I don't know what other people think, how they feel, or what they would do in any given situation.").

[10] Defendant asserts that Mr. Brackett acknowledged those seeking industrial jobs may have a different view of attacking a company providing so many Muscatine jobs. Brackett Dep. At 145 (App. At 928). Defendant asserts further that Mr. Boysel does not approve of this suit. G. Boysel Dep. At 157 (App. At 1591); Defendant alleges this conflicts with Ms. Boysel who wants Defendant to cease operations because she wants emissions reduced to zero. R. Boysel Dep. At 71 (App. At 148).

argument, and Iowa's distinctive approach to predominance is more favorable to class certification than its federal counterpart. For instance, while the federal predominance rule imposes a strict requirement that common issues predominate over individual ones (Fed.R.Civ.P. 23(b)), the Iowa rule does not. Plaintiffs note that, under Iowa law, common issues predominate so long as they represent a significant aspect of the case. Thus, common questions need not be dispositive of the entire action. Moreover, Plaintiffs note that, under Iowa law, predominance is a single factor among thirteen, and the Court may disregard the predominance factor all together. Because the crux of every class member's claim will be the same—Defendant purportedly operated an outdated facility with virtually no controls to reduce emissions that released noxious smoke, odor and haze into the surrounding neighborhood—Plaintiffs contend the predominance element is satisfied.

Second, Plaintiffs deny certification will violate Defendant's Due Process rights. Plaintiffs assert that Iowa law gives the Court tools and broad authority to manage individual issues. Accordingly, the Court may defer proving individual class membership and even class members' entitlement to damages after common issues are resolved in a second-stage claims administration process. Plaintiffs assert that Defendant's threat to call 4,000 witnesses in the event of certification unduly restricts class certification to carbon-copy claims, which contradicts Iowa law.

Third, Plaintiffs object that their counsel will inadequately represent the class. Plaintiffs contend they have hired experienced class counsel, secured testimonial support of more than 100 neighbors and arranged full support for the cost of the lawsuit. Although Andrew Hope identified a small fraction of the class he says signed on with his firm, those parties have not appeared nor have any questioned the adequacy of Plaintiffs' counsel or the propriety of class

certification. "Andrew Hope solicitations" are the subject of Plaintiffs' pending motion for court supervision.

Plaintiffs also deny that class variations prevent class representatives from adequately representing the class. According to Plaintiffs, their answers in deposition—that they cannot "speak for others"—reflects humility, not conflict or "class variation." Moreover, Plaintiffs note many of their deposition answers are inapposite to Defendant's claim that class representatives will inadequately represent the class.[11]

Plaintiffs deny further that their purported "claim-splitting" defeats their adequacy to represent the class. According to Plaintiffs, any concern over class members' rights to pursue claims for relief not sought in the class action can be addressed in two ways. First, the Court has authority to limit any judgment in the case to the claims the parties have actually litigated. Second, Iowa Rule of Civil Procedure 1.267 allows any class member who wishes to pursue other claims to opt out at the time and in the manner the Court prescribes in the class notice in order to pursue different relief. In light of this, Plaintiffs assert their decision to narrow their claims for relief was taken responsibly to serve the interest of the class members equally. According to Plaintiffs, the Court's authority to limit the scope of the judgment and the opt-out notice will protect any who wish to pursue different relief.

Plaintiffs similarly deny that there is disagreement among the class over the lawsuit. According to Plaintiffs, Brackett did not testify at his deposition "that those seeking industrial jobs may have a different view of attacking a company providing so many Muscatine jobs…"

[11] Pltfs' Reply App., Ex. AAA (B. Boysel Dep. At 116) ("[w]e speak on behalf of everybody, you know, as a group, not just any person."); Pltfs' Reply App., Ex. BBB (L. Goreham Dep. At 109) ("I don't have a bubble around my house," "[s]o if [the pollution]'s hitting my house and disrupting my life and my property, then it's probably affecting [my neighbor] in the same way."); Pltfs' Reply App., Ex. CC (G. Boysel Dep. At 34) (Gary Boysel testified that if GPC's pollution is bothersome at his house, it would be equally bothersome in his "part of the south end.").

Plaintiffs' allege Brackett's exchange with Defendant's counsel reflects that this is the view of counsel, not Brackett. (Pltfs' Reply App., Ex. DDD (Brackett Dep. At 144-47). Although Mr. Boysel testified his uncle thinks this lawsuit is a bad idea,[12] Mr. Boysel's uncle is not a member of the class. Plaintiffs assert further that Ms. Boysel testimony that "[she] would like to see [the pollution] all gone" (GPC Resist. at 94-95), poses only a hypothetical disagreement with other class members based on Defendant's counsel's opinion.

Fourth, Plaintiffs deny that the Alternative Damages Formula only accounts for wind direction. Contrary to Defendant's contention, Plaintiffs assert the AERMOD algorithm, which underpins their formula, accounts for nearly all of the property characteristics and meteorological conditions Defendant says the formula lacks. According to Plaintiffs, these include: the distance from Defendant to each property, actual terrain, surface roughness (which takes into account topographical obstructions at each property), wind speed, wind direction, temperature, precipitation rate, relative humidity, station pressure; and cloud cover. Pltfs' Reply App., Ex. WW, (Rosenfeld Reply Decl., ¶10).

Plaintiffs' assert further that their Animation, which similarly buttresses their formula, reveals that Defendant's pollutants deposited at each property over time, and the pollutants' resulting concentrations. Pltfs' Reply App., Ex. WW (Rosenfeld Reply Decl., ¶7 and Ex. 1); *See also* Pls. Am. Mem. at 16. According to Plaintiffs, Dr. Rosenfeld's Animation provides a visual depiction of where Defendant's pollutants traveled within the class area, and how frequently—demonstrating for the sampled months that every property in the proposed class area was repeatedly hit by Defendant's pollution. Pltfs' Repy App., Ex. WW (Rosenfeld Reply Decl., ¶7 and Ex. 1). Moreover, the animation depicts that whenever Defendant's pollution is blown towards a single property, it is also blown to surrounding properties. Pltfs' Reply App., Ex. WW

[12] Pltfs' Reply App., Ex. CCC (G. Boysel Dep. At 157).

(Rosenfeld Reply Decl., ¶7, 8 and Exs. 1-7). Indeed, the animation depicts the pollution plume covering all properties in the same general area downwind from Defendant. Pltfs' Reply App., Ex. WW (Rosenfeld Reply Decl., ¶8 and Ex. 6). Accordingly, Plaintiffs allege the animation provides evidence from which reasonable inferences can be drawn, from Plaintiffs' descriptions of the pollutants' impacts at their own properties, that the impacts were largely the same at properties in close proximity. Pltfs' Reply App., Ex. WW (Rosenfeld Reply Decl., ¶8 and Exs. 2 and 6).

Plaintiffs also deny a series of objections to the Alternative Damages Formula's mechanics. The first is that the resident at a particular property "may be sleeping, on vacation or at work" during some of the direct-hit hours the formula counts. Plaintiffs assert that their formula is not intended as a precise measure of exposure and is not required to be pursuant to *Miller*, 720 N.W.2d at 569. According to Plaintiffs, once the existence of the nuisance and the fact of harm are shown, Plaintiffs are free to use a formula based on reasonable inference and approximation to measure the degree of harm suffered from the nuisance. *See Id.* at 572. Further, Plaintiffs assert that their formula limiting damages to direct-hit hours is conservative because class members suffered from uncertainty about when the winds would turn in their direction.

Further, Plaintiffs deny that the Alternative Damages Formula's concentration estimates are unscientific because they (1) fail to link each pollutant concentration to a specific harm, and (2) improperly aggregate concentrations of three separate pollutants. Plaintiffs assert the formula is merely a mechanism for approximating and apportioning damages and the concentration estimates serve this purpose well. Plaintiffs reassert that the existence of nuisance level harms is

determined in Iowa by "normal persons," not a scientific cutoff.[13] Moreover, Plaintiffs assert, pursuant to *Weinhold v. Wolff*, 555 N.W.2d 454 (Iowa 1996), that Iowa law permits proof of nuisance-level physical harms by lay testimony. Thus, Plaintiffs allege reasonable inferences can be drawn, from class members' descriptions of the pollutants' impacts at their own properties, and that the impacts were largely the same at properties in close proximity. Accordingly, Plaintiffs assert cumulating the major pollutants associated with the smoke, odor and the haze is a reasonable mechanism for approximation and apportionment.

Finally, Plaintiffs deny assigning the same dollar amount to each direct-hit hour fails to account for individual circumstances throughout the area. Plaintiffs assert the "concentration percentages" account for variations in the direction of the wind and hourly concentrations calculated by AERMOD. Thus, Plaintiffs assert class members' relative harm is adequately addressed by the Alternative Damages Formula.

The Court heard Plaintiffs' Motion for Class Certification on September 8, 2015. There, Plaintiffs requested the Court to certify the named Plaintiffs as representatives for "persons who resided within 1.5 miles of Grain Processing Corporation's corn wet milling plant in Muscatine, Iowa (excluding uninhabited and non-residential areas to the plant's south and east) during the period since April 24, 2007;" and to certify their counsel as class counsel with Sarah Siskind and Scott Entin of Miner, Barnhill & Galland, P.C. as lead counsel for the class. The primary focus of Plaintiffs' presentation was elucidating their trial strategy. In doing so, Plaintiffs focused exclusively on their nuisance claims.

Plaintiffs reasserted that Defendant's unreasonable operation of its Muscatine plant is a common nucleus of operative fact linking every class member. Plaintiffs alleged that had

[13] Defendant's expert admits that the National Ambient Air Quality Standards (NAAQS) do note measure nuisance level harms. *See* Pltfs' Reply App., Ex. UU (Daugherty Dep. At 323-25).

Defendant invested in readily available technology, its emissions would not have diminished the class members' use and enjoyment of their properties. Plaintiffs asserted that the same witnesses and exhibits will be used to prove the unreasonableness of Defendant's conduct. Plaintiffs emphasized that class members' knowledge when they moved to the neighborhood is immaterial because the critical issue is what everyone did not know—Defendant unreasonably operated its Muscatine facility with virtually no pollution controls.

Plaintiffs reasserted that they intend to prove Defendant was responsible for class-wide harm with admissions from GPC, expert testimony, scientific evidence of the pollutants' dispersion, and illustrative testimony from the plaintiffs themselves and the neighbor-declarants who reside throughout the class area. This evidence, according to Plaintiffs, is common to all class members and will require substantial trial time. Plaintiffs noted that the Court can tell Plaintiffs when evidence is cumulative at a class hearing. At that point, it is a question of fact for the jury to determine whether a normal person would find Defendant's emissions "definitely offensive, seriously annoying or intolerable."

Plaintiffs also argued that nothing in Iowa nuisance law forbids Plaintiffs from using reasonable inferences to establish class-wide harm. Plaintiffs alleged that class action is premised on the possibility that reasonable inferences can and will be drawn from the representative class members' evidence on behalf of the class. Without it, Plaintiffs argued, it is difficult to imagine any case that could be brought as a class action.

Plaintiffs reiterated their Alternative Damages formula and its purported viability. Notably, in discussing their formula, Plaintiffs alleged that the identity and tenure of each class member need not be known at trial. This, according to Plaintiffs, may be resolved in a second-stage claims administration process. Plaintiffs concluded that certification of this class will save

hundreds of days of trial time, and relegating the named plaintiffs and class to individualized litigation would result in an "administrative nightmare."

In response, Defendant reasserted that Plaintiffs confuse emissions with nuisance, and that the sole issue is whether this case can be tried without addressing the idiosyncrasies of individual class members and their respective properties. In an attempt to sidestep this critical issue, Defendant noted that Plaintiffs' rely on an antitrust case. *See Comes v. Microsoft Corp.*, 696 N.W.2d 318 (Iowa 2005) (*Comes II*). According to Defendant, there is no generalized evidence which proves or disproves an element of nuisance on a simultaneous, class-wide basis, because the objective nuisance standard must be applied property-by-property, pursuant to *Perkins* 613 N.W.2d. at 273. Moreover, Defendant noted that Plaintiffs are seeking damages for loss use and enjoyment—not diminished property value—and mental anguish is suffered individually. Defendant alleged that claims requiring individual review are inappropriate for class certification, pursuant to *Vos v. Farm Bureau Life Ins. Co.*, 667 N.W.2d 36 (Iowa 2003).

Defendant emphasized that Plaintiffs cannot assume injury for absent class members while simultaneously denying Defendant the right to show their assumption incorrect. Defendant alleged that at least half of the named plaintiffs purchased their houses at a discount to account for proximity to industry like Defendant. Far from speculation, Defendant asserted this is a real issue recognized by Iowa law and confirmed by testimony in this case. Further, Defendant noted that if the Court oversaw trial of an individual nuisance suit in which evidence was offered that plaintiff (1) received a lower purchase price precisely because of odor from a neighboring facility, (2) suffered from a history of allergies or exposure to allergens, (3) smoked, (4) lived in close proximity to other emission sources, or (5) withstood environmental exposure in his or her home, the Court would allow such evidence. According to Defendant, if this

evidence is admissible in the ordinary suit, then Defendant must be allowed to explore these issues where relevant with each absent class member and each would have to testify despite no indication of a desire to sue.

Defendant also criticized the merits of Plaintiffs' claims. Defendant noted that the National Ambient Air Quality Standards ("NAAQS") protect the most sensitive among us, and Defendant's Muscatine plant is in compliance with the NAAQS. According to Defendant, Iowa's nuisance standard is higher because, unlike NAAQS, it does not protect the most sensitive among us. Defendant also noted that five declarants in the proposed class testified that they were not harmed by Defendant's emissions. Accordingly, Defendant asserts that Plaintiffs' nuisance claims fail under the normal person standard.

Defendant concluded that certification would mask inherently individual claims at issue. According to Defendant, denying certification will not spark a multitude of individual suits because the majority of the proposed class members' have expressed no desire to sue.

On rebuttal, Plaintiffs asserted variation is not masked, and the Court is well-equipped to handle any class discrepancies. Plaintiffs conceded that the effects of Defendant's emissions at the edge of the class boundary cannot be inferred from the testimony of class members living in close proximity to GPC. This, according to Plaintiffs, is not fatal to their Motion for Class Certification because the Court may segment the class and force a special verdict if nuisance is not found throughout the entire class area. Alternatively, the Court may divide the proposed class into subclasses and treat each sub-class as a class. Plaintiffs noted that the Court may modify or decertify the class at a later time.

Plaintiffs also argued that Iowa's class action rules contemplate and assume individual issues will be present. Plaintiffs asserted that idiosyncrasies are not unique to class action suits;

otherwise the entire class action system would crumble. According to Plaintiffs, any manageability concerns can be resolved in a second-stage claims administration process. Plaintiffs alleged that the sole issue before the court is whether certification will create more management problems then relegating the named plaintiffs and class to individualized litigation.

APPLICABLE LAW AND ANALYSIS

I. General Requirements for Class Certification

When determining whether to certify a class action, the Court is guided by Iowa Rules of Civil Procedure 1.261-1.263. The Court may certify a class if it finds three requirements are established: (1) the requirements of rule 1.261 are met, (2) a class action would provide for the fair and efficient adjudication of the case, and (3) the representative parties will protect the interest of the class. Iowa R. Civ. P. 1.262(2). The requirements of rule 1.261 are established if the class is either so numerous or constituted in such a way that joinder is impracticable and there is a question of law or fact common to the class. Iowa R. Civ. P. 1.261. The plaintiff has the burden of proving that the purported class meets all three criteria. *Vos*, 667 N.W.2d at 45. A failure of proof on any one of the prerequisites is fatal to class certification. *City of Dubuque v. Iowa Trust,* 519 N.W.2d 786, 791 (Iowa 1994).

In determining whether a class action will provide a fair and efficient adjudication of the case, Iowa Rule of Civil Procedure 1.263 provides "the court shall consider and give appropriate weight to [thirteen listed factors] and other relevant factors." Iowa R. Civ. P. 1.263(1). The parties concede four factors are inapplicable, and request the Court to consider the following nine factors:

1. "Whether a party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making final injunctive relief or corresponding declaratory relief appropriate with respect to the class as a whole." Iowa R. Civ. P. 1.263(1)(d)
2. "[w]hether common questions of law or fact predominate over any questions affecting only individual members," *id.* 1.263(1)(e)
3. "[w]hether other means of adjudicating the claims and defenses are impracticable or inefficient," *id.* 1.263(1)(f)
4. "[w]hether a class action offers the most appropriate means of adjudicating the claims and defenses." *id.* at 1.263(1)(g)
5. "[w]hether members who are not representative parties have a substantial interest in individually controlling the prosecution or defense of separate actions." *id.* at 1.263(1)(h)
6. "[w]hether the class action involves a claim that is or has been the subject of a class action, a government action, or other proceeding." *id.* at 1.263(1)(i)
7. "[w]hether it is desirable to bring the class action in another forum." *id.* at 1.263(1)(j)
8. "[w]hether management of the class action poses unusual difficulties." *id.* at 1.263(1)(k)
9. "[w]hether the claims of individual class members are insufficient in the amounts or interest involved, in view of the complexities of the issues and the expenses of the litigation, to afford significant relief to the members of the class." *id.* at 1.263(1)(m)

"Basically, the criteria to be considered have two broad considerations: achieving judicial economy by encouraging class litigation while preserving, as much as possible, the rights of litigants-both those presently in court and those who are only potential litigants." *Vignaroli v. Blue Cross of Iowa*, 360 N.W.2d 741, 744 (Iowa 1985). The Supreme Court of Iowa has

recognized that the language of rule 1.263 grants a district court "considerable discretion" in weighing the factors. *Id.* "The rule does not require the district court to assign weight to any of the criteria listed…[n]or does the rule require the court to make written findings as to each factor…" *Vos*, 667 N.W.2d at 45; *accord City of Dubuque*, 519 N.W.2d at 793; *Martin v. Amana Refrigeration, Inc.*, 435 N.W.2d 364, 369 (Iowa 1989).

At the outset, the Court notes that "[o]ur class-action rules are remedial in nature and should be liberally construed to favor the maintenance of class actions." *Anderson Contracting, Inc. v. DSM Copolymers, Inc.*, 776 N.W.2d 846, 848 (Iowa 2009) (quoting *Comes*, 696 N.W.2d at 320). Additionally, because Iowa rules pertaining to class actions closely resemble Federal Rule of Civil Procedure 23, the Court may rely on federal authorities construing similar provisions of federal rule 23. *Vos*, 667 N.W.2d at 44.

II. Implicit Requirements for Class Certification

"In addition to the above factors, numerous courts also have recognized two 'implicit' prerequisites: 1) that the class definition is drafted to ensure that membership is 'capable of ascertainment under some objective standard;' and 2) that all class representatives are in fact members of the proposed class." *In re Teflon Products Liability Litigation*, 254 F.R.D. 354, 360 (S.D. Iowa 2008); *see also Bentley v. Honeywell Int'l, Inc.*, 223 F.R.D. 471, 477 (S.D. Ohio 2004) ("Before delving into the 'rigorous analysis' required by Rule 23, a court first should consider whether a precisely defined class exists and whether the named plaintiffs are members of the proposed class"); *Carson P. ex. Rel. Foreman v. Heineman*, 240 F.R.D. 456, 495-502 (D.Neb.2007) (recognizing that a "class should be clearly defined at the outset of litigation," and proceeding to redraft definition to sufficiently narrow and clarify subclasses of potential litigants).

III. Analysis

The principle issue before the Court is whether idiosyncrasies amongst the proposed class members and their respective properties preclude class certification. Because the class definition is at the heart of any decision on certification, the Court will begin its analysis by considering the "implicit" requirements for class certification. After considering the "implicit" factors, the Court will determine whether Plaintiffs are entitled to class certification pursuant to Iowa Rules of Civil Procedure 1.261-1.263.

A. Class Definition

When a plaintiff defines a class in geographic terms, courts often analyze whether there is a "logical reason" or "evidentiary basis" for drawing the class boundaries at a particular location. *Burkhead v. Louisville Gas & Elec. Co.*, 250 F.R.D. 287, 291 (W.D. Ky. 2008). All that is required is a "reasonable" relationship between the evidence and the class boundaries as proposed by the plaintiff. *Id.* "Usually, scientific or objective evidence closely ties the spread of the alleged pollution or contamination to the proposed class boundaries, as many mass environmental tort cases demonstrate." *Id.* Courts have thus found identifiable classes in environmental torts cases based on expert testimony and diffusion models. *See Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 61-62 (S.D. Ohio 1991) (finding an expert's diffusion model sufficient to support a "reasonable relationship" between the evidence of record and the six-mile radius class definition); *Boyd v. Honeywell Int'l, Inc.*, 898 So.2d 450, 463 (La.Ct.App.2004) (Plaintiff's expert testimony, "[w]hile it may not be sufficient for purposes of proving causation

on the merits, it may properly be considered as corroborative evidence supporting the trial court's decision on the geographic area in the context of determining class certification.").

Here, Plaintiffs defined the class as "persons who resided within 1.5 miles of Grain Processing Corporation's corn wet milling plant in Muscatine, Iowa (excluding uninhabited and non-residential areas to the plant's south and east) during the period since April 24, 2007." To support this class boundary, Plaintiffs presented the expert testimony of Dr. Rosenfeld and air-diffusion models he prepared. Dr. Rosenfeld's testimony and models show that Defendant's emissions dispersed throughout the proposed 1.5 mile class boundary. Ex. M (Rosenfeld Decl., Ex. 2 at I, Ex. 3, Ex. 5 at 2, 4-5). Additionally, Dr. Rosenfeld employed an AERMOD algorithm, which diminishes variation. *Id.* at 3-4 (explicating the animation). Plaintiffs have presented a "reasonable relationship" between the evidence of record and the 1.5 mile radius class definition, thereby establishing the requirement of an identifiable class. The Court has concerns regarding this class but finds that the concerns can be alleviated through the establishment of subclasses. Further discussion of subclasses is set forth below.

B. Proposed Class Members

"[A] class representative must be part of the class and possess the same interest and suffer the same injury as the class members." *Hammer v. Branstad*, 463 N.W.2d 86, 90 (Iowa 1990) (quoting *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 216 (1974)). "To have standing to sue as a class representative it is essential that a plaintiff must be part of that class, that is, he must possess the same interest and suffer the same injury *shared by all members of the class he represents*." *Schlesinger*, 418 U.S. at 216 (emphasis added) (citations omitted).

Here, the Court is not persuaded class representatives have suffered the same injury shared by all members of the class. Based on Dr. Rosenfeld's AEROMD estimates, named Plaintiff, Sharon Mockmore, the closest living class member to GPC, has a "Concentration Total" of 317.21. (Rosenfeld Reply Decl. at Exs. 2-7). Named Plaintiff Bobbie Weatherman, who lives at the edge of the class boundary, has a "Concentration Total" of 71.50. *Id.; see also* Pltfs' Reply App., Ex. WW (Rosenfeld Reply Decl., ¶9). Dr. Rosenfeld did not develop a "Concentration Total" threshold at which harm exists. Rosenfeld Dep. At 137-38 (App. At 566-66a). Moreover, Dr. Rosenfeld's model measures emission concentrations that may not even be perceivable. Rosenfeld Dep. at 155, 186 (App. at 568, 570).

Plaintiffs contend that Dr. Rosenfeld's Animation provides evidence from which reasonable inferences can be drawn, from Mockmore's and Weatherman's testimony of the pollutants' impacts at their own properties, that the impacts were "largely the same" at properties nearby. Pltfs' Reply App., WW (Rosenfeld Reply Decl., ¶8 and Exs. 2 and 6). Notwithstanding, Plaintiffs conceded at the certification hearing that the effects of Defendant's emissions at the edge of the class boundary cannot be inferred from the testimony of class members living in close proximity to Defendant. Because Plaintiffs intend to establish class-wide harm by drawing inferences from lay testimony, Plaintiffs acknowledge class representatives living at the edge of the class boundary have not suffered the same injury as class representatives living in close proximity to Defendant.

1. Subclassification

The Iowa Rules of Civil Procedure governing class actions are flexible. Specifically, Rule 1.262(3)(c) allows the Court, where appropriate, to "[d]ivide a class into subclasses and treat each sub-class as a class." Iowa R. Civ. P. 1.262(3)(c). There are eight named Plaintiffs in this

case. Named Plaintiffs Sharon Mockmore, Laurie Freeman, Gary Boysel, Becky Boysel, Gary Goreham, Linda Goreham all live in close proximity to Defendant's Muscatine facility. Named Plaintiffs Bobbie Weatherman and Kelcey Brackett live at or near the 1.5 mile radius boundary. Notably, Plaintiffs claim their air dispersion analysis is accurate because it yields results one would expect—properties in close proximity have comparable "Concentration Totals" and direct-hit hours. Thus, named plaintiffs suffer the most comparable harm to absent class members who live in close proximity, and the closer the proximity the more analogous the harm. As a result, named plaintiffs are ideal representatives for absent class members who live nearby. In this case, the Court believes that the makeup of the class without subclasses will be potentially confusing to a jury and could result in prejudicial decisions by the jury. For example, if the jury feels that those in close proximity suffered a nuisance, they may sweep in those in the peripheral area. This would be improper and prejudicial to GPC. If the jury finds those in the peripheral class have not suffered a nuisance, the jury may conclude no nuisance for the entire class. This would be potentially prejudicial to those in close proximity.

With this in mind, the Court divides Plaintiffs' proposed class into two subclasses: (1) Close Proximity, and (2) Peripheral Proximity.[14] The Court defines the classes as follows: The Close Proximity subclass shall consist of the area south of County Road G28 and Hershey Avenue. The line shall be as if though Hershey Avenue continued across the Mississippi River. The Peripheral Class shall be comprised of the area north of County Road G28 and Hershey Avenue. Once again the line shall be as if though Hershey Avenue continued across the Mississippi. The Court will consider requests from counsel for either party for further specification of subclasses or to determine the need for additional subclasses.

[14] Notably, the more piecemeal examination necessitated by sub-classification diminishes the need to simply assume damages are linearly related Concentration Percentage.

Because each subclass is treated as a class, each subclass must separately satisfy class certification requirements. Iowa R. Civ. P 1.262(3). Notably, Defendant's objections to certification apply uniformly throughout Plaintiffs' proposed class. Consequently, Defendant's objections to certification apply uniformly to each subclass. To the extent sub-classification presents unique challenges to certification, the Court will consider such as they arise and directs the parties to the well-established law that the Court can "modify the certification order or decertify the class altogether at a later time." *Anderson*, 776 N.W.2d at 851. The Court will now determine whether each subclass is entitled to certification pursuant to Iowa Rules of Civil Procedure 1.261-1.263.

C. Impracticability of Joinder

Iowa Rule of Civil Procedure 1.261 mandates that the class must be "so numerous or so constituted that joinder of all members, whether or not otherwise required or permitted, is impracticable." Iowa R. Civ. P. 1.261(1). "The general rule of numbers is that if the class is large, then the numbers alone should be dispositive…[f]orty or more has been recognized as the range where numbers alone should suffice to show impracticability of joinder." *Amana*, 435 N.W.2d at 368 (citation omitted). Plaintiffs' proposed class, which consisted of at least 4,000 individuals, even when divided into three subclasses to address class membership concerns has at least forty members in each subclass, and each subclass is sufficiently "numerous" to be certified.

D. Commonality

Iowa Rule of Civil Procedure 1.261 mandates that there must be a "question of law or fact common to the class." Iowa R. Civ. P. 1.261(2). Generally, class certification will not be denied

simply because the class members' claims have some factual dissimilarity. Individual claims need not be "carbon copies of each other;" rather, if a common nucleus of operative facts is present, "a class action can be brought even without a complete identity of facts relating to all class members." *Vos*, 667 N.W.2d at 45. Under Iowa law, "[t]he appropriate inquiry is not the strength of each class member's personal claim, but rather, whether they, as a class, have common complaints." *Amana Refrigeration,* 435 N.W.2d at 367. "[C]ourts have held that a [class action] can be brought…even though there is not a complete identity of facts relating to all class members, as long as a 'common nucleus of operative facts' is present." *Comes*, 696 N.W.2d at 322. Thus, the mere fact that questions peculiar to each individual member of the class remain after the common questions of the defendant's liability have been resolved does not dictate the conclusion that certification is impermissible.

Here, each subclass is comprised of proposed class members who live in the vicinity of Defendant's Muscatine facility and allegedly suffered damages from Defendant's common course of conduct. Specifically, Defendant operating outdated, high-polluting dryers and coal-boilers, with virtually no controls to reduce emissions, that purportedly released noxious smoke and odor and haze into the surrounding neighborhoods for years, which caused a class-wide nuisance. Almost identical evidence will be required to establish the level and duration of Defendant's emissions, the reasonableness of Defendant's operations, and the causal connection, if any, between the injuries allegedly suffered and Defendant's liability. Notably, Plaintiffs' air dispersion analysis presents evidence that airborne contaminants are attributable to Defendant and that Defendant's emissions spread to at least a one and one-half mile radius.[15] The major

[15] In *Burkhead v. Louisville Gas & Electrict Co.*, 250 F.R.D. 287 (W.D.Ky.2008) the district court denied plaintiffs' motion to certify a class based on the lack of predominance. In *Burkhead*, the plaintiffs failed to put forth any evidence that the cause of the entire class' damages could be determined in a single proceeding. *Id.* at 299. The plaintiffs' evidence was limited to complaints of residents within a single, geographically contained area about

issue distinguishing the class members is the nature and amount of damages, if any, that each sustained. The central factual basis for all of Plaintiffs' claims, however, is GPC's course of conduct and knowledge of its potential hazards. Thus, Plaintiffs' theory presents a common nucleus of operative fact. Because each subclass presents the same theory, each subclass raises common questions of both law and fact, and each subclass satisfies the commonality requirement.

The Court finds that each subclass satisfies the requirements of rule 1.261. The remaining issues, pursuant to rule 1.262, are (1) whether class action should be permitted for the fair and efficient adjudication of the controversy, and (2) whether the representative parties will fairly and adequately protect the interests of the class. Iowa R. Civ. P. 1.262(2)(a-c). The Court will consider these in turn.

E. Fair and Efficient Adjudication of the Controversy

To determine whether a class action will provide a fair and efficient adjudication of the case, rule 1.263 provides "the court shall consider and give appropriate weight to [thirteen listed factors] and other relevant factors." Iowa R. Civ. P. 1.263(1). The parties concede four factors are inapplicable, and request the Court to consider nine factors. The Supreme Court of Iowa has recognized that the language of rule 1.263 grants a district court "considerable discretion" in weighing the factors. *Vignaroli*, 360 N.W.2d at 744. "The rule does not require the district court

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various substances and odors on their property and evidence of emissions from the defendant's facility. *Id.* at 292. Notably, the plaintiffs did not present evidence that the substances or odor were attributable to the defendant or that the airborne contaminants might have spread in all directions from the defendant's facility. *Id.* at 293. In contrast, the district court in *Boggs v. Divested Atomic Corporation*, 141 F.R.D. 58 (S.D.Ohio 1991) certified a class of residents surrounding a radioactive materials plant to recover for emotional distress and reduced property values. There, the plaintiffs supported their proposed class with expert testimony that the released radioactive materials spread to at least a six-mile radius. In that case, the court noted that "differences in the situation of each plaintiff or class member do not necessarily defeat typicality: 'the harm suffered by the named plaintiffs may differ in degree from that suffered by other members of the class so long as the harm suffered is of the same type.'" *Id.* at 65 (quoting *In re Asbestos School Litigation*, 104 F.R.D. 422, 430 (E.D.Pa.1984)).

to assign weight to any of the criteria listed…[n]or does the rule require the court to make written findings as to each factor…" *Vos*, 667 N.W.2d at 45. "The factors in rule 1.263(1) center on two broad considerations: achieving judicial economy by encouraging class litigation while preserving, as much as possible, the rights of litigants-both those presently in court and those who are only potential litigants." *Luttenegger*, 671 N.W.2d at 437.

1. Predominance of common questions of law or fact

In determining whether the class action should be permitted for the fair and efficient adjudication of the controversy, the Court is instructed to consider "[w]hether common questions of law or fact predominate over any questions affecting only individual members." Iowa R. Civ. P. 1.263(1)(e). The predominance inquiry is "far more demanding" than the commonality requirement. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 609 (1997). Thus, while idiosyncrasies among class members and their respective properties do not bar certification, the question presented here is whether the idiosyncrasies justify denying class certification.

"In particular, the question of predominance necessitates a 'close look' at 'the difficulties likely to be encountered in the management of a class action." *Vos*, 667 N.W.2d at 46 (citations omitted). "'Predominate' should not be automatically equated with 'determinative' or 'significant.'" *Id.* at 45 (citation omitted). "A claim will meet the predominance requirement when there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position." *Id.* (citations omitted). A class action can be brought even without a "complete identity of facts relating to all class members." *Vignaroli*, 360 N.W.2d at 744.

"Certification of a class action does not depend on a determination of whether the plaintiffs will ultimately prevail on the merits." *Id.* (citation omitted). "The appropriate inquiry is

not the strength of each class member's personal claim, but rather, whether they, as a class, have common complaints." *Amana*, 435 N.W.2d at 367. "For this reason, the court does not conduct a preliminary inquiry into the merits of a suit in a certification hearing." *Vos*, 667 N.W.2d at 46. However, "that is not to say that the court may not require sufficient information to form a reasonable judgment in deciding whether to certify a class action." *Amana*, 435 N.W.2d at 367-68; *Vos*, 667 N.W.2d at 49 ("[g]iven the vast amount of documents produced following the certification order and the deposition taken, we think it was proper for the district court to probe behind the pleadings on the issue of predominance.").

Iowa courts provide no reported decision interpreting predominance in the context of a mass environmental tort case. Generally, in determining whether common issues predominate in environmental mass tort cases, federal authorities follow the standard articulated in *Sterling*:[16]

> In complex, mass, toxic tort accidents, where no one set of operative facts establishes liability, no single proximate cause equally applies to each potential class member and each defendant, and individual issues outnumber common issues, the district court should properly question the appropriateness of a class action for resolving the controversy. However, where the defendant's liability can be determined on a class-wide basis because the cause of the disaster is a single course of conduct which is identical for each of the plaintiffs, a class action may be the best suited vehicle to resolve such a controversy.

Sterling v. Velsicol Chemical Corp., 855 F.2d 1188, 1197 (6th Cir. 1988). Although "the problem of individualization of issues is often cited as a justification for denying class action treatment in mass tort accidents...numerous other courts have recognized the increasingly

[16] "[t]he principles for certification…set forth in *Sterling* have been applied consistently in certifying [mass environmental tort] cases." *Burkhead v. Louisville Gas &Elec. Co.*, 250 F.R.D. 287, 300 (W.D. Ky. 2008) (internal quotation omitted). "The *Sterling* principles guide this Court in deciding whether Plaintiffs have met the requirements of Rule 23." *Bentley v. Honeywell Int'l, Inc.*, 223 F.R.D. 471, 480 (S.D. Ohio 2004).

insistent need for a more efficient method of disposing of a large number of lawsuits arising out of a single disaster or a single course of conduct." *Id.* [17]

Defendant argues that there are too many idiosyncrasies between Plaintiffs and the proposed class members and between their respective properties. Defendant's Due Process arguments apply to each subclass. According to Defendant, individual inquiries will be necessary at trial because: (1) Plaintiffs allege inherently, and legally, individual causes of action that must be evaluated, as a matter of law, property-by-property and person-by-person; (2) the jury must examine each individual's habits, experiences, exposures, and intended uses of his/her property; (3) the jury must evaluate if each property suffered sufficient impact to constitute a nuisance given its nature, location, neighborhood, exposure, history and so forth; (4) the jury must determine causation for individual plaintiffs' alleged harm. (5) the jury must determine whether each class member traded convenience for a lower price and, thus, was already compensated for any inconvenience of living near GPC.

Plaintiffs rebut that Iowa's objective "normal person" nuisance standard and *Miller*'s endorsement of formulaic damages render most of these variabilities immaterial. To the extent individual issues persist after determining class-wide liability, Plaintiffs assert those issues may be resolved in a second-stage claims administration process.

[17] *Ludwig v. Pilkington North America*, *Inc.*, 2003 WL 22478842 at *5 (N.D.ILL.2003) (certifying class where common course of conduct and common nucleus of operative fact existed as to contamination, although there were multiple sources, manners, and levels of contamination); *Bates v. Tenco Services, Inc.*, 132 F.R.D. 160, 163-64 (D.S.C. 1990) (finding that although there will be individualized proof issues in ground water contamination cases, the common questions, such as whether there was contamination and whether the Defendant should be liable, predominate.); *Wehner v. Syntex Corp.*, 117 F.R.D. 641, 645 (N.D.Cal.1987) (certifying class where common questions existed as to whether the defendants were negligent in the manufacture, transportation, and distribution of hazardous chemical, and individual issues included amount of damages each plaintiff sustained and the issue of causation as to each plaintiff); *Watson v. Shell Oil Co.*, 979 F.2d 1014 (5th Cir. 1992) (certifying class with common issues as to liability despite existence of individual issues of causation).

a. Iowa's objective nuisance standard accounts for idiosyncrasies amongst proposed class members and their respective properties

"Iowa has statutory nuisance provisions that are supplemented by the common law of nuisance. Under the Iowa Code and under common law, the use of property or structures in such a manner as to unreasonably interfere with another's reasonable use and enjoyment of his property or in such a manner as to injure another's health is a nuisance." *Miller*, 720 N.W.2d at 567 (citations omitted). The Court applies the following rules and analysis in determining whether one's use of property constitutes a nuisance:

> Whether a lawful business is a nuisance depends on the reasonableness of conducting the business in the manner, at the place, and under the circumstances in question. Thus the existence of a nuisance does not depend on the intention of the party who created it. Rather, it depends on the following three factors: priority of location, the nature of the neighborhood, and the wrong complained of....
>
> *A fact finder uses the normal person standard to determine whether a nuisance involving personal discomfort or annoyance is significant enough to constitute a nuisance. The normal-person standard is an objective standard....*
>
> "... If normal persons living in the community would regard the invasion in question as definitely offensive, seriously annoying or intolerable, then the invasion is significant."

Id. at 567-68 (emphasis added) (citations omitted); *see also Perkins v. Madison County Livestock & Fair Ass'n*, 613 N.W.2d 264, 271 (Iowa 2000) ("In determining whether a property owner's use of his land is a nuisance, we use an objective, normal-person standard.").

Here, because Iowa law measures the existence of nuisance-level harm objectively, a nuisance claim brought under Iowa law is not inherently individual. Indeed, Iowa's objective standard renders many of Defendant's Due Process arguments—idiosyncratic sensitivities, physical infirmities, life style choices, preferences for use and enjoyment, housekeeping habits—immaterial to proving nuisance. Further, Iowa's objective-nuisance-standard supports Plaintiffs'

plan for presenting the jury with lay testimony from witnesses—whom the jury can find are "normal persons living in the community"—to prove the class-wide impact of the alleged nuisance throughout each subclass area.

Miller also supports Plaintiffs' proposed use of formulaic damages. For instance, *Miller* upheld the trial court's formulaic use of an identical per hour dollar value for all of the plaintiffs notwithstanding differences in their proximity to the source of pollution. *Id.* at 570-73. *Miller* also approved the trial court multiplying an identical per hour dollar value by sixteen hours per day—without requiring proof that each plaintiff was home during sixteen hours a day—because it assumed that "most normal people would be out of their home a period of eight hours a day." *Id.* at 570. Finally, *Miller* approved identical awards of $1,670 in cleanup costs per year based, not on actual costs incurred by each plaintiff, but on a list it deemed "reasonable" produced by just one of the plaintiffs. *Id.* at 572. *Miller* approving formulaic damages based on reasonable inferences and approximation renders more of Defendant's Due Process arguments—each class member living in different proximity to the source of the pollution, the varying rate of emission over time, the varying velocity and direction of the wind, and the number of hours each plaintiff was actually or wakefully present at his or her property—immaterial to proving nuisance.

b. Causation

Defendant asserts that proving its plant, as opposed to other sources, harmed a resident requires individual inquiry. First, Defendant asserts proposed class members live in varying proximity to other emission sources. Second, Defendant asserts there are multiple sources of contamination because potential class members have varying descriptions of the particulates depositing on their land. The Court will consider these arguments in turn.

i. Proximity to other sources

Defendant notes that alternative emission sources include the sewage treatment plant, HNI, Muscatine Power & Water, Cargill, Musco Lighting, Union Tank Car, Muscatine Metals, Potters Industries, railroad tracks, farmland and the Mississippi River. Defendant notes further that proposed class members live in varying distances and directions from each source. According to Defendant, depending on proximity and wind, other sources may have a greater impact on proposed class members' use and enjoyment.

The commercial nature of an area, however, does not preclude the finding of a nuisance. *See Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168, 180 (Iowa 2004) (finding evidence sufficient to support finding of nuisance even though defendant's "confinement operation was a customary enterprise in the neighborhood"); *Bates v. Quality Ready-Mix Co.*, 154 N.W.2d 852, 858 (Iowa 1967) (affirming finding of nuisance notwithstanding commercial character of neighborhood). The "nature of a neighborhood" is only one factor to consider in determining whether a nuisance exists. *Weinhold v. Wolff*, 555 N.W.2d 454, 459 (Iowa 1996). "Nor does the existence of similar businesses in the area preclude a finding that [Defendant's facility is] a nuisance given the differing testimony on whether the other [emission sources] in town created the complained of emissions." *Miller*, 720 N.W.2d at 568-69; *see Bates*, 154 N.W.2d at 858 (stating evidence showed "other commercial enterprises in the area created no excessive noise or dust" and "the noise and dust complained of by plaintiffs…came from defendant's plant.").

Furthermore, in *Olden v. LaFarge Corp.*, 383 F.3d 495 (6th Cir. 2004), the Sixth Circuit certified a mass environmental tort class despite the presence of other industrial sources. *See Id.* at 508 *disapproved of by Burkhead v. Louisville Gas & Elec. Co.*, 250 F.R.D. 287 (W.D. Ky.

2008).[18] *Olden* emphasized that "the defendant [did] not allege that the toxins from [other] sources are indistinguishable from the toxins from [its] plant" and the class was able to "show that their properties were frequently covered by cement dust," a contaminant directly attributable to the defendant. *Id.* at 508, 509 n. 5.

Here, Defendant has not alleged that the emissions from alternative sources are indistinguishable from its own emissions. Nor has Defendant alleged that other sources emit a significant amount of pollutants relative to itself. Defendant has simply noted that other emission sources exist within a 1.5 mile radius. Because Plaintiffs' air dispersion model reveals that Defendant's emissions disperse and deposit throughout the 1.5 mile geographical boundary, the mere existence of other sources does not preclude a finding of class-wide liability.

Of course, if it is determined that Defendant does not, on its own, emit enough pollutants to establish liability (either because Plaintiffs cannot establish causation or nuisance level harm), Defendant will prevail. If it is determined that an alternative emission source contributes to or causes a proportion of a subclass' injury, then damages can be reduced to reflect any proportion of the subclass' injury not caused by Defendant. "[A] number of courts have concluded manageability issues alone are rarely sufficient to refuse certification." *Anderson*, 776 N.W.2d at 851(upholding class certification despite challenging "but not insurmountable" difficulties of proving both individual injury and damages, deferring these, if required, to a second-stage claims

[18] This case is distinguishable from *Burkhead*, 250 F.R.D., where the court denied the plaintiffs' motion to certify a class based on the lack of predominance. In *Burkhead*, the plaintiffs failed to put forth any evidence that the cause of the entire class' damages could be determined in a single proceeding. *Id.* at 299. The plaintiffs' evidence was limited to complaints of residents within a single, geographically contained area about various substances and odors on their property and evidence of emissions from the defendant's facility. *Id.* at 292. Notably, the plaintiffs did not present evidence that the substances or odor were attributable to the defendant or that the airborne contaminants might have spread in all directions from the defendant's facility. *Id.* at 293. In fact, the plaintiffs in *Burkhead* did not provide an expert report at all. As a result, the court reasoned it was "given no evidence that a classwide determination of liability on any of Plaintiffs' theories would be possible." *Id.* at 300. As explained above, this case is more analogous to *Boggs v. Divested Atomic Corporation*, 141 F.R.D. 58 (S.D.Ohio 1991). In *Boggs*, the district court certified a class of residents surrounding a radioactive materials plant to recover for emotional distress and reduced property values. There, the plaintiffs supported their proposed class with expert testimony that the released radioactive materials spread to at least a six-mile radius.

administration process). Should a subclass become unmanageable, the Court can "modify the certification order or decertify the class altogether at a later time." *Anderson*, 776 N.W.2d at 851. Presently, however, the commercial nature of the area does not justify denying certification.

ii. Varying descriptions of particulates

Defendant argues that there are multiple sources of contamination because potential class members have varying descriptions of the particulates depositing on their land. In addition to the reasons stated above, the Court notes that Defendant's theories regarding multiple sources of contamination are factual in nature. Plaintiffs survived summary judgment, and they have a constitutional right to have these factual issues determined by a jury instead of this Court on a motion for class certification.

c. Transaction-by-Transaction evaluation

According to Defendant, every class members' property transaction must be evaluated to determine: (1) whether purchase price or rent reflects the desirability of location, and (2) priority of location. The Court will address these in turn.

i. Purchase price or rent reflecting inconvenience

Defendant alleges that purchase prices and rent for each property may already account for any alleged harm. According to Defendant, if purchase or rental price reflects a discount to compensate for inconvenience then the plaintiff suffered no injury and cannot be compensated again for the same annoyance. Defendant argues that it has a right to determine whether each class member was already compensated for inconveniences.

Defendant's argument, however, goes to damages, not liability. The fact a "potential class action involves individual damage claims does not preclude certification when liability issues are common to the class." *City of Dubuque v. Iowa Trust*, 519 N.W.2d 786, 792 (Iowa 1994). "[T]he predominance inquiry often turns on common issues of liability, not damages." *Jackson v. Unocal Corp.*, 262 P.3d 874, 890 (Colo. 2011). If additional individualized damage determinations are necessary, those determinations "will arise, if at all, during the claims administration process after a trail of the liability and class-wide injury issues." *Anderson*, 776 N.W.2d at 851. Defendant's claim that the potential for differing damages bars certification is unpersuasive.

ii. Priority of location

Defendant argues that it has a right to ascertain when each class member knew or should have known of the alleged contamination. According to Defendant, if a proposed class member knew of the contamination when moving into the area, then the class member has no loss. Defendant alleges that conditions at each property vary markedly day-by-day, location-by-location; thus, individual inquiry to each proposed class member is necessary.

Notwithstanding, Defendant asserts in its resistance that "anyone who did not know GPC created emissions and haze when they moved to GPC's neighborhood had to be 'living under a rock.'" Levetzow Dep. At 564-65 (App. At 117). In other words, the resistance argues, the pollution was so obvious for so many years that no one could have missed it. Given these claims, Defendant's query about individualized knowledge is unpersuasive.

d. Predominance of common questions of law or fact conclusion

While variations in the individual damage claims are likely to occur and other sources of emissions may pose unusual difficulties, common questions of law or fact regarding Defendant's liability predominate over questions affecting only individual class members such that the subclasses should be permitted for the fair and efficient adjudication of this controversy. Numerous variability concerns are alleviated via Iowa's objective nuisance standard and *Miller* approving formulaic approximation of damages. Further, there is nothing in the record indicating other emission sources will inevitably pose unusual difficulties. Due to the remedial nature of our class action rules, the manageability concerns raised by Defendant's arguments are presently insufficient to deny certification.

2. Fair and efficient adjudication of the controversy conclusion

One of the purposes of class action procedures "is to provide small claimants an economically viable vehicle for redress in court." *Amana*, 435 N.W.2d at 366. Class actions establish "an effective procedure for those whose economic position is such that it is unrealistic to expect them to seek to vindicate their rights in separate lawsuits." *Comes*, 696 N.W.2d at 320. Given the complexities of the liability issue and the expenses of this litigation, the claims of individual class members are insufficient in the amounts or interests involved to afford significant relief to the proposed subclass members without certification of the subclasses. Finally, class action will establish or extinguish Defendant's liability in a single proceeding for thousands of Muscatine residents. This will avoid unacceptable costs and repetition for both parties. The Court concludes class action offers the most appropriate means of adjudicating this

controversy and "should be permitted for the fair and efficient adjudication" of Defendant's liability. *See* Iowa R. Civ. P. 1.262(2)(b)

F. Adequacy of Class Representation

The final issue for this Court to consider is whether class representatives "fairly and adequately ... protect the interests of the class." Iowa R. Civ. P. 1.262(2)(c). In making this determination, the Court must consider whether: (1) the attorney for the named parties will adequately represent the interests of the class; (2) the named parties "do not have a conflict of interest in the maintenance of the class action"; and (3) the named parties "have or can acquire sufficient financial resources to guarantee that the class interests will not be harmed." Iowa R. Civ. P. 1.263(2). "On the issue of adequate representation, each case must be judged on its own facts. Resolution of the issue depends on all the circumstances presented." *Stone v. Pirelli Armstrong Tire Corp.*, 497 N.W.2d 843, 847 (Iowa 1993) (citation omitted).

1. Adequacy of Attorneys for Named Parties

Defendant's first adequacy objection arises from Plaintiffs' former counsel, Andrew Hope, currently representing a portion of Plaintiff's potential class members. "Andrew Hope solicitations" are the subject of Plaintiffs' pending motion for court supervision. Although Andrew Hope identified a small fraction of the class he says signed on with his firm, those parties have not appeared nor have any questioned the adequacy of Plaintiffs' counsel or the propriety of class certification. None have repudiated participation in the class action or indicated any plan of action separate from the class.

Defendant asserts that *Stone v. Pirelli Armstrong Tire Corp.*, 497 N.W.2d 843 (Iowa 1993) supports its adequacy objection. In *Stone*, the Supreme Court of Iowa rejected class

certification where fifteen potential plaintiffs did not want to be part of the class. *Id.* at 847. Notably, the class in *Stone* only had forty-five members; thus, the fifteen repudiators comprised a full third of the group. Here, Hope's signed clients comprise less than one percent of the sum of the subclasses proposed members.

Furthermore, in *Stone*, multiple failures led to the named plaintiff's disqualification as class representative. She moved out-of-state; she lacked financial resources to support the lawsuit; her testimony was contradicted by other class members; and "[m]ore disturbing" to the court, she had admitted destroying medical records in a divorce action "so they could not be a part of her dissolution of marriage action." *Id*. It was in the context of these circumstances and defects of character that the Court concluded "[t]he fact that fifteen of the present forty-five women employees of Pirelli do not want Stone to represent them" indicated to the Court both "a lack of confidence" in Stone, not Stone's counsel, and "a lack of community of interest." *Id.*

Here, no such circumstances exist. Plaintiffs, all Muscatine residents, retained experienced class counsel. They have secured testimonial support of more than 100 neighbors. They have arranged full support for the cost of the lawsuit and they have cooperated in every way with their counsel's efforts on behalf of the class. Defendant's first adequacy challenge is rejected.

2. Adequacy of Class Representatives

Defendant asserts class representatives have the following conflicts of interest in the maintenance of the class action: (1) Plaintiffs' decision to waive medical and property damage claims may bar absent class members' claims; (2) those who previously lived in the area have different incentives than those who still do; (3) class members disagree about the outcome they seek.

a. Waiver of claims

First, Defendant argues that Plaintiffs' decision to waive medical and property damage claims creates conflicts of interest. Defendant notes that Plaintiffs initially alleged health concerns and property damage, but subsequently decided not to pursue those claims. According to Defendant, this decision risks precluding absent class members from pursuing health and property claims they desire to bring.

Any concern over class members' rights to pursue claims for relief not sought in this class proceeding can be addressed in two ways. First, this Court has authority to limit any judgment in the case to the claims the parties have actually litigated. *See Lambert v. Iowa Dept. of Transportation*, 804 N.W.2d 253, 259 (Iowa 2011) (holding that the "rules of res judicata allow judges to control the preclusive effects of their decision…a court 'should have power to narrow the ordinary rules of claim preclusion'" and that "[a] clear signal from a court that it did not intend its decision to have preclusive effect on a specific claim should be honored."). Second, Iowa Rule of Civil Procedure 1.267 allows any class member who wishes to pursue other claims to opt out in order to do so. Iowa R. Civ. P. 1.267. The opportunity to opt out as required by Iowa Rule of Civil Procedure 1.267 solves any res judicata problem.

b. Incentives conflicts as between the named plaintiffs and the class

Second, Defendant argues that Plaintiffs' proposed class, including current and prior residents, creates conflicts of interest. Defendant asserts that a former resident may have sold to a current resident at a discount to reflect any diminished use and enjoyment of the property. Defendant notes that a seller may wish to recover the discounted price. Thus, a prior owner may wish to claim a discount was given, but the current owner may wish to claim the opposite.

Defendant's objection, however, is unfounded speculation. There is no evidence that any seller exists who wishes to sue Defendant to recover such a discount. More importantly, the proposed inquiry is irrelevant to the issue of special damages for loss of use and enjoyment. Damages for diminution in value are not sought here.

c. Disagreement among class members

Third, Defendant argues class members disagree about the outcome they seek. According to Defendant, those seeking industrial jobs may have a different view of attacking a company providing so many Muscatine jobs. Notwithstanding, "[t]he fact that some members of an alleged class do not favor the bringing of a lawsuit, or may feel that the representative party may have ulterior motives for bringing the suit, will not defeat the bringing of a class action." *Vignaroli*, 360 N.W.2d at 747 (citations omitted). The conflict between a representative and other class members must be fundamental, "going to specific issues and controversies." *Id.* at 746.

The central issue in this case is Defendant's operation, which purportedly released noxious smoke and odor and haze into the surrounding neighborhood for years. Defendant has not alleged any dispute between class members with regard to the subject matter of this suit. A class member disfavoring the lawsuit is insufficient to bar certification. The Court does not find that named plaintiffs have conflicts which render them inadequate representatives of the class members.

3. Financial resources

Defendant does not contest that named parties have or can acquire sufficient financial resources to guarantee that the class interests will not be harmed. The Court finds that named

parties have arranged full support for the cost of the lawsuit. The Court finds further that class representatives will fairly and adequately protect the interests of the class.

RULING

Based upon the foregoing analysis, the Court GRANTS Plaintiffs' Motion for Class Certification, certifying two subclasses as follows:

(a) Close Proximity shall consist of all persons who live in the area south of County Road G28 and Hershey Avenue. The line shall be as if though Hershey Avenue continued across the Mississippi River.

(b) Peripheral Proximity shall consist of all persons who live in the area north of County Road G28 and Hershey Avenue. The line shall be as if though Hershey Avenue continued across the Mississippi River.

The Court directs the clerk to provide copies of this Ruling and Order to the counsel of record. All of the above is SO ORDERED.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
LACV021232	FREEMAN LAURIE ET AT VS GRAIN PROCESSING CORPORATION

So Ordered

Tom Reidel, District Court Judge,
Seventh Judicial District of Iowa