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OPINIONS

ALLEGHENY COUNTY COURT OF COMMON PLEAS

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PLJ

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Opinions

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CITY OF PITTSBURGH vs.
FRATERNAL ORDER OF POLICE, FORT PITT LODGE NO. 1 (AARON FETTY)

Arbitration

Court upholds arbitrator's award.

Case No.: SA 22-729. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. Hertzberg, J. July 17, 2023.

OPINION

This Opinion supports my April 20, 2023 Order of Court, which upheld an arbitration award in favor of Defendant. On June 19, 2021 a group of City of Pittsburgh police officers assigned to Zone 5 held a cookout at the station at the end of their shift, and many of the officers consumed alcoholic beverages at the cookout. Following the cookout, many of the officers went to Industry Public House, a bar and restaurant in the Lawrenceville neighborhood of Pittsburgh where the officers continued to drink alcohol. Officer Fetty and a female police officer (who I will identify only as "Officer X" herein) were among those officers who continued to drink at Industry. Officer X became so intoxicated that she vomited and had to be removed from the bar. Officer Fetty drove Officer X home and assisted getting her into her home and into her bed.

On June 28, 2021 an anonymous letter was slipped under the door of the Office of Municipal Investigations ("OMI") detailing the events of June 19, 2021 and alleging that when Officer Fetty got Officer X back to her home he sexually assaulted her. OMI investigated the allegations and determined that the "facts…do not meet the criteria" of Indecent Assault under the Pennsylvania Crimes Code. (R.R. p. 292a). OMI found that Officer Fetty violated the Pittsburgh Bureau of Police Standards of Conduct relating to Conduct Unbecoming of an Officer and Truthfulness. (R.R. p. 292a). Based on this report the City of Pittsburgh initiated a Disciplinary Action Report ("DAR") charging Officer Fetty with a violation of Conduct Unbecoming of an Officer (Rule 3.6) and a violation of Truthfulness (Rule 3.19). On October 27, 2021, Officer Fetty was disciplined with a 3-day suspension, a 5 year last chance agreement for sexual harassment, counseling, and a transfer from Zone 5. (R.R. 351a).

On December 30, 2021, Officer X filed for and was granted a Temporary Order of Protection for Victims of Sexual Violence against Officer Fetty. On December 30, 2021 Officer X sent a department wide email alleging that Officer Fetty had sexually assaulted her and shared that she was granted the protection order. (R.R. pp 298a-311a). On March 23, 2022 Officer X was granted a Final Order of Protection for Victims of Sexual Violence.

On July 14, 2022, based on the email and Final Order of Protection for Victims of Sexual Violence, the City of Pittsburgh initiated DAR #22-059 against Officer Fetty for violations of the PBP Standards of Conduct relating to Obedience to Laws and Orders (Rule 3.1), Conduct Unbecoming (Rule 3.6), and Conduct Towards Superior Officers and Other Employees (Rule 3.8). (R.R. p. 270a). On September 9, 2022 Officer Fetty was disciplined with a 5 day suspension pending termination. (R.R. p. 272a).

Officer Fetty was terminated on September 27, 2022 and appealed to arbitration. On November 17, 2022 a three member arbitration panel held a hearing. The arbitration panel determined that the discipline issued in DAR 22-059 violated Article 19, Section II F of the collective bargaining agreement, which provides that "absent unusual circumstances, disciplinary action must ordinarily be taken not more than one hundred twenty (120) calendar days after the City should have reasonably know about the infraction" and granted Officer Fetty's grievance. (R.R. pp. 356a-357a). On December 29, 2022, the City of Pittsburgh appealed the arbitration award to the Court of Common Pleas of Allegheny County. Upon consideration of briefs filed by the parties and oral argument, I upheld the decision of the arbitration panel and this appeal to the Commonwealth Court of Pennsylvania followed. On June 8, 2023 the City of Pittsburgh filed its Concise Statement of Errors Complained of on Appeal alleging that I erred in two ways, which I will address in this Opinion.

The City first alleges that I "abused my discretion or committed an error of law by upholding the Arbitrator's disregard of a term of the Working Agreement." It is well established that Act 111 arbitration awards are subject only to a narrow certiorari scope of review and thus a reviewing court can only review questions of 1) the jurisdiction of the arbitrators; 2) the regularity of the proceedings; 3) an excess of the arbitrator's powers; and 4) deprivation of constitutional rights. Pennsylvania State Police v. Pennsylvania State Troopers Association, 540 Pa. 66, 71, 656 A.2d 83, 86 (1995). The City of Pittsburgh argues that the Arbitration Panel exceeded its authority because it "reformed" the Collective Bargaining Agreement when it did not find that "unusual circumstances" existed to warrant an exception to the 120 Day Rule. "Where resolution of the issue turns on a pure question of law, or the application of law to undisputed facts, our review is plenary. However, when it depends upon fact-finding or upon interpretation of the collective bargaining agreement, we apply the extreme standard of deference applicable to Act 111 awards; that is, we are bound by the arbitrator's determination of these matters even though we may find them to be incorrect." Pennsylvania State Police v. Pennsylvania State Troopers Ass'n, 840 A.2d 1059, 1062 (Pa. Commw. Ct. 2004). Here, the parties agree on certain facts such as when the anonymous letter was written, when the Protection from Sexual Violence Order was issued, etc. These events all arise from the same set of facts on June 19, 2021. The question is whether events such as the City's referral to the Allegheny County Police Department constitute an "unusual circumstance" as contemplated in the 120 Day Rule of the Collective Bargaining Agreement. This is a question of interpretation of the Collective Bargaining Agreement to which the arbitration panel is entitled to extreme deference, and I committed no error.

The City of Pittsburgh next argues that I committed an abuse of discretion when I "upheld the Arbitrator's award in violation of public policies." As the City of Pittsburgh themselves point out, the position that an arbitrator exceeds its authority if an award contravenes public policy has been explicitly rejected by the Supreme Court of Pennsylvania. See Pennsylvania State Police v. Pennsylvania State Troopers Association, 741 A.2d 1248, 12521253 (Pa.1999). Therefore, I did not abuse my discretion by upholding the arbitrator's award.

BY THE COURT:
/s/The Hon. Alan Hertzberg

BERNADETTE FEDORKA AND PAUL FEDORKA, husband and wife vs. UNIVERSITY OF PITTSBURGH MEDICAL CENTER, UNIVERSITY OF PITTSBURGH PHYSICIANS, PABLO SANCHEZ, M.D., JAMES D. LUKETICH, M.D., FACS, TAKASHI HARANO, M.D. and PATRICK CHAN, M.D.

JAMES D. LUKETICH, M.D., FACS, Third-Party Plaintiff vs. JONATHAN D'CUNHA, M.D., PH.D. and LARA WALEED SCHAHEEN, M.D., Third-Party Defendants

Medical Malpractice – Wiretap

This matter involves distinct Complaints joined by a golden thread – allegations pertaining to physician activity in the workplace.

Case No.: GD No. 18-017117. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. Ignelzi, J. July 2023.

MEMORANDUM OPINION AND ORDER OF COURT
Re: Defendant/Counterclaimant/Third-Party Plaintiff's Motion for Preliminary and Permanent Injunction, and for Related Order of Exclusion

This matter involves distinct Complaints joined by a golden thread – allegations pertaining to physician activity in the workplace.

The Fedorkas Complaint is a medical malpractice action seeking damages in sixteen (16) counts against varying Defendants averring causes of action in negligence/recklessness, vicarious liability, and loss of consortium. (Pltf. First Amd. Cmplt., ECF 27).[1] Of particular import are Counts XIII and XIV against Dr. Luketich which aver, inter alia, in pertinent part at (ECF 27, ¶¶200-201) (emphasis added):

200. [D]efendant Luketich's decision regarding hiring, staffing, surgical calls, ICU calls, rotations and supervisory reporting structure were motivated by recognition that his skills were being affected by substance abuse, his desire for continued financial gain for himself and his Division of Thoracic and Foregut Surgery, and he knew, recklessly disregarded and/or should have known that his decisions created an increased risk of serious harm to patients in the Lung Transplant Center including Ms. Fedorka.

201. [D]efendant Luketich's decisions regarding hiring, staffing, surgical calls, ICU calls, rotations and supervisory reporting structure were also motivated by a petty, personal dispute with his subordinate, Jonathon D'Cunha, M.D., Chief of the Lung Transplant Center, including defendant Luketich's actions to strip the Chief of the resources and authority he needed to effectively operate the center, while he knew, recklessly disregarded and/or should have known that this created an increased risk of serious harm to patients in the Lung Transplant Center including Ms. Fedorka.

Dr. Luketich asserts Counterclaims against the Fedorkas and pleads a Third-Party Complaint against Drs. D'Cunha and Schaheen, which aver inter alia, in pertinent part at (ECF 93, ¶¶230-234) (emphasis added):

230. Dr. James Luketich . . . did not know Mrs. Fedorka, was not her doctor, and never treated her, brings the following Counterclaims and Third-Party Claims to terminate and secure relief for a vicious vendetta launched against him by two of his former surgical colleagues, Third-Party Defendants Jonathan D'Cunha and Lara Schaheen— in part through the precipitation of the baseless claims brought against Dr. Luketich in this proceeding.

231. While working in Dr. Luketich's Department at UPMC, D'Cunha and Schaheen: a. engaged in an inappropriate relationship; b. jointly engaged in serious research misconduct and integrity violations; c. believed (incorrectly) that Dr. Luketich was undermining D'Cunha's leadership of the lung transplant division; d. believed (correctly) that Dr. Luketich, as the Chair of the Department in which they both worked, was trying to separate them and end their inappropriate relationship; and e. decided and conspired to "take [Dr. Luketich] down and watch him die a slow death."

232. As part of this conspiratorial effort, D'Cunha and Schaheen illegally surveilled and captured a private, privileged consultation between Dr. Luketich and his treating physician in clear violation of Title III of the Omnibus Crime Control and Safe Streets Act of 2018, of the Pennsylvania Wiretap Act, of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), of the physician/patient privilege, of Dr. Luketich's right to privacy, and of UPMC's policies regarding the confidentiality of patient encounters.

233. D'Cunha and Schaheen then distorted and disseminated information gleaned from this illegally captured consultation to make false, defamatory allegations ("the False and Defamatory Allegations"), often anonymously, about Dr. Luketich to among others: (i) UPMC, (ii) the Pennsylvania Board of Medicine, (iii) a competing academic medical center, (iv) the U.S. Attorney's Office in Pittsburgh, (v) the Federal Bureau of Investigation and (vi) private lawyers (on information and belief, including counsel here); and (vii) the general public, as the False and Defamatory Allegations appear in the First Amended Complaint docketed in this matter.

234. The False and Defamatory Allegations against Dr. Luketich have largely already been published in the Fedorkas' First Amended Complaint. But because they derive from an unlawful wiretap, the False and Defamatory Allegations are subject to suppression and exclusion, and Dr. Luketich will move for an order doing just that at the appropriate time.

Moreover, this Court takes judicial notice of the matter of United States Ex Rel. D'Cunha v. Luketich, UPMC & UPP, ("D'Cunha, et al. v. Luketich, et al.") Civil Action No. 19-495 (US. Dist. Ct. W.D. Pa. 2019) (case resolved April 17, 2023)[2] wherein Jonathan D'Cunha, M.D., as Relator, initially brought an action on behalf of the United States against James D. Luketich, M.D., by filing a 46-page, 188-paragraph complaint under seal and serving it on the United States, but not Defendants, pursuant to the False Claims Act ("FCA") procedure, 31 U.S.C. § 3730(b)(2).[3] See D'Cunha, et al. v. Luketich, et al., 2022 WL 2359417 at *2 and n.2. (June 30, 2022, Order re: Defendants' Motion to Dismiss Denied, Bissoon, J.).[4]

To state that the competing parties and counsel have an intertwined judicial history, and at times have morphed their respective legal claims and defenses into a scintillating saga of operatic proportion, seeking to play their roles not just for the Court – but to the media – would be a diplomatic understatement.[5] As identified by Judge Bissoon of the United States District Court in D'Cunha, et al. v. Luketich, et al., 2:19-CV-00495, 2022 WL 672257, (U.S. Dist. Ct. W.D. Pa 2022):

The Court reminds parties that this forum is not a chance to relitigate squabbles in their state case, and the parties should make best efforts to confer with each other before presenting issues to the Court. To the extent Dr. D'Cunha needed to refer to

specific sealed filings, such as the specific filings he wanted to share with his counsel and Dr. Schaheen and her counsel, or the June 9, 2021 Order (Doc. 28), he could have done so by using docket numbers and dates. It appears that in order to seek the relief requested, he need not have discussed their contents, which remain under seal.

Id., 2022 WL 672257 at *1.

To be clear, this Court's judicial notice of the above qui tam action and Judge Bissoon's assessment is not an indictment of the parties' respective positions herein regarding the subject sealed documents and the parties' right to advocate their respective positions, nor is it a critique of the media's inherent First Amendment constitutional or common-law right to judicial records; but is a discernment that in-court grandstanding-advocacy or pettyfoggery does little to promote the prompt and proper administration of justice pursuant to the applicable law governing this case. A word to the wise is sufficient.

The Rule of Law shall not be subverted by over-dramatized in-court theatre. The parties have been and are counseled wisely to heed the Court's admonishments about decorum. Whereas, with this contextual backdrop, this Court evaluates the merits of the Parties' contending positions related to the Movant's Motion for Preliminary Injunction, Responses thereto, innumerable briefs[6], and the parties' submitted Findings of Fact and Conclusions of Law.[7]

I. Injunctive Relief Summary

Dr. Luketich seeks to enjoin Plaintiffs/Counterclaim Defendants Bernadette and Paul Fedorka ("the Fedorkas") and Third-Party Defendants Jonathan D'Cunha, M.D., Ph.D. ("Dr. D'Cunha") and Lara Waleed Schaheen, M.D. ("Dr. Schaheen") and their representatives, agents, counsel and alleged co-conspirators (collectively "Respondents") from continuing to inflict irreparable harm on Dr. Luketich arising from their alleged illegal interception and/or use of an alleged confidential, HIPAA-protected physician-patient communication between Dr. Luketich and his primary care physician occurring in Observation Room G212 ("Room G212") of UPMC Presbyterian Hospital on February 26, 2018. Dr. Luketich seeks to enjoin the Respondents from disclosure or use of any and all information derived from an audio recording[8] of the communication as a violation of the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa. C.S. §§ 5701, et seq. ("PA Wiretap Act"). As a separate ground for relief independent of injunction, Dr. Luketich also seeks an Order under the PA Wiretap Act's Exclusion Provisions, 18 Pa. C.S. § 5721.1(a)(1)[9] to suppress any and all intercepted communications and evidence derived from the covertly obtained audio recording.[10]

Dr. Luketich requests this Court grant the Motion because Dr. Luketich can satisfy all necessary elements to support issuance of a preliminary and permanent injunction, and for exclusion under the PA Wiretap Act. (See ECF 121).

II. Factual Background

Movant Dr. Luketich alleges that on February 26, 2018, Drs. D'Cunha and Schaheen illegally intercepted confidential physician-patient communications between Dr. Luketich and his doctor in Room G212, an alleged private and secure area identified as Room G212, in violation of the PA Wiretap Act. Dr. Luketich further alleges that Drs. D'Cunha and Schaheen then illegally disclosed a false version of the Wiretap content, including a transcript ("Transcript") to multiple parties, for their alleged misuse in supporting the Fedorkas' lawsuit. Dr. Luketich claims this disclosure of the Wiretap contents is part of a vindictive campaign by Drs. D'Cunha and Schaheen to defame and harm him. (See ECF 122, pp. 1-2).

In response, as represented by Dr. D'Cunha's Counsel:

Pre-trial discovery has established the undisputed fact that in early November of 2018 a package containing a Transcript and a Tape of the alleged content of the Recorded Conversation was anonymously mailed to several persons at the University of West Virginia and Dr. Schaheen, and then several months later to Dr. D'Cunha. The Transcript's cover letter describes the package as "a tape of a conversation between Dr. James Luketich and Dr. David Wilson at UPMC Presby." The Transcript and cover letter are unsigned, undated, and give no indication as to the date of the recording or its transcription.

(D'Cunha Memorandum, ECF 176, p.2) (emphasis added).

Substantial information and testimony was offered during hearings on June 10, 2022; August 22-24, 2022; and December 13-16, 2022[11]; with the parties subsequently submitting Findings of Fact and Conclusions of Law.[12] Among the issues litigated was the application of a "reasonable expectation of privacy" standard to the factual circumstances surrounding the alleged Wiretap. The record is replete with nuanced factors about the circumstances surrounding Dr. Luketich's conversation with his physician in Room G212. During the hearings, in-court live testimony was presented by the following witnesses on the identified date(s): Dr. James Luketich (6/10/22 and 8/22-23/22); Dr. Inderpal Sarkaria (6/10/22); Duc Nguyen, Guardian Consultant (8/22/22); Jerry Hatchett, Verasity Forensics (8/24/22 and 12/13/22); Dr. David Wilson (8/24/22); Andrea Clark Smith, Esq., UPMC Associate Chief Legal Officer (12/13-14/22); Jeffrey Francis, UPMC Director of Public Safety Administration (12/14/22); Anita Soltez, UPMC Director of Operating Rooms (12/15/22). Dr. Jonathan D'Cunha and Dr. Lara Schaheen did not testify during the preliminary injunction hearings; however, each was deposed. Dr. C'Cunha was deposed on October 12, 2021; and Dr. Schaheen was deposed on October 13, 2021.[13]

During the pendency of this decision, The Pittsburgh Post-Gazette as Intervenor obtained a Transcript of the recording via a Freedom of Information Act ("FOIA") request to West Virginia University Health System.[14] The Transcript was subsequently published on May 15, 2023 at 5:33 a.m. contained within an online article authored by Mike Wereschagin. See "Newly released transcript reveals UPMC doctors' exchange," The Pittsburgh Post-Gazette available at https://www.post-gazette.com/local/city/2023/05/14/upmc-doctors-transcript/stories/202305140105. As a result of publication, The Pittsburgh Post-Gazette moved to unseal the record. The Post-Gazette argues that Dr. Luketich's privacy interest pursuant to any alleged Wiretap Act violation no longer exists to maintain the seal, and the public should have access to the record in this case. See also The Pittsburgh Post-Gazette Motion to Unseal Record (ECF 291) and Fedorkas' Response to Intervenor's Motion to Unseal Record (ECF 299).

This Court herein addresses the legal standard applicable for issuance of a preliminary and/or permanent injunction and analyzes the instant facts to the legal standard to determine whether an unlawful wiretap occurred and/or whether any exceptions apply to its disclosure in this matter and/or whether the record should be unsealed.

III. Injunction Legal Standard

For a preliminary injunction to issue, Pennsylvania law requires that the moving party show: (1) that the injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by money damages; (2) that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings; (3) that preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) that the activity it seeks to restrain is actionable,

that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that is likely to prevail on the merits; (5) that the injunction it seeks is reasonably suited to abate the offending activity; and (6) that a preliminary injunction will not adversely affect the public interest. Home Line Furniture Indus, Inc. v. Banner Retail Marketing, LLC, 631 F. Supp. 2d 628, 631, 632 (E.D. Pa. 2009) (citing Pa. R.C.P. 1531(a)); Vigilante v. Statharos, No. 08-cv-3408, 2009 WL 414014, at *3 (E.D. 12 Pa. Feb. 18, 2009); Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc., 828 A.3d 995, 1001 (Pa. 2003); Warehime v. Warehime, 860 A.2d 41, 46-47 (Pa. 2004).

The showing necessary for a permanent injunction includes some, but not all, of these elements necessary for a preliminary injunction: (1) the right to relief is clear; (2) the injunction is necessary to avoid injury that cannot be compensated by money damages; and (3) that greater injury will result if the court does not grant the injunction than if it does. Doe v. Zappala, 987 A.2d 190, 193 n.2 (Pa. Cmwlth. 2009).

See (ECF 122, pp. 11-12).

IV. Alleged Illegal Wiretap

A. The Intercepted Communication and Disclosure of Tape and Transcript

There is no dispute that Room G212 was the location of the February 26, 2018 conversation between Dr. Luketich and his personal physician Dr. David Wilson. The meeting between Luketich and Wilson was set up through a series of text messages the two sent between each other that same day. The text messages and a summary compilation were introduced into evidence. The evidence is undisputed that only Drs. Luketich and Wilson knew a meeting was occurring on February 26. Only Luketich and Wilson knew the time and place. There is no other evidence that anyone other than Luketich and Wilson had arranged their meeting before February 26. As such, there could be no reasonable opportunity to plant a recording device in advance knowing the exact location, date, and time of their meeting. In other words, it was not until the two physicians started texting each other that day that they agreed upon the logistics. The significance of this inference is that if the interceptor was someone who prior to February 26 had planned to record them, then the actor would have had no idea of the logistics until a time contemporaneous to the conversation.

In support of this inference, Dr. Luketich admitted there was no meeting preset for February 26, and that his text at 10:50 a.m. was his effort to set up a meeting with Dr. Wilson:

Q. Now, we saw through your direct testimony that on that date you had no preset meeting with Dr. Wilson. In other words, you hadn't decided the day before or any other time before at 10:50 a.m. on that date that you might want to have a meeting with Dr. Wilson. Do you understand my question?

A. Yes. I'm aware of his schedule and that he typically comes to Presby for education days so I was laying the groundwork for what would be convenient for both of us to meet.

(8/22/22, Luketich, p. 225 lines 11-21)

The February 26, 2018 meeting between Drs. Luketich and Wilson was spontaneous which rules out that a recording device could have been planted in or about the Room G212 premises. The Court finds that Drs. Luketich and Wilson had not scheduled to have a meeting on February 26 and the likelihood that a recording device was planted in the room to record the specific time the two physicians had their conversation is, in practicality, highly remote in possibility.

To the contrary, there was only one way to record the conversation; the recording would require direct human intervention with a recording device – which in the current technological scenario – is easily achieved by use of a personal cellphone or other mobile recording device.

Drs. Luketich and Wilson had a less-than-conventional physician-patient relationship. Conventional wisdom and experience acknowledge that with certain identifiable exceptions, most physician-patient meetings occur in the physician's office. The day of the doctor house call is now but a rare remnant of the past. The modern age with electronic recordkeeping, medical coding, explanation of benefit notices, and insurance reimbursement are now a realistic part and parcel of healthcare. UPMC and its physicians are no exception. Indeed, UPMC is known for pioneering advancements in healthcare and health plans. See https://www.upmchealthplan.com/. UPMC maintains electronic medical records. In this case, Dr. Wilson made an exception for his patient. Dr. Wilson kept Dr. Luketich's paper medical records in his office. See (8/24/22 Hrg. 240:23 to 242:2, Wilson). Although this practice is not of itself untoward, it is a factor pertaining to the proper scope and evaluation of the Luketich-Wilson, physician-patient relationship as being far from the norm.

Dr. Wilson was prescribing Suboxone which contains buprenorphine, a Schedule III controlled substance under the Controlled Substances Act. Suboxone (buprenorphine and naloxone) is a combination of two opioid receptor antagonists used in the maintenance treatment of opioid addiction. See https://www.rxlist.com/suboxone-drug.htm#interactions and https://www.rxlist.com/suboxone-drug.htm#description.[15] Dr. Luketich had a previous pain specialist, Dr. Lloyd in Butler County who had initially prescribed the medication in 2008 and required a lot of urine tests over the course of three years. (8/22/23 Hrg. 205:18 to 206:17, Luketich). In 2011, Dr. Luketich, transferred his Suboxone prescription care to his primary care physician Dr. Wilson at UPMC Shadyside in Pittsburgh. (8/22/23 Hrg. 207:19 to 206:7, Luketich). Dr. Wilson is "triply boarded in internal medicine, pulmonary medicine, and occupational med[icine]." (8/22/23 Hrg. 208:18 to 209:2, Lukeitch). Dr. Wilson is not a pain specialist nor addiction specialist. (8/24/23 Hrg. 232:7-9 and 232:25 to 233:6, Wilson). Dr. Wilson did not require the urine screens that Dr. Lloyd required. (8/22/23 Hrg. 216:18-21, Luketich; and 8/24/22 Hrg. 256:25 to 257:2, Wilson). Dr. Wilson also confirmed that he did not require any drug testing, such as blood or hair samples, while he treated Dr. Luketich. (8/24/22 Hrg. 256:24 to 257:6, Wilson). While Dr. Wilson was attempting to convince Dr. Luketich to completely wean himself off Suboxone, this had not occurred. (8/24/22 Hrg. 245:15-18; and 246:2-13). Dr. Wilson testified he was Dr. Lukeitch's personal physician for a long time. (8/24/22 Hrg. 208:23 to 209:7, Wilson). Dr. Wilson specifically denied he was Dr. Luketich's primary care physician. (8/24/22 Hrg. 239:1 to 240:2, Wilson). Dr. Wilson conceded that he is not a primary care physician and if Dr. Luketich were asked, Dr. Luketich would say the he was Dr. Luketich's primary care physician. (Id.). Dr. Luketich testified in a similar, if not identical manner. (8/23/22 Hrg. 142:21 to 146:24, Luketich).

Moreover, Dr. Wilson was Dr. Luketich's colleague at UPMC and Dr. Luketich "contributed a small portion [$50,000] to the department for his [Dr. Wilson's services[.]" (8/23/23 Hrg. 126:17-24, Luketich responding to cross-examination related to page 6 of the Transcript). See also (8/24/22 Hrg. 257:25 to 258:3, Wilson). Dr. Luketich was never charged for any of Dr. Wilson's services. (8/24/22 Hrg. 257:21-24; and 269:9-11, Wilson). Dr. Luketich's informal relationship to Dr. Wilson as it relates to dispensing the Suboxone, although legally compliant, presents as an irregular arrangement.

The bulk of the recorded conversation with Dr. Luketich (as produced on the Transcript) was not even doctor-patient related.[16] Of the eight-page Transcript total, approximately one-half of page 1 and one-half of page 2 were related to the subject

medication. Nevertheless, Defendants desire the Court accept that the February 26 meeting be given sacrosanct status under the physician-patient privilege notwithstanding the informal nature, location, and context of the meeting. Dr. Wilson acknowledged on cross-examination that he and Dr. Luketich would have physician-patient conversations in either of their respective offices. (8/24/22 Hrg. 273:5-8, Wilson). Simply stated, if Dr. Luketich and Dr. Wilson wanted to maintain a normal physician-patient relationship; this could have occurred by their meetings transpiring in either of their private offices.

While the physician-patient relationship was unusual, those facts alone are not dispositive of whether Drs. Luketich and Wilson had a reasonable expectation of privacy in their February 26, 2018 meeting and conversation. The Court must analyze the totality of the circumstances of the meeting to determine the issue. As established by additional circumstantial evidence and inference, the backdoor to Room G212 was open to some degree during the entirety of the conversation. Director Soltez testified that when the backdoor to Room G212 is closed, a ventilation system fan located outside of G212 cannot be heard inside G212. (12/15/22 Hrg. 653:13-22, A. Soltez). Audio Expert J. Hatchett testified that the tape recording of the February 26, 2018 conversation reveals a large fan noise present throughout the recording. (12/13/22 Hrg. 295:8-13 Expert J. Hatchett). Dr. Sarkaria confirmed that if both doors are shut, one cannot hear what is going on outside the doors. (6/10/22 Hrg. 134:13 to 135:7, Sarkaria). As such, it is proper to infer that because the ventilation system fan noise could be heard on the recording; then the backdoor to Room G212 was open during the conversation between Drs. Luketich and Wilson. Moreover, Drs. Schaheen and D'Cunha each testified that they observed the door propped open. (10/12/21 Schaheen Dep. 179:15-22 and 10/13/21 D'Cunha Dep. 379:17 to 380:16).

Dr. Sarkaria confirmed that there are two doors to Room G212 – the sidedoor has a keypad, while the backdoor is restricted by cardkey entry. (6/10/22 Hrg. 134:13 to 137:5, Sarkaria). Dr. Sarkaria had entered G212 through the sidedoor with the punch code on the keypad; and further testified that the backdoor was not open. (6/10/22 Hrg. 143:1 to 144:4, Sarkaria). However, on cross-examination, Dr. Sarkaria granted that he did not physically inspect the backdoor to ensure it was one hundred percent closed, and further conceded that he did not look directly at the backdoor. (6/10/22 Hrg. 163:22 to 164:12; and 227:15-20, Sarkaria).

Because the ventilation system fan noise could be heard on the recording; the Court finds that the backdoor to Room G212 was open in some manner during the conversation between Drs. Luketich and Wilson which allowed at a minimum Drs. Schaheen and D'Cunha to hear the conversation.

Drs. Luketich and Wilson had no idea that they were being recorded on February 26 and as such, years later, would not have any reason to remember the specifics of the physical confines of the meeting, e.g., door closed, door open, door ajar, etc., any more than any other date. In fact, when Dr. Wilson was first asked about the February 26, 2018 meeting, he responded as follows, "I can't recall. I think since 2018, I probably had fifty to sixty meetings with Dr. Luketich. I don't know the dates." (8/24/22 Hrg. 209:16-23, Wilson). Likewise, when shown his text messages arranging the meeting, he did not recall any of them. (8/24/22 Hrg. 211:18-24, Wilson). Dr. Wilson could not recall whether he and Dr. Luketich had met in Room G212 on February 26, 2018. He testified they would meet in one of two different rooms – an observation room between Operating Rooms 25 and 26; or Room G212. (8/24/22 Hrg. 217:24 to 218:12, Wilson).

In other words, people remember events when there is a triggering event that renders the events "out of the ordinary." For example, one's wedding day or the death of a family member or friend. By way of example, this Honorable Court's generation remembers where they were and what they were doing on the day President John F. Kennedy was horrifically assassinated. The lack of a triggering event is to be contrasted with the physical evidence produced at hearing and reasonable inferences that may be made or drawn from the circumstances.

Moreover, in contrast to Drs. Luketich and Wilson's lack of a triggering event as to an otherwise innocuous meeting as another "day in the life;" Drs. Schaheen and D'Cunha would, by nature, have a more specific recollection. Drs. Schaheen and D'Cunha were -at the very least - eavesdropping on a conversation which was paramount to their professional and personal concerns. They had reason to remember.

While Dr. Luketich is not tasked with the burden of establishing who made the recording, this Court believes addressing this issue assists the Court in determining and evaluating the credibility of the parties for purposes of the preliminary injunction. Additional facts inferentially tie the recording (Tape and subsequent Transcript production) to Dr. Schaheen, Dr. D'Cunha, and/or both working in concert.

The record establishes that Dr. Schaheen had secretly recorded Dr. Luketich on her iPhone camera on Friday, February 23, 2018, two days before the Monday, February 26 Luketich-Wilson meeting. (ECF 93, p. 53, ¶260). Dr. Schaheen's action two days earlier (the prior business day) demonstrates that she had the contemporaneous means and a motive to record Dr. Luketich. As expressed by the Fedorka's, "[L]uketich's decisions [regarding hospital protocol] . . . were motivated by a petty, personal dispute with his subordinate, Jonathan D'Cunha, M.D.[.]" See (Fedorkas' First Amd. Cmplt, ECF27, ¶201). It is not far from understanding human nature that Dr. Schaheen, involved in some relationship with Dr. D'Cunha (which later developed into a romantic relationship), would seek to garner support for D'Cunha in the "petty, personal dispute."[17] She had already videotaped Dr. Luketich and testified about his Suboxone use.

Moreover, on February 26, 2018, Dr. Schaheen, as an observing trainee was, at some point, present in Operating Room 25 with Dr. Sarkaria. (6/10/22 Hrg. 182:5-11, Sarkaria). An issue arose with the patient decompensating and Dr. Schaheen expressed concern that the procedure should stop. (6/10/22 Hrg. 185:10 to 186:5, Sarkaria). Dr. Sarkaria went to consult with Dr. Luketich, and it was initially determined that the procedure continue. The patient was prepared for the next step and "during that time, they [the patient] decompensated." See (6/10/22 Hrg. 192:7 to 202:12, Sarkaria). At that point, Dr. Sarkaria made the decision to discontinue the robotic surgery. (6/10/22 Hrg. 201:8-11, Sarkaria). After discontinuing the TEE procedure[18] and other assessments, Dr. Sarkaria then went to look for Dr. Luketich and entered G212. This testimony comports with the Transcript at pages 7-8, which in pertinent part transcribes Dr. Sarkaria stating to Dr. Luketich:

SAKARIA: I think we're gonna stop. Cardiology is coming down. The TEE. . . . I'm doing an esophagectomy. But I'm only half way through.

LUKETICH: I'm happy to help.

SARKARIA: I appreciate it.

(Transcript, 7-8).

The Court finds the above interaction significant as it places Dr. Schaheen in the operating room - observation room locations on February 26, 2018 and additionally, provides additional motive or impetus for Dr. Schaheen to affirm her initial opinion to discontinue the procedure despite being initially overruled by Dr. Sarkaria upon his initial consultation with Dr. Luketich. In simple humanistic terms, a recording of their conversation could be proof of Dr. Schaheen being correct, if – heaven forbid – the

patient did not fair well; or alternatively, further "proof" that her medical opinion was not respected. As such, Dr. Schaheen, the trainee would be vindicated.

Suffice it to say, the operatic antagonists; Drs. D'Cunha and Schaheen juxtaposed with Dr. Luketich might even intrigue the composing talents of Verdi, Rossini, Wagner, or whomever one prefers in their appreciation of musical theatre. Notwithstanding the performing arts, the allegations herein are not fictional but present with serious allegations and counter-allegations. The Fedorkas' alleged "petty, personal dispute" provides a contextual backdrop for motive of a party with an interest in the dispute to record the conversation of February 26, 2018 when opportunity was present.

As further contextual backdrop, in or around February 2018, Dr. Luketich was directed by UPMC Human Resources to inquire of Dr. Schaheen and Dr. D'Cunha's personal relationship at the time Dr. Schaheen was a resident, and to investigate allegations of plagiarism and misrepresentations of authorship between Dr. Chan and Drs. Schaheen and D'Cunha. (8/22/22 Hrg. 67:1 to 69:3, Luketich). Among allegations was that Dr. D'Cunha had arbitrarily changed the authorship of a medical abstract, removed Dr. Chan's name, and made Dr. Schaheen first author. See (8/22/22 Hrg. 79:14-19, Luketich). While this Court does not make a fact-finding about the truth of the underlying plagiarism allegations (which is not within the Court's purview), it does note that the continued tension between the antagonists provides further impetus for motive to record and/or retaliate against the person charged with the inquiry.

As further indicia, on April 24, 2018, Dr. Luketich learned of an anonymous complaint against him made to UPMC and believed it was made by Dr. D'Cunha. See (8/22/22 Hrg. 83:25 to 86:6, Luketich). Also, on April 24, 2018, Dr. Schaheen sent an email [Luketich Ex. 6] to Dr. Wilcox, one of the heads of the Office of Integrity for the University of Pittsburgh alleging inter alia, "Over the course of the past several weeks, my chairman, Dr. James Luketich's behavior has damaged my academic career and reputation and violated my academic rights." (8/22/22 Hrg. 89:9-13, Luketich). Adding to the drama, Dr. Luketich alleges that Dr. Schaheen and Dr. D'Cunha, "decided and conspired to 'take [Dr. Luketich] down and watch him die a slow death.'" See Luketich Amended Counterclaims and Third-Party Claims (ECF 93, ¶231(e).[19] At her deposition, Dr. Schaheen sought to construct her responses employing semantic distinctions by parsing words and specific phrases as applicable only to particular persons in most particular order.[20] See (10/12/22 Schaheen Dep. 253:12 to 254:17). Clever, perhaps half-calculated, but not wholly credible. The friction between the antagonists is undeniable. Attempting to reframe it at deposition on nuanced wordsmithing is folly.

Yet again, this Court does not make a fact-finding about the truth of the underlying tit-for-tat allegations (which is not within the Court's purview), but finds there to be sufficient animus between the antagonists to conclude that Dr. Schaheen and/or Dr. D'Cunha, alone or in concert, had motive to record Drs. Luketich and Wilson on February 26, 2018.

Finding motive, this Court also finds that Drs. Schaheen and/or D'Cunha had opportunity to record, produce, and/or disseminate the Transcript. Garnering recorded evidence of Dr. Lukeitch's medication usage could be used as substantial proof and/or leverage -- whether by proper or improper means for proper or improper ends.[21] The record identifies that on February 26, both Drs. D'Cunha and Schaheen were outside of Room G212 at some point in time during the Luketich-Wilson conversation. They each testified that the backdoor was open, and they overheard the conversation. See (10/12/21 Schaheen Dep. 143:9 to 144:15; and 10/13/21 D'Cunha Dep. 379:17 to 380:16). Although Drs. D'Cunha and Schaheen each deny that they (individually or jointly) had recorded the conversation, they both admit that they overheard Drs. Luketich and Wilson's conversation. It is beyond mere coincidence. To the contrary, Dr. Schaheen and D'Cunha's after-the-fact recitation of the specific facts contained in the recording -- which purports to be but a segment of the entire meeting -- belies Dr. D'Cunha and Schaheen's denial of intercepting the conversation in an alleged contravention of the Wiretap Act.[22]

Chronologically, it is important to note that the evidentiary confirmation of Dr. Luketich's Suboxone use was not forthcoming until the False Claims Act qui tam action was filed in 2019 at D'Cunha, et al. v. Luketich, et al., supra. In other words, the existence of the recording and Transcript were and could become "proof" of the medication usage to support Drs. Schaheen and D'Cunha's concerns. This is bore out by Dr. D'Cunha's status as the Relator in the above-referenced action, whereby as a private citizen whistleblower he may receive a portion of the government's recovery on a successful qui tam action. See footnotes 1-3, infra. For any and all of the reasons above, the Court finds Drs. D'Cunha and Schaheen's testimonial denial of recording the Luketich-Wilson conversation to not be credible in light of their exclusive motive, opportunity, admission of aural eavesdropping, and prior conduct to intercept the conversation.

Not only are Drs. Schaheen and D'Cunha's fingerprints on the interception of the communication, these fingerprints are on the disclosure of the Tape and Transcript. As identified in footnote 16 herein, the Transcript document totals ten pages – eight of which are the Transcript plus the cover letter and the envelope. As this Court sits as fact-finder for purposes of the preliminary injunction, the following inferences related to the Transcript cover letter and envelope are made. These inferences can be made based upon the plain language of the text contained in the cover letter and on the envelope.

The cover letter was written by someone who heard the recording and can identify the voices on the Tape and location (i.e., "this is a tape of a conversation between Dr. James Luketich and David Wilson at UPMC Presby."). The author has knowledge about the persons on the recording and their hospital positions (i.e., Dr. Luketich is chairman of the department… Dr. Wilson…works under Dr. Luketich). The author has knowledge of the timing of the recording which comports with the facts related to February 26, 2018 (i.e., "2 patients are asleep in the operating room…"). The author has institutional hands-on "knowledge" to make allegations of detailed prior events (i.e., Dr. Lukeitch "talks on the phone while operating," "doesn't wash his hands," and "dropped phone in a patients [sic] body"). The author has knowledge of "his [Dr. Luketich's] drugs."[23]

Direct inferences can be made based upon simple inductive logic of the assertions contained in the plain text of the cover letter. The author would have to know/have access to the "2 patients" in the OR on 2/26/18 AND knowledge of Dr. Luketich's "drug" use. It is unlikely that any casual "observer" on 2/26/18 would know of these factors unless they were in direct or constant contact with Luketich; thereby eliminating the likelihood that it was an "observer" other than Schaheen (trainee in the department and close associate of Dr. D'Cunha).[24] For example, Dr. Schaheen testified at deposition, "[h]e [Dr. Luketich] also has physically dropped the Suboxone in front of me." (10/12/21 Schaheen Dep. 135:23-24). The only other hypothetical "suspect" with such combined knowledge would have to be a nurse/tech assistant working in the ORs that day and had opportunity (highly improbable) to record and then have the recording forwarded, transcribed and then sent via mail to Schaheen.[25]

The envelope is addressed to Lara Schaheen. There is no return address on the envelope. Although the envelope is a photocopy of the original, the Court cannot discern if the envelope was photocopied in landscape or portrait format and whether any additional text or marking are not represented. Nevertheless, the Court can make the following findings based upon plain visualization of the document.[26] There is no postmark or cancellation mark on the three stamps represented. Pursuant to United

States Postal Service regulation 3.4.8 Cancellation of Stamps: "black ink must be used for cancellation. It must provide enough indelibility and contrast to prevent reuse of the stamps. The precancel permit number must not be obscured by the cancellation." The plain eye does not observe any evidence of cancellation of the stamps on the envelope nor any postmark. See https://about.usps.com/handbooks/po408/ch1_003.htm.[27]

The two "Butterfly" postage stamps also incorporate a non-machinable surcharge which permits the sender to have the envelope hand-stamped. See https://wherecanibuystampshq.com/non-machinable-stamps/. "A nonmachinable mailpiece is sorted outside of the standard automated mail process. A surcharge applies because it is more expensive to processes." See https://faq.usps.com/s/article/What-is-the-Non-Machinable-Surcharge-for-First-Class-Mail. The represented stamps on the envelope are not hand-stamped, nor is there an automated or mechanized post-mark.

The subject envelope also contains a digital bar code at the bottom of the document. "A barcode is a series of long and short bars that represent ZIP Codes, ZIP+4 codes, and delivery addresses. The Postal Service uses automated equipment that reads the barcode to process and sort mail. At the Postal Service, the barcode tells us where to deliver your mail." https://pe.usps.com/BusinessMail101?ViewName=Barcodes. The USPS identifies such a code as an Intelligent Mail® Barcode ("IMb"). "The IMb is used to sort and track letters, cards and flats and offers greater versatility by allowing many services to be requested and embedded within one barcode." See https://postalpro.usps.com/mailing/intelligent-mail-barcode. IMb Tracing™ requires that mailers display prescribed Intelligent Mail™ on the front of mailpieces. A mailer's proper application of these barcodes allows the Postal Service to generate IMb Tracing™ scan data and distribute this data to the mailer. IMb Tracing User Guide, USPS, January 9, 2012. p. 4 (emphasis added). See https://www.usps.com/mailtracking/_pdf/imb-tracing-user-guide-v1-6-final.pdf.

At this juncture, this Court concludes that the Transcript with Cover Letter and Envelope presents no proof that its contents were actually delivered by the United States Postal Service to Lara Schaheen. As such, this Court without admissible evidence to the contrary, infers that the intent of the information presented on the Envelope was created, intended, and published to mislead third-parties who might be the recipient of its contents.[28] In common parlance, the Court makes an eliminative inductive inference that the envelope does not provide an "alibi" that Lara Schaheen could not have been the author of the envelope's contents. To the contrary, the Envelope does not rule out that Lara Schaheen may have been the author of the Cover Letter and may have created the envelope as a stratagem to maintain a construct of anonymity as the author.

Alas, Dr. Luketich's credibility is also questionable. As to the bulk of the Transcript, beyond the above-mentioned medication discussion, Drs. Luketich and Wilson discussed other issues. Among the issues, Dr. Luketich is transcribed as stating as follows reproduced verbatim (punctuation and grammar as in original) from the eight-page Transcript ("Tr.")[29] of the February 26, 2018 conversation:

LUKETICH: Well.. I think.. I think that with the Shigemura loss, until we got Pablo, that there probably were some organs that got turned down because of fatigue, because I told everybody, we can't keep up with the, Even now they are dicking us around with hiring Benga for Shadyside. If I don't get Benga, and yeah I'm gonna get Lara but ya know but even that is a struggle and she's back with Will. I actually have his phone number I talked to him the other day. Well all I know is that I think there are a number of people that could have tapped into that if they wanted to, me included.

WILSON: yeah of course

LUKETICH: But Im so, um I don't know, Chris and I are just very close and pretty active and

WILSON: Oh Yeah. You want to fuck that up.

LUKETICH: and I'm just not interested in her.

WILSON: So, Well anyways enough about that.

(Tr. 4-5) (emphasis added).

Dr. Luketich explained that his use of the word "tap" was meant as seeking to recruit Dr. Schaheen as a UPMC surgeon. (Hrg. 117:2 to 119:12, Luketich). When Dr. Luketich was asked whether this was a "sexual reference," Dr. Luketich stated, "No." Tr. 117:13-117:20.

THE COURT: Let's go back to the [Recording Transcript] page before. I want to see the paragraphs before this. Let me read this, hold on. Go back to the page we were on. Doctor, what are you referring to? I don't want to put words in anybody's mouth. Go back to the end of the paragraph on the prior page. You say, well, all I know is I think -- and go to the top of the next page -- all I know is that I think there are a number of people who could have tapped into that if they wanted to, me included. What is that referring to?

THE WITNESS: Your Honor, I can't recall what we were referring to but all I know is that after I said it, I clearly wanted to clarify the line of thinking that I was on, that it had nothing to do with me and Lara Schaheen.

(8/23/22 Hrg. 119:13 to 120:5, Luketich) (emphasis added):

Attorney Barnes, representing Dr. D'Cunha, then continued with cross-examination of Dr. Luketich:

Q. In terms of accuracy, Dr. Luketich, after talking about Chris, you and your wife being very close and pretty active, when you say pretty active, are you talking about sexually active?

MR. GRAIL [Luketich's Counsel]: Are we really going here, Judge?

THE COURT: Now, let's get over to the Transcript here. Gentlemen and ladies, I didn't engage in this conversation. Yeah, you can ask him the question.

Q. What is the reference to Chris and I are just very close and pretty active?

A. I would say I refuse to answer that question. It is none of your business.

THE COURT: Give me that one more time.

THE WITNESS: I don't think it is any –

THE COURT: Doctor, you are referring to something personal with your wife?

THE WITNESS: Yes, Your Honor, and I'm refusing to answer that question.

THE COURT: We don't need to go into details, personal with his wife.

MR. BARNES: I just want to make sure they are not talking about row boating, hiking.

THE COURT: We are all big girls and boys here. We don't need to get into the specifics.

Q. [reciting from Transcript] Wilson: Oh, yeah, you don't want to fuck that up. Luketich: I'm just not interested in her. When you say you're not interested in her, are you again talking about her surgical skills?

A. No, I'm clarifying that I am interested in her surgical skills. I'm not interested in that. In other words, I think, if I'm remembering this conversation, how it went, that that word tap was probably the wrong word and that Wilson maybe rolled his eyes or smiled, I don't know, we don't get facial remarks here but I wanted to clarify that it had nothing to do with that.

(8/23/22 Hrg. 120:18 to 122:12, Luketich).

This Court finds Dr. Luketich's explanation of his use of the word "tap" to not be credible when a reasonable explanation of the use of "tap" in common parlance is a slang idiom for the sexual desire of another.[30] This was abundantly clear to the Court at the time. The Court attempted to spare Dr. Luketich embarrassment by stating "we don't need to go into details, personal with his wife . . . we are all big girls and boys here. We don't need to get into specifics." (8/23/22 Hrg. 121:16-23, Ignelzi, J.).

B. Expectation of Privacy

In Agnew v. Dupler, 717 A.2d 519 (Pa. 1998), our Pennsylvania Supreme Court laid out the applicable standards to assess whether a party has "a justifiable expectation of privacy in the communication subject to interception." Id. at 522. The Court assessed the protections afforded, if any, under the Wiretap Act when a police chief monitored officers' squadroom conversations through an intercom system. Appellant police officer brought an action pursuant to the Wiretap Act, 18 Pa.C.S. §5725(a). In reviewing the facts, our Supreme Court found that the officer "did not have a reasonable expectation of non-interception because he lacked the requisite reasonable expectation of privacy in the conversations." Id. at 524.

The facts of this case indicate that appellant did not possess a reasonable expectation of privacy in the conversations at issue. The conversations took place between appellant and Officers Sowers and Shaffer, who were present in the squadroom when appellant entered. . . . Thus, when appellant spoke to Sowers, Shaffer could overhear as could anyone else in the squadroom. Likewise, Sowers could overhear the casual conversation between appellant and Shaffer as could anyone else in the squadroom. At the time that the statements were made, the door to the squadroom was open, as it was the majority of the time, and the conversation could be heard outside of the room. All conversations conducted in the squadroom could be heard without amplification in Dupler's office, which was a mere thirty feet down the hallway, when the door was open. Additionally, by the time that appellant entered the squadroom at 10:45 p.m., Dupler had the light on in his office. The squadroom was a large room with six desks and two counters, and had a total of four telephones in it. The intercom lines on the phones could be open at any time, facilitating not only the opportunity to make announcements, but the opportunity to hear conversations occurring at a remote location within the building.

Agnew, 717 A.2d at 524. (emphasis added).

As discussed herein above, similarly the circumstances surrounding the conversation between Drs. Luketich and Wilson did not amount to a level that supports a finding that Dr. Luketich had a reasonable expectation of privacy as the backdoor to G212 was, to some degree, open and Drs. Schaheen and D'Cunha overheard the discussion.[31] As described by Dr. Luketich, "Well, I believe Dr. Schaheen was scrubbed and participating with Dr. Sarkaria in Room 25 which just happens to be the room right next to it [G212] so that would certainly give her ample opportunity to hear what is going down, what is happening." (8/22/22 Hrg. 229:23 to 230:3, Luketich). As testified by Dr. Sarkaria, Dr. Schaheen was "intermittently" present in the Operating Rooms on February 26, 2018. See (6/10/22 Hrg. 182:5 to 184:23 and 193:21 to 195:15, Sarkaria).

The Wiretap Act defines the term "oral communication" as "[a]ny oral communication uttered by a person possessing an expectation that such communication is not subject to interception under circumstances justifying such expectation." 18 Pa.C.S. § 5702.

To establish a prima facie case under the Wiretap Act for interception of an oral communication, a claimant must demonstrate that: (1) he engaged in a communication; (2) he possessed an expectation that the communication would not be intercepted; (3) his expectation was justifiable under the circumstances; and (4) the defendant attempted to, or did successfully, intercept the communication, or encouraged another to do so.

Commonwealth v. Mason, 247 A.3d 1070, 1081 (Pa. 2021), citing Agnew, 717 A.2d at 522. Similarly see Pennsylvania State Police v. Grove, 161 A.3d 877, 901 (Pa. 2017).

[I]n determining what constitutes an 'oral communication' under the Wiretap Act, the proper inquiries are whether the speaker had a specific expectation that the contents of the discussion would not be intercepted, and whether that expectation was justifiable under the existing circumstances. In determining whether the expectation of non-interception was justified under the circumstances of a particular case, it is necessary for a reviewing court to examine the expectation in accordance with the principles surrounding the right to privacy, for one cannot have an expectation of non-interception absent a finding of a reasonable expectation of privacy. To determine the existence of an expectation of privacy in one's activities, a reviewing court must first examine whether the person exhibited an expectation of privacy; and second, whether that expectation is one that society is prepared to recognize as reasonable.

Saracco v. Sweeney, 237 A.3d 1076, 2020 WL 3432710, *4 (Pa. Super 2020) (non-precedential case) citing Matenkoski v. Greer, 213 A.3d 1018,1028-1029 (Pa. Super 2019).

As a result of the foregoing facts and applicable law cited herein; this Court finds Drs. Luketich, Wilson, and any other participant to have had no reasonable expectation of privacy in Room G212 during their conversation. This Court has considered the totality of circumstantial facts and context of the February 26, 2018 meeting as applied to the our current Pennsylvania Supreme Court's holdings related to the "expectation of privacy" standard as applied to the Pennsylvania Wiretap Act. This Court holds there was no violation of the Pennsylvania Wiretap Act.

If an appellate court reviewing this Court's Findings concludes that the participants in the February 26, 2018 conversation possessed a reasonable expectation of privacy -- in essence, disagreeing with this Court's holding -- several reasons exist which would still compel use and disclosure of the Tape and Transcript.

C. Independent Source and Waiver Analysis

In pertinent part, 18 Pa.C.S.A. § 5721.1, "Evidentiary disclosure of contents of intercepted communication or derivative evidence," provides exceptions to the prohibition on disclosure of the contents of any wire, electronic or oral communication, or evidence derived therefrom, in any proceeding in any court, board or agency of this Commonwealth. Whereas here, Dr. Luketich seeks to exclude the contents of the recording and Transcript pursuant to § 5721.1(b)(6), it is significant to note that §5721.1(c)(6), "Procedure," states:

Evidence shall not be deemed to have been derived from communications excludable under subsection (b) if the respondent can demonstrate by a preponderance of the evidence that the Commonwealth or the respondent had a basis independent of the excluded communication for discovering such evidence or that such evidence would have been inevitably discovered by the Commonwealth or the respondent absent the excluded communication.

18 Pa.C.S.A. § 5721.1(c)(6) (emphasis added).

At the time of the February 26, 2018 recording, both Drs. D'Cunha and Schaheen were already aware of Dr. Luketich's Suboxone use. Dr. D'Cunha testified he was made aware of Dr. Luketich's drug use around 2010 and 2012 from his mentor at the

University of Minnesota, Dr. Mike Maddaus (10/13/21 D'Cunha Deposition, 66:21-67:9) and his University of Minnesota colleague Dr. Raphael Andrate (Id. at 70:12-72:10). Dr. D'Cunha testified that he witnessed Dr. Luketich place a strip of Suboxone under his tongue multiple times during his employment with UPMC, including during a UPMC recruitment event at the Fox Chapel Yacht Club in 2012 (Id. at 75:19-76:24) and at various meetings while Dr. D'Cunha was employed by UPMC (Id. at 77:9-16). He also observed Dr. Luketich in the operating room while under the influence of "something" in August of 2012 (Id. at 78:9-79:1; 81:23-82:4).

Sometime between 2015 and 2017, Dr. Schaheen informed Dr. D'Cunha that Dr. Luketich was "on" Suboxone, and Dr. Schaheen described text messages between Doctor Luketich and his wife about how the Suboxone was affecting him. (Id. at 77:17-21; 86:8-87:17). Dr. Schaheen testified that throughout her residency (which ended in June of 2018) she observed Luketich use Suboxone, drop it on the floor, and observed it in his wallet in a foil-like wrapper labeled "Suboxone." She also described being present in the operating room when Dr. Luketich called Dr. Wilson and requested a refill of his Suboxone prescription. (10/12/21 Schaheen Dep. 91:5-92:10; and 93:4-95:9).

Dr. Lukeitch's testimony, in conjunction with Drs. Schaheen and D'Cunha's independent knowledge of Dr. Luketich's use of medication (Suboxone) undermines the argument that the Transcript, however obtained or disclosed, is the sole and unique source – at this juncture - of any alleged irreparable harm suffered by Dr. Luketich by precluding the use of the Tape or Transcript. The bell has been rung. Drs. Schaheen and D'Cunha knew of Dr. Luketich's use of Suboxone before February 26, 2018. Indeed, the prior knowledge may be indicia of the motive and means by which Dr. Schaheen and/or Dr. D'Cunha had interest in securing "proof" of their independent knowledge via a recording. The Tape and the Transcript are at the crux of this Opera – it is the theatrical Der Ring des Nibelungen[32] of Wagnerian magnitude around which this drama centers. This Court shall no longer shield from sunlight the objects over which our antagonists and their Valkyries[33] contend. This Opera shall move forward to its concluding Götterdämmerung as sunlight shall be the best disinfectant.

V. Preliminary Injunction Analysis

As a framework, this Court has assessed each element, in seriatim, as required for the issuance of a preliminary injunction as applied to the established facts. As set forth in CKHS v Prospect, 2023 WL 3221623 at *5 (Pa. Cmwlth. 2023) (non-precedential but confirming SEIU Healthcare Pennsylvania v. Com., 104 A.3d 495, 501 (Pa. 2014)):

The six essential prerequisites that a moving party must demonstrate to obtain a preliminary injunction are as follows: (1) the injunction is necessary to prevent immediate and irreparable harm that cannot be compensated adequately by damages; (2) greater injury would result from refusing the injunction than from granting it, and, concomitantly, the issuance of an injunction will not substantially harm other interested parties in the proceedings; (3) the preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; (4) the party seeking injunctive relief has a clear right to relief and is likely to prevail on the merits; (5) the injunction is reasonably suited to abate the offending activity; and, (6) the preliminary injunction will not adversely affect the public interest.

Id.

"For a preliminary injunction to issue, every one of these prerequisites must be established; if the petitioner fails to establish any one of them, there is no need to address the others." Allegheny Cnty. v. Com., 544 A.2d 1305, 1307 (Pa. 1988) (emphasis added). It is well settled that "[a] preliminary injunction's purpose is to preserve the status quo and to prevent imminent and irreparable harm that might occur before the merits of a case can be heard and determined." Ambrogi v. Reber, 932 A.2d 969, 976 (Pa. Super. 2007). A preliminary injunction is an "extraordinary remedy," and the party seeking the injunction bears a heavy burden of establishing the six prerequisites. Wolfington v. Bartkowski, 2023 WL 3839508 at *3 (Pa. Super. 2023) (non-precedential) quoting Allied Envtl. Serv., Inc. v. Roth, 222 A.3d 422, 426 (Pa. Super. 2019). "T]he proponent of a preliminary injunction faces a heavy burden of persuasion." Allegheny County v. Comm., 544 A.2d 1305, 1308 (Pa. 1988).

A. Whether the injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by money damages.

The Court finds that an injunction is not necessary to prevent immediate and irreparable harm to Dr. Luketich that cannot be adequately compensated by money damages. Simply put, the proverbial genie has been let out of the bottle. To the extent that the genie creates harm, Dr. Luketich may proceed to prove his claims and seek money damages per his Third-Party Complaint.

First, Dr. Luketich's counsel[34] waived preclusion of the Transcript for use in discovery by its use at deposition. See (10/12/21 Schaheen Dep. 254:18, Ex. 25).[35] Attorney Ridge questioned Dr. Schaheen about the Tape and Transcript and Dr. Schaheen testified that she provided "the entire package" to "law enforcement agents." See (10/12/21 Schaheen Dep. 290:16 to 291:4).

In October 2021, Dr. Luketich's counsel deposed Dr. D'Cunha and Dr. Schaheen as third-party witnesses for a combined 26 hours. During these depositions, Dr. Luketich's counsel moved the Transcript into evidence and questioned the deponents extensively as to its content and source. Both Dr. D'Cunha and Dr. Schaheen repeatedly denied making or disseminating the Transcript or Tape. Prior to voluntarily using the Transcript for full discovery purposes at these depositions, Dr. Luketich's counsel sent letters to counsel for the Fedorkas and counsel for Drs. D'Cunha and Schaheen warning them that the Tape and Transcript were the product of an "illegal wiretap" and that any use whatsoever of either would constitute a crime. Despite these warnings, Dr. Luketich's counsel freely used the Transcript in the depositions without seeking Court approval.

See Dr. D'Cunha's Bench Memorandum (ECF 176, pp. 2-3).

Second, for all practical intents and purposes, The Pittsburgh Post-Gazette's publication of the Transcript – regardless of whether properly obtained via a Freedom of Information Request made of a West Virginia entity[36] -- has permanently removed the cork from the genie's bottle. In this electronic digital age, The Pittsburgh Post-Gazette's Transcript publication now exists in the public domain at the press of a button via weblink. The Transcript genie will not go back into the bottle. The irreparable damage, if any, has been done.

Third, at Oral Argument on May 17, 2023, Dr. Luketich's counsel, Attorney Grail as Movant contradictorily argued that the Transcript also not be used in discovery.[37] See 5/17/23 Status Hearing Transcript at p. 5, l. 3. This position was ipso facto waived by Dr. Luketich's predecessor, Attorney Ridge, when used during discovery depositions.

Fourth, to the extent any publication of the Transcript contained admissions or references to Dr. Luketich's use of medication (Suboxone) which would be actionable under the Wiretap Act; Dr. Luketich himself testified about his prescribed Suboxone usage stating, "it's a daily PRN drug" and further described its pharmaceutical properties of Buprenorphine and Naxolone[38] which act as an "antagonist" and "agonist" and "does not adversely affect my ability." See (8/22/22 Hrg. 150:17-22 and 196:11 to 204:8, Luketich). As this Court noted on the record during Attorney Barnes cross-examination, "[t]he man [Dr. Luketich] has admitted his Suboxone use. He has admitted what he has done to address it."[39] (8/22/23 Hrg. 204:22-24, Ignelzi, J.).

For any or all of the above reasons, this Court concludes that the injunction is not necessary to prevent immediate and irreparable harm that cannot be adequately compensated by money damages.

B. Whether greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings.

The only party whose credibility remains intact are that of the Plaintiffs Bernadette and Paul Fedorka, husband and wife. Granting the injunction would harm the only innocent party in this case, the Fedorkas.

A party who comes into a court of equity "must come with clean hands. The doctrine of unclean hands requires that one seeking equity act fairly and without fraud or deceit as to the controversy at issue." Morgan v. Morgan, 193 A.3d 999, 1005 (Pa. Super. 2018). The doctrine "is derived from the unwillingness of a court to give relief to a suitor who has so conducted himself as to shock the moral sensibilities of the judge[.]" Id. "A court may deprive a party of equitable relief where, to the detriment of the other party, the party applying for such relief is guilty of bad conduct relating to the matter at issue." Id. The court has "wide range" to "refuse to aid the unclean litigant," but "in exercising this discretion, the equity court is free to refuse to apply the [unclean hands] doctrine if consideration of the record as a whole convinces the court that [its] application ... will cause an inequitable result." Id. See Matenkoski v. Greer, 213 A.3d 1018 (Pa. Super. 2019) (property owners' recordings of neighbors did not violate Wiretap Act for purposes of establishing violation of zoning ordinance and nuisance for carrying on automobile repairs and restorations).

This Court finds that Drs. Luketich, Schaheen, and D'Cunha come before this Court to address the factual and legal issues for this Preliminary Injunction covered in sufficient mire as averred in voluminous motions and pleadings regarding personal scandal, muckraking, and credibility issues to be worthy of inclusion in the January 1903 issue of McClure's Magazine.[40] Notwithstanding the legal and factual mudslinging among physicians; to be sure, the Fedorkas have clean hands in this equity determination. The Fedorkas' lawsuit is a medical malpractice completely independent of the Wiretap Act allegations but for any relevance or materiality to Counts XIII and XIV of Plaintiffs' Amended Complaint (ECF 27) as against Dr. Luketich. See (Pltf. Amd. Cmplt., Count XIII, ¶ 206(e) (alleging "petty, personal dispute"). The Fedorkas were not witnesses nor had any involvement with the activities in or about Room G212 on February 26, 2018 or the recording.

Drs. Luketich, Schaheen, and D'Cunha seek equity in this matter involving the merits of a preliminary injunction, yet each has unclean hands. As to the case(s)-in-chief, including Dr. Luketich's claims against Drs. Schaheen and D'Cunha, additional discovery or testimony may or may not bear out further evidence material to the truth of the matters asserted. Accordingly, the litigating parties are not precluded from using the Tape and Transcript to assert or defend claims as set forth in the substantive pleadings.

In fact, the Fedorkas did not know about the alleged Wiretap vis-à-vis the Tape and Transcript, until identified in discovery depositions in the cojoined case with the Third-Party Plaintiff Luketich and Third-Party Defendants D'Cunha and Schaheen.

Much like the Post-Gazette, they [the Fedorkas] acquired, their counsel acquired the transcript innocently when Bob Ridge and Alan Lopus gave it to us. There is absolutely no evidence to the contrary. Much like the Post- Gazette who while a pending order was in place published the transcript. They have a right to do that because of the Bartnicki case in our opinion, that the content contains matters of public concern[.]

Fedorkas' Attorney, P. Loughren, 5/17/23 Status Conference Hearing Transcript at p. 18, l. 16 tp p. 19, l. 1. Attorney Loughren further asserted:

The Fedorkas' use of the transcript consistent with a stipulated confidentiality agreement with witnesses and jurors is absolutely permissible under Bartnicki. It is not criminal or felonious. And that's why neither Mr. Ridge's production of it at a deposition nor Mr. Lopus's was either, because they acquired the transcript innocently.

Id. at p. 19, l. 13-21.

In Bartnicki v. Vopper, 121 S.Ct. 1753, 532 U.S. 514, 149 L.Ed.2d 787 (2001), Justice Stevens writing for the majority held that the Pennsylvania Wiretap Act prohibitions do not apply when the disclosing party played no role in the illegal interception; did not or should not have known that the intercepted communication was illegally obtained; and the intercepted communication concerned a matter of public importance. The Fedorkas assert that the Bartnicki fact pattern is analogous to the case at hand, i.e., the Fedorkas had no role in the alleged illegal recording; had no knowledge as to whether a recording existed; and that the recording was a matter of public importance.

At present, there is no evidence that the Fedorkas or their attorneys had any role in intercepting or disseminating the Tape and/or Transcript. As with Bartnicki, the Fedorkas, played no part in the illegal interception.

Rather, they found out about the interception only after it occurred, and in fact never learned the identity of the person or persons who made the interception. Second, their access to the information on the tapes was obtained lawfully, even though the information itself was intercepted unlawfully by someone else. Third, the subject matter of the conversation was a matter of public concern.

Bartnicki, 532 U.S. at 525.

Albeit this Court finds that Drs. Luketich and Wilson did not have a reasonable expectation of privacy in Room G212 – additionally, the Fedorkas: 1) did not intercept the communication, learned about the interception only after it occurred, and have not (as with the Court) learned the identity of the person(s) who made the interception; 2) access to the information on the Tape was obtained lawfully via the litigation process; and 3) the subject matter of the conversation may be of public concern to the extent that it relates to to the truth or falsity of allegations regarding public healthcare as set forth in the underlying pleadings in the currently cojoined Complaint and Third-Party Complaint.

For purposes of the preliminary injunction analysis, this Court adopts the rationale expressed by Plaintiffs' counsel as to their innocent receipt of the recording and Transcript thereby permitting its use in discovery and does not preclude its use as unlawful under the Wiretap Act. At this juncture, maintaining a seal on the Transcript is and would be an act in futility. The recording and Transcript are the gravamen of Dr. Luketich's claim and have already been disclosed to the public via The Pittsburgh Post-Gazette.

The Court is cognizant of UPMC's counsel, John Conti's assertion that, "the [alleged] tortfeasor should not be able to benefit by effectively leaking the material that they criminally recorded, which is what the outcome would be." (5/17/23 Status Conf. 7:12-15). However, UPMC's assertion does not eliminate Dr. Luketich's shortfall in proving irreparable harm at this juncture. Notwithstanding UPMC's understood position - ex turpi causa non oritur actio[41] - Dr. Luketich still retains his claims for monetary damages[42] as this Court does not have the power to scrub the internet nor undo that which is done. Applicable idioms abound: "the

genie is out of the bottle," "the horse is out of the barn," 'the milk has been spilt," "the cat is out of the bag," "the dirty laundry has been aired," and one "can't unring the bell."[43] As such, this matter must move forward as this Court will not engage in a futile act and the substantive claims must be litigated.[44]

In essence, the recording and Transcript are indeed, the gravamen of Dr. Luketich's Third-Party Complaint. Purposeful discovery of the audible contents of the recording, the Transcript of the recording, the author of the attached letter and envelope addressed to Dr. Schaheen which accompanied the eight-page Transcript, the electronic device which allegedly intercepted the oral communication, the owner or possessor of the device, the person(s) who did the recording, and chain of custody are all salient to Dr. Luketich's Third-Party Complaint.

C. Whether a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct.

As this Court has addressed in detail, the genie is out of the bottle. The grant of a preliminary injunction will not properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct. There is no legalistic magic wand to unring the bell.

D. Whether Dr. Luketic has a clear right to relief and is likely to prevail on the merits.

Dr. Luketich seeks relief to restrain disclosure of the Tape and Transcript. As set forth herein, the Court cannot unring the bell. The Transcript has been publicly disclosed by The Pittsburgh Post-Gazette. Applying the standards of Bartnicki v. Vopper, 532 U.S. 514 (2001), absent evidence to the contrary; the Fedorkas appear to have been innocent recipients of the Tape and Transcript. Moreover, the Tape is the purported origin for the Transcript and is the gravamen of Dr. Luketich's Third-Party Complaint for which he seeks money damages. In fact, Dr. Luketich's counsel has utilized the Transcript in discovery to defend the claims against him. As such, Dr. Luketich has waived any privilege to exclude the foundation upon which he girds his claims. The Tape and the Transcript are inextricably tied for purposes of the parties ascertaining, inter alia: their origin; the manner/method of recording; the speakers on the recording; the location of the recording; the chain of custody of the original Tape; the existence of any duplicates; the author of the Transcript, including cover letter and envelope; the manner/method of delivery of the Tape and/or Transcript to third-parties including Dr. Schaheen, the West Virginia University Hospital, The Pittsburgh Post-Gazette, and potential subsequent disclosure to other entities; and the truth or defamatory meaning of the substantive content.

Second, as discussed above, Dr. Luketich had no reasonable expectation of privacy. He is not likely to prevail on the merits of his claim pursuant to the Wiretap Act.

Moreover, this Court finds the reasoning proferred in Dr. D'Cunha's Findings of Fact (ECF 262 at pp. 26-280) to be sound:

The record also shows that Dr. Luketich's Wiretap Act claim is barred by Pennsylvania's two-year limitations period. Although the Wiretap Act itself does not include a limitations period, courts have applied the two-year limitations period from 42 Pa. C.S. § 5524(7). McCulligan v. Pa. State Police, 123 A.3d 1136 (Pa. Commw. Ct. 2015); Bristow v. Clevenger et al., 80 F. Supp. 2d 421 (M.D. Pa. 2000). That section provides that any lawsuit "founded on negligent, intentional, or otherwise tortious conduct must be commenced within two years" from accrual of the cause of action. 42 Pa. C.S. § 5502(a) and 5524(7).

As a "general rule a cause of action accrues, and thus the applicable limitations period begins to run, when an injury is inflicted." Wilson v. El-Daief, 964 A.2d 354, 361 (Pa. 2009); see also Pocono Int'l Raceway, Inc. v. Pocono Produce, Inc., 468 A.2d 468, 471 (Pa. 1983) ("[T]he statute of limitations begins to run as soon as the right to institute and maintain a suit arises . ."). Relevant here, a party's right to "institute and maintain" a suit arises regardless of whether the party knows the tortfeasor's identity. To put it differently, the so-called "discovery rule" cannot save a plaintiff who claims ignorance regarding the identity of his wrongdoer. This is so because "the burden is on the injured party, once he discovers the cause of his injuries . to determine within the statutory period (unless there is fraud or concealment) the party or parties whose negligence or breach of duty was responsible for the event or the condition." Cathcart v. Keene Indus. Insulation, 471 A.2d 493, 501 (Pa. Super. Ct. 1984) (en banc); see also Trieschock v. Owens Corning Fiberglas Co., 511 A.2d 863, 866 n.3 (Pa. Super. Ct. 1986) (citing Cathcart approvingly); De Martino v. Albert Einstein Med. Ctr., 460 A.2d 295, 305 n.16 (Pa. Super. Ct. 1983) ("The fact that appellant may not have known the identity of the dentist who performed the work is not relevant to the start of the limitations statute.").

Federal courts applying Pennsylvania law have relied on these Superior Court decisions. See, e.g., Landaur v. Lamas, 2019 U.S. Dist. LEXIS 128840 (M.D. Pa. Aug. 1, 2019) ("[T]he statute of limitations is not tolled by uncertainty regarding the identity of a defendant."); Robinson v. Lowe's Home Ctrs., Inc., 2007 WL 2739187 (E.D. Pa. Sept. 20, 2007) ("Uncertainty as to the identity of a defendant is not the sort of lack of knowledge [that] triggers the discovery rule."); Guenther v. Quartucci, 1996 WL 67616 (E.D. Pa. Feb. 12, 1996) ("The Pennsylvania Superior Court has generally found the discovery rule inapplicable in cases where a plaintiff was aware of an injury and its cause but had not determined the identity of the defendants within the limitations period."); In re Mushroom Transp. Co., 247 B.R. 395, 407 n.8 (E.D. Pa. Bankr. 2000); Piccolini v. Simon's Wrecking, 686 F. Supp. 1063, 1073 (M.D. Pa. 1988); Merry v. Westinghouse Elec. Corp., 684 F. Supp. 852, 855 (M.D. Pa. 1988).

See (D'Cunha FOF, ECF 262, pp. 26-28) (incorporating n.79 as part of text above).

Moreover, Ms. Clark Smith, UPMC Counsel, sometime in November 2018 after receiving the Transcript from WVU Hospital, met with Dr. Luketich who was accompanied by his counsel, Mr. Grail; and during the meeting she informed both of her belief that the Transcript and Tape represented a possible illegal wiretap. See generally (D'Cunha ECF 262, ¶¶113-131)(specifically ¶122 citing to 12/13/22 Hrg. 35:23-36:5; 43:7-16; 60:2-5, Smith).

As such, Dr. Luketich's limitations period would expire no later than the end of November 2020. Notwithstanding self-revelation that Dr. Lukeitch suspected Drs. D'Cunha and Schaheen as the culprits of the Tape and Transcript from the outset, Dr. Luketich did not file his Wiretap Act claim until January 2022 despite being represented by counsel and being advised by UPMC Counsel of a possible illegal wiretap. With these principles in mind, Dr. Luketich's right to institute and maintain a suit arose no later than November 2018 after UPMC's and his counsel, Andrea Clark Smith, told him and Mr. Grail that the recording was a potential violation of the Wiretap Act.

Third, for the reasons set forth above regarding time bar, the Court cannot ascertain at this juncture that Dr. Luketich is likely to prevail on the merits of his remaining claims related to defamation and invasion of privacy. Per 42 Pa.C.S.A. § 5523(1), actions and proceedings for libel, slander or invasion of privacy must be commenced within one year. The alleged torts occurred on February 26, 2018. It is averred Dr. Luketich learned about the Transcript and the Tape on November 5, 2018. The Fedorkas filed their initial Complaint (ECF 1) on December 21, 2018 and their Amended Complaint (ECF 27) on January 23, 2020. Dr. Luketich filed his initial Answer and New Matter (ECF 37) on October 8, 2020 and his Amended Answer and Counterclaim (ECF 93) on January 13, 2022. Dr. Luketich did not seek to enjoin anyone from using the Transcript or Tape until May 11, 2022, over

three years later after he was purported to know or should have known about the intercepted communication. See (Luketich Motion for Preliminary Injunction, ECF 121).

For any or all of the reasons cited herein, the right to relief is not clear and for this Preliminary Injunction, Dr. Luketich is not likely to prevail on the merits.[45]

At this point, this Court finds no need to address the remaining two prerequisites of all six required of the Movant, Dr. Luketich. As such, prerequisites numbered 5 and 6 will not be analyzed.[46]

WHEREAS, the following ORDER of this same date is entered and incorporated herein.

BY THE COURT:
/s/The Hon. Philip A. Ignelzi

[1] "ECF" means Electronic Court Filing, as reference to the Department of Court Records docket filing.

[2] D'Cunha, et al. v. Luketich, et al., 2:19-CV-00495, Case Status: Closed, Stayed; Docket Entry #136, 04/17/2023 (ORDER granting the United States of America's Motion for Voluntary Dismissal with Prejudice as set forth more fully in the contents of the filing. (U.S. Dist. Ct. W.D. Pa. 2019, Bisson, J.).

[3] As set forth by the United States Department of Justice: In addition to allowing the United States to pursue perpetrators of fraud on its own, the FCA allows private citizens to file suits on behalf of the government (called "qui tam" suits) against those who have defrauded the government. Private citizens who successfully bring qui tam actions may receive a portion of the government's recovery. Many Fraud Section investigations and lawsuits arise from such qui tam actions. The Department of Justice obtained more than $2.2 billion in settlements and judgments from civil cases involving fraud and false claims against the government in the fiscal year ending Sept. 30, 2022. See https://www.justice.gov/civil/false-claims-act. Qui tam is the abbreviation for the Latin phrase "qui tam pro domino rege quam pro se ipso in hac parte sequitur," meaning "Who sues on behalf of the King as well as for himself." In a qui tam action, a relator brings an action against a person or company on the government's behalf. The government, not the relator, is considered the plaintiff. If the government succeeds, the relator bringing the suit receives a share of the award. This is also called a popular action. For example, the federal False Claims Act authorizes qui tam actions against parties who have defrauded the federal government. If successful, a relator in a False Claims Act qui tam action may receive up to 30% of the government's award. See https://www.law.cornell.edu/wex/qui_tam_action. As set forth in the following concise summary: Qui tam is a provision of the False Claims Act (FCA) allowing whistleblowers to report fraud on behalf of the US government and receive a share of the recovered funds. Fraud includes abuse of disaster relief loans, over billing, kickbacks, false statements, and upcoding in healthcare, among many others. Whistleblowers, also known as qui tam relators, can earn 15-30% of the funds recovered by the government if they decide to intervene. The FCA is considered one of the strongest whistleblower laws, having paid over $7.3 billion in rewards since 1986. In fact, many other whistleblower programs have been modeled around the False Claims Act and qui tam provision because of its effectiveness in bringing government fraudsters to justice. The FCA is codified as 31 U.S.C. §§ 3729-33 with anti-fraud requirements in 3729 and qui tam provisions in 3730. See https://kkc.com/frequently-asked-questions/what-is-qui-tam/.

[4] D'Cunha, et al. v. Luketich, et al., 2:19-CV-00495, 2022 WL 2359417, n.2, (citations removed), further states: The Relator [Dr. D'Cunha], based on first-hand knowledge, asserted in his complaint that Dr. Luketich, with the knowledge of UPMC and UPP, engaged in the alleged fraudulent conduct at issue. Pursuant to the FCA, the United States investigated the Relator's allegations and, on July 26, 2021, notified the Court that it had elected to intervene in the Relator's concurrent-surgery and related allegations and that it intended to file a complaint in partial intervention addressing those issues. After the United States filed the instant Complaint in Intervention, the Relator voluntarily dismissed any claims in his complaint that differed from the intervened allegations. The Relator remains a party to the case. See 31 U.S.C. § 3730(c)(2). As noted in footnote 1 above, the subject FCA action was resolved by Court Order granting the United States' Motion for Voluntary Dismissal with Prejudice.

[5] The Court notes this case could easily be mistaken for a script from the sixty-year current long-running television melodrama, General Hospital (1963-present). Rather than being set in the mid-sized fictional city of Port Charles, New York, our story is set in the real-life city of Pittsburgh, Pennsylvania. Rather than being set at General Hospital which is the major employer in Port Charles and one of the largest medical providers on the East Coast our scene is set within the University of Pittsburgh Medical Center ("UPMC") which without a doubt serves as a worthy understudy. Replacing the roles of the General Hospital fictional physicians and families; here we have the real-life drama of UPMC, Drs. D'Chuna, Schaneen, and Luketich; intertwined with the Fedorka family and an ever waiting and insistent press and television media. Much like the initial focus of the fictional series, our story centers around the goings on within the walls of the hospital. As in both General Hospital and this case, the media is chomping at the bit to broadcast the salacious details about allegations related to healthy doses of sex, drugs, betrayal, intrigue, fame, and fortune in addition to the equally compelling issues related to medical malpractice claims, defenses, and hospital protocol. See General Hospital, https://en.wikipedia.org/w/index.php?title=General_Hospital&oldid=1156445403; https://soaps.sheknows.com/general-hospital/; https://apnews.com/article/general-hospital-60-years-soap-opera-120ba44b08ac517a56b94257b294a678; https://abc.com/shows/general-hospital.

[6] The parties are to be congratulated for their support of the United States Pulp and Paper Industry. https://www.statista.com/topics/5268/us-pulp-and-paper-industry/#topicOverview

[7] Pa.R.C.P. 1038, Trial without Jury (emphasis added): (a) Except as otherwise provided in this rule, the trial of an action by a judge sitting without a jury shall be conducted as nearly as may be as a trial by jury is conducted and the parties shall have like rights and privileges, including the right to move for nonsuit. (b) The decision of the trial judge may consist only of general findings as to all parties but shall dispose of all claims for relief. The trial judge may include as part of the decision specific findings of fact and conclusions of law with appropriate discussion. (c) The decision may be made orally in open court at the end of the trial, and in that event shall be forthwith transcribed and filed in the office of the prothonotary, or it may be made there-after in writing and filed forthwith. In either event the prothonotary shall notify all parties or their attorneys of the date of filing. The trial judge shall render a decision within seven days after the conclusion of the trial except in protracted cases or cases of extraordinary complexity. See also Puelo v. Thomas, 624 A.2d 1075 (Pa.Super. 1993) (applicable rule does not require numerated findings and allows an adjudication and discussion in narrative form). As such, the Court has chosen to adjudicate this matter in narrative form.

[8] For purposes herein, the specific audio recording will also be identified as the "Tape."

[9] See 18 Pa. C.S. § 5721.1(a): § 5721.1. Evidentiary disclosure of contents of intercepted communication or derivative evidence. (a) Disclosure in evidence generally.-- (1) Except as provided in paragraph (2), no person shall disclose the contents of any wire, electronic or oral communication, or evidence derived therefrom, in any proceeding in any court, board or agency of this Commonwealth. (2) Any person who has obtained knowledge of the contents of any wire, electronic or oral communication, or evidence derived therefrom, which is properly subject to disclosure under section 5717 (relating to investigative disclosure or use of contents of wire, electronic or oral communications or derivative evidence) may also disclose such contents or evidence in any matter relating to any criminal, quasi-criminal, forfeiture, administrative enforcement or professional disciplinary proceedings in any court, board or agency of this Commonwealth or of another state or of the United States or before any state or Federal grand jury or investigating grand jury. Once such disclosure has been made, then any person may disclose the contents or evidence in any such proceeding. (3) Notwithstanding the provisions of paragraph (2), no disclosure in any such proceeding shall be made so long as any order excluding such contents or evidence pursuant to the provisions of subsection (b) is in effect.

[10] As our Supreme Court recently reiterated, "[i]n general, the Wiretap Act prohibits the interception, disclosure or use of any wire, electronic or oral communication." Commonwealth v. Mason, 274 A.3d 1070, 1080 (Pa. 2021) citing Commonwealth v. Byrd, 235 A.3d 311, 319 (Pa. 2020) (citation and internal quotation marks omitted).'"

[11] The Preliminary Injunction Hearing transcripts are cited herein as, e.g. Month/Date/Year - "Hrg." -page:line(s) - witness name.

[12] Dr. Schaheen, ECF 261; Dr. D'Cunha, ECF 262; Dr. Luketich, ECF 264; The Fedorkas, ECF 270; and UPMC, ECF 262 (Supplemental Brief in Support of Preliminary Injunction).

[13] At the December 13, 2022 Preliminary Injunction Hearing, Dr. D'Cunha's Deposition was marked Exhibit 8A and Dr. Schaheen's Deposition was marked Exhibit 8B. See (12/13/22 Hrg. 81:18-24). The Court not only reviewed every page and line of both depositions, the Court also summarized both depositions. On the record there was an extended discussion regarding the portions of Drs. D'Cunha and Schaheen's deposition designations submitted by the moving party, Dr. Luketich's counsel. Initially, opposing counsel for Drs. D'Cunha and Schaheen, as well as the Fedorkas' counsel wanted to submit counter-designations. Dr. Luketich filed a Motion to Preclude such designations as inadmissible hearsay. Obviously, Drs. D'Cunha and Schaheen's depositions constitute party admissions when offered by the opposing party, Dr. Luketich. See Pa.R.E. 803(25), An Opposing Party's Statement. Dr. Luketich withdrew his Motion after the opposing parties' counsel withdrew any further designations of the depositions beyond those sections designated by Dr. Luketich's counsel. See (12/13/22 Hrg. 77:9 to 66:12). Throughout this Opinion references are made to Drs. D'Cunha and Schaheen's depositions. The references are either to sections designated by Dr. Luketich's counsel which were admitted, or established facts through the depositions of either Dr. Schaheen or Dr. D'Cunha which were proven through evidence other than their depositions. In other words, their deposition testimony was corroborated by other evidence. By way of example, in the Court's "Independent Source and Waiver Analysis," the Court cites to various portions of the depositions of Dr. Schaheen's and Dr. D'Cunha's knowledge of Dr. Luketich's Suboxone use prior to February 26, 2018. These facts are not seriously disputed by the parties and are corroborated by other evidence. This Court has reviewed all the deposition citations of Drs. D'Cunha and Schaheen referenced in this Opinion. On one occasion the Court cited to a passage of Dr. D'Cunha's deposition not designated by Dr. Luketich's counsel. See (10/13/21 D'Cunha Dep. 379:17-380:16, infra p. 17). However, Dr. Luketich's counsel did designate the identical testimony from Dr. Schaheen's deposition. See (10/12/21 Schaheen Dep. 179:15-22, infra p. 17). To the extent any referenced deposition section was not designated by Dr. Luketich's counsel, this Court has exercised its authority under Pa.R.E 106, in the interest of fairness to consider Dr. D'Cunha's transcribed deposition text as the Judge sitting as fact-finder. This issue was addressed by the parties and the Court on the last day of the Preliminary Injunction Hearing. See (12/16/22 Hrg. 777:24-787:9).

[14] The Pittsburgh Post-Gazette asserts that the contents of the February 26, 2018 conversation "are in fact a matter of public record pursuant to West Virginia's Freedom of Information Act ("FOIA"), W.Va. Code § 29B-1-1 et seq.," whereas any person may request and obtain a transcript of a conversation that is "verbatim." Intervenors assert that the Transcript disclosed by the West Virginia University Health System is a public record under West Virginia law and the Post-Gazette's May 14, 2023 publication of the Transcript, it has now "conclusively eviscerated" any protectable privacy interest held by Dr. Luketich. See Intervenors Motion to Unseal Record (ECF 291 at ¶¶ 3-6), filed on May 23, 2023. Pursuant to W. Va. Code, § 29B-1-2(5): "'Public record' includes any writing containing information prepared or received by a public body, the content or context of which, judged either by content or context, relates to the conduct of the public's business." The West Virginia FOIA also provides exceptions to disclosure. Specifically, W. Va. Code, § 29B-1-4(a)(2) which states: There is a presumption of public accessibility to all public records, subject only to the following categories of information which are specifically exempt from disclosure under this article: . . . . (2) Information of a personal nature such as that kept in a personal, medical, or similar file, if the public disclosure of the information would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in this particular instance: Provided, That this article does not preclude an individual from inspecting or copying his or her own personal, medical, or similar file[.]

[15] See also available public medical literature; e.g., https://www.pdr.net/drug-summary/Suboxone-buprenorphine-naloxone-1292; https://pain.ucsf.edu/opioid-analgesics/buprenorphine; https://www.drugs.com/tips/buprenorphine-patient-tips, etc. To be clear, this Court is not presenting itself as expert in the management of pain or addiction medicine but cites to these public-sourced references for definitional purposes.

[16] The Transcript as produced in toto is a ten-page document. The first page is a cover letter identified by the numeral "1" centered at the bottom of the page. The second page which begins the transcription is identified by the numeral "1" at the bottom right margin of the page. The subsequent pages are numbered sequentially at the bottom right margin through and including, "2", "3", "4", "5", "6", "7", and "8". The final page appears to be copy of a stamped envelope with typewritten address to addressee "Lara Schaheen." As such, the Transcript document totals ten pages – eight of which are the Transcript plus the cover page and the envelope. These documents were identified during the testimony of Duc Nguyen who was called as a witness during Dr. Luketich's case. See (8/22/2022 Hrg. 125:12 to 126:16). At that time, three additional documents were included: the back page of the envelope, and two pages consisting of photos of both sides of the cassette tape.

[17] This Court makes no evaluation of the subjective description of the dispute between the antagonists. What may be characterized as "petty" by one party may well be "serious" to another. It does not escape the Court's attention that whether the dispute be characterized as "petty" or "serious;" it is a matter that has garnered the attention of numerous attorneys, witnesses, voluminous pleadings and discovery, depositions, the Federal Courts, the EEOC, Pennsylvania State Board of Medicine, anonymous complaints to the UPMC Hotline, numerous internal investigations, law enforcement, the regional medical community including West Virginia University Hospital, UPMC medical and legal personnel, and the ever-vigilant press and media, among others.

[18] "TEE" is a medical acronym for Transesophageal echocardiography. "TEE is a test that produces pictures of your heart. TEE uses high-frequency sound waves (ultrasound) to make detailed pictures of your heart and the arteries that lead to and from it." See e.g, https://www.heart.org/en/health-topics/heart-attack/diagnosing-a-heart-attack/transesophageal-echocardiography-tee

[19] This Court finds Dr. Schaheen's deposition denial of having made the "die a slow death" statement to be extremely odd and incongruous with the backdrop context of enmity among the parties. See (10/12/21 Schaheen Dep. 253:12 to 254:17). When Dr. Schaheen was initially asked if she remembered telling Angela Kinnunen that she intended to "take Dr. Luketich down?", Dr. Schaheen responded, "No. I don't recall that." (10/12/22 Schaheen Dep. 253:12-14). One page later, when asked, "do you remember telling Ashley Mason that you were going to take Dr. Luketich down and watch him die a slow death?"; Dr. Schaheen responded, "I did not tell Ashley Mason that." (10/12/22 Schaheen Dep. 254:14-17). Dr. Schaheen's testimony defies logic. On one hand she does not recall making the statement; yet on the other hand she has a specific recollection of not making this statement. This inconsistent recollection appears contrived as it strikes the Court incredulous that one would forget ("not recall") having made a professionally foreboding threat, albeit with sufficient bravado against a professional mentor by the same person who admits having the colloquial "balls" to do so. See n. 20, infra. If anything is consistent among these discordant parties, it is found in the idiom that "loose lips will sink ships." In other words, beware of loose talk. See https://en.wikipedia.org/wiki/Loose_lips_sink_ships. In equal measure, whether it be "tapping into" or "dying a slow death," or having "the balls;" the subsequent denial or white-washed reframing of the spoken word as uttered in colloquial context calls into question the credibility of the utterer. Denying human nature is no easy task. In assessing credibility, the denial of that which is natural can be more conspicuous than the admission.

[20] Whereas Dr. Luketich used the idiom, "tapped into" (See Transcript p. 5 and footnote 23, infra); Dr. Schaheen is no stranger to idiom or slang usage: Q. Do you remember telling Angela Kinnunen that you would be "the first person ever with the balls to stand up to Jim Luketich and take him down"? A. I remember referencing "the balls" section of that, yes. (10/12/21 Schaheen Dep. 253:21-25) (emphasis added). In common parlance, "balls" is synonymous with ballocks, cojones, cullions, nuts, and bollocks – all references to the human male gonad responsible for production of testosterone (the male hormone). To "have the balls" is to be "ballsy", which is rude slang for one to be "fearless, bold, or gutsy, especially to an impudent or reckless degree." "'Balls,' as a slang term for testicles, is often used figuratively to refer to resourceful daring and courageousness.) Example: That was ballsy, asking the boss to explain his decision in front of everyone like that. Ballsy move. I hope you don't come to regret it." See https://idioms.thefreedictionary.com/ballsy. Acknowledging the legal maxim that "equality is equity," the applicable idiom for these antagonists is that "sauce for the goose is sauce for the gander."

[21] It is noted that the recording and Transcript were initially forwarded anonymously to the West Virginia University Hospital, and not to a proper government investigatory agency. In common parlance, the recording and Transcript were leaked to a non-party. The leak was directed to WVU Hospital (not UPMC) and was not accidental. The Court can reasonably surmise that a competitive regional Hospital would take action upon receipt of the information, which WVU Hospital did by forwarding the information to UPMC. In effect, the leak triangulated WVU Hospital, UPMC, and the anonymous leaker. Simply put, the leaker could maintain anonymity and yet be assured that a third party (WVU) would take action and have no reason to deny the existence of the information. Furthermore, the extra-jurisdictional nature of the disclosure across state lines posits additional intrigue by which this Court will not entertain at this juncture.

[22] It has not gone unnoticed as a viable proposition, that at the time of the February 23 and 26 recordings; neither Dr. Schaheen and/or D'Cunha knew -- as a legal matter -- that Pennsylvania requires the mutual consent of the parties for a communication to be lawfully intercepted and recorded. Once the Transcript of the February 26 recording surfaced and the Qui Tam action under the False Claims Act commenced which involved federal agents and lawyers; it is a reasonable inference that Schaheen and D'Cunha then became knowledgeable of the mutual consent legal standard for tape recording. It is not a strain of human nature or legal strategy to understand that Schaheen and D'Cunha found themselves in a proverbial "Catch 22." On one hand they possessed information about Luketich's alleged suspect activities via personal knowledge; but on the other hand, had to deny association with a potential unlawful wiretap. This middle ground strategy (admit the former – deny the latter) was their forlorn hope: admit to overhearing the conversation but deny engaging in any unlawful wiretap activity. At this juncture, the Court finds this strategy incredulous based upon the current record. Furthermore, the Court is mindful that neither Dr. Schaheen nor Dr. D'Cunha chose to personally testify in Court during the Preliminary Injunction hearings. This Factfinder finds their in-court testimonial absence, particularly related to substantive issues for which they have purported firsthand knowledge, to be inherently suspect at this stage by precluding the Court from evaluating their credibility from the witness stand while under oath and cross-examination.

[23] To be clear, this Court does not make a finding as to the truth of the allegations asserted within the Transcript. The substantive content of the truth of the matters asserted are subject to further evidence and a jury determination as related to Dr. Luketich's Third-Party Complaint and Defenses thereto. The foregoing analysis relates to motive and/or opportunity of parties who may be suspect of making, transcribing, delivering, or publishing the Tape and/or Transcript.

[24] In the realm of possible universes, the "author" could be a ghost-writer serving in a secretarial function as agent for the person(s) with first-hand personal knowledge of the alleged facts. Based upon the totality of circumstances, the Court finds that a non-party "ghost-writer" theory to be non-persuasive speculation. To the contrary, the "ghost-writer" anonymity is the modus operandi of the author as reflected in the cover letter and envelope.

[25] This inductive reasoning is known as eliminative induction. In eliminative induction a number of possible hypotheses concerning some state of affairs is presumed, and rivals are progressively eliminated by new evidence. See https://www.oxfordreference.com/display/10.1093/oi/authority.20110803095747206 In other words, a person without any

knowledge of the purported "facts" identified in the cover letter is eliminated from the set of persons who could have written the cover letter; and thereby permits inference to those persons with knowledge, motive, and opportunity to record the conversation.

[26] This Court takes judicial notice, pursuant to Pa.R.E. 201, Judicial Notice of Adjudicative Facts, that the United States Postal Office Rules and Regulations are a source whose accuracy cannot be reasonably questioned as applied to the adjudicative facts outlined herein. In CR 2018 LLC v. Columbia County Tax Claim Bureau, 229 A.3d 398, n.4 (Pa. Cmwlth. 2020), the Commonwealth Court quoted the trial court record affirming that, "[i]f the Supreme Court can take judicial notice of USPS regulations, then it is assumed that the trial court may." (brackets omitted). Moreover, as the "sender" of the envelope is currently unknown and in the absence of an admission or testimony to confirm actual mailing or delivery to the postal service, this Court makes the findings and conclusions herein. See Ugi Utilities, Inc. v. Unemployment Compensation Bd. of Review, 776 A.2d 344, 348 (Pa. Cmwlth. 2001), citing to where the appellate court upheld the Board's finding that a barcode was not a postmark because neither the barcode itself, nor the analysis conducted by the postal service, contained sufficient information to meet the definition of a postmark. "Specifically, the barcode analysis lacked the zip code of the post office or the month or year of mailing." Id. By reference, this Court notes Opinions from the United States District Court, District of Columbia, which affirm judicial notice of documents and information on official government websites pursuant to Fed. R. Evid. 201(b)(2); see, e.g., Western Watershed Project v. Bernhardt, 468 F.Supp.3d 29, 36 n.4, (D.D.C. 2020). (court takes judicial notice of certain information at the World Health Organization website, the Johns Hopkins University website, and the Mayo Clinic website which is "not subject to reasonable dispute" because they are "sources whose accuracy cannot be reasonably questioned." The language of Fed. R. Evid. 201(b)(2) is akin to Pa.R.E. 201(b)(2). See Pa.R.E. 201, Comment: "This rule is identical to F.R.E. 201, except for subdivision (f)." See also e.g., Democracy Forward Found. v. White House Office of Am. Innovation, 356 F. Supp. 3d 61, 62 n.2 (D.D.C. 2019) ("[J]udicial notice may be taken of government documents available from reliable sources."); Kelleher v. Dream Catcher, L.L.C., 221 F. Supp. 3d 157, 160 n.2 (D.D.C. 2016) ("Courts in this jurisdiction have frequently taken judicial notice of information posted on official public websites of government agencies." (quoting Pharm. Research & Mfrs. of Am. v. U.S. Dep't of Health & Human Servs., 43 F. Supp. 3d 28, 34 (D.D.C. 2014)).

[27] 1-1.3 Postmarks – A postmark is an official Postal Service™ imprint applied in black ink on the address side of a stamped mailpiece. A postmark indicates the location and date the Postal Service accepted custody of a mailpiece, and it cancels affixed postage. Since 1979, the Postal Service's Postal Operations Manual (POM) has provided standards for postmarks applied to single-piece First-Class Mail®. Letters and flats that need to be postmarked come from carrier pick-up, collection boxes, retail counters, or lobby drop boxes. Postmarks are not required for mailings bearing a permit, meter, or precanceled stamp for postage, nor to pieces with an indicia applied by various postage evidencing systems. The postmarking process uses the following three basic methods of imprinting: Automated: Advanced facer canceller systems used by processing distribution centers cancel letters quickly. These machines are equipped with biohazard detection systems so letters postmarked by automation benefit from added safety measures. Mechanized: A variety of older devices apply postmarks to flat-size mailpieces and to philatelic pieces. Manual: Hand-stamp devices are used by Postal Service employees for local cancellation or philatelic requests. A "local" postmark shows the full name of the Post Office, a two-letter state abbreviation, ZIP Code™, and date of mailing. Because the Postal Service is sensitive to the importance some customers place upon these postmarks, each Post Office is required to make a local postmark available. Lobby drops should be designated for this purpose with clear signage signifying its use.

[28] It is clear that Drs. Schaheen and D'Cunha have gone to great lengths to create subterfuge upon seeing the ghost of their own words. As with humanity and in the pen of William Shakespeare, memory and the past may come to haunt a tortured psyche. *And therefore as a stranger give it welcome. There are more things in heaven and earth, Horatio, Than are dreamt of in your philosophy. But come, Here, as before, never, so help you mercy, How strange or odd soe'er I bear myself (As I perchance hereafter shall think meet To put an antic disposition on), That you, at such times seeing me, never shall— With arms encumbered thus, or this headshake, Or by pronouncing of some doubtful phrase, As "Well, well, we know," or "We could an if we would," Or "If we list to speak," or "There be an if they might," Or such ambiguous giving out— to note That you know aught of me. This not to do, So grace and mercy at your most need help you, Swear.* – Shakespeare, Hamlet. Act I, scene 5, 186-203. It strikes this Court beyond mere coincidence that the only "proof" of the Cover Letter and Transcript are contained with an Envelope addressed to one of the persons with knowledge, motive, and opportunity to record and disclose the information. The mysterious ghost may be found amongst those involved in the play.

[29] See preceding footnote and (8/23/23 Hrg. 69:20 to 71:4 and 97:5) wherein Attorney Barnes identifies the Transcript as Exhibit 8 "using the one defense counsel used in the depositions of the doctors." (Id. at 70:24 to 71:4). See introduction of Exhibit 8 by Attorney Ridge (10/12/22 Schaheen Dep. 136:17-136:18) and (10/13/22 D'Cunha Dep. 97:11-97:12).

[30] It is unfortunate to note that female surgeons, such as Dr. Schaheen, may be objectified in the workplace. While society has made strides to recognize the contributions of women in the workplace based upon the inherent value, dignity, and respect for their intelligence, skills, and professional talent as co-equals; there remain unwelcome, untoward, offensive, and inappropriate vestiges of sexist commentary. Regrettably, the more things change; the more they stay the same. Likewise, it is one thing to use salacious language; it is doubly odious to deny the underlying meaning of one's word choice.

[31] The record establishes that G212 was used or accessible by other persons on a regular basis which created the inherent risk of others overhearing conversations. As evidenced by the recording and the Transcript, Dr. Sarkaria walked into G212 and had a question for Dr. Luketich which interrupted the February 26, 2018 conversation. See (8/24/22 Hrg. 222:19 to 223:13, Wilson). Dr. Sakaria was doing robotic surgery in Operating Room 25 which is next to G212 and Dr. Schaheen was on Dr. Sarkaria's service and "they were asking my [Dr. Luketich's] opinion on what to do next." See (6/10/22 Hrg. 150:14 to 151:23, Sarkaria and 8/22/22 Hrg. 229:23 to 231:8, Luketich). Oftentimes, visitors would observe surgeries in G212 or in the vicinity. (8/24/22 Hrg. 271:23 to 272:4, Wilson). G212 is used for meetings, lunch occasionally, "a lot of things, [and] to have a cup of coffee." (8/22/22 Hrg. 233:12-14, Luketich). G212 was also used as a break room. (6/10/22 Hrg. 156:24 to 157:10, Sarkaria). In G212, people would hang their coats, have retirement parties, baby showers and lunch; and a robotic company representative is "there virtually every day." (6/10/22 Hrg. 158:13 to 160:13, Sarkaria). At any moment in time somebody could walk in. (6/10/22 Hrg. 178:5-8, Sarkaria). The persons that go in and out of the observation room [G212] are physician assistants, staff, surgeons, nurse practitioners, residents, intern trainees, Intuit representatives, and observers. (6/10/22 Hrg. 202:13 to 203:6, Sarkaria). Dr. Sarkaria testified he [Dr. Sarkaria] never met a patient in G212. (6/10/22 Hrg. 204:17-19, Sarkaria).

[32] Whilst the parties have thrust their saga upon the courts, this Court shall strive to do equal justice under the law; and it is all together fitting that an equal measure of allegorical reference be thrust upon the parties. See http://websites.umich.edu/~umfandsf/symbolismproject/symbolism.html/Teutonic_Mythology/ringsum.html

[33] See https://norsemythologist.com/valkyrie/#:~:text=The%20Valkyries%20are%20best%20known%20for

[34] On February 12, 2021, Attorney Ridge filed his Praecipe of Appearance on behalf of all Defendants, which included Dr. Luketich. See (ECF 51). Attorney Efrem Grail filed his appearance on behalf to Dr. Luketich on October 28, 2021 (ECF 82) which was after Dr. Schaheen's October 12, 2021 deposition

[35] During Dr. Schaheen's deposition, Attorney Thomas Duffy representing the Fedorkas, interjected at the time of introduction of the Transcript (sans envelope) as Exhibit 25; that: "You [Attorney Ridge] can go ahead with your questioning. This document will not -- I will not in any way waive my claim that you have waived any privileges or any confidentiality that may be associated with these documents." (10/12/22 Schaheen Dep. 254:18, Ex. 25).

[36] At the May 17, 2023, Status Conference, which followed The Pittsburgh Post-Gazette's May 14, 2023, publication of the Transcript, Attorney Jonathan Bruno for the Post-Gazette stated: The Post-Gazette obtained a public record through a legitimate public records request under the West Virginia Freedom of Information Act that any person could have made. The Post-Gazette made it. The West Virginia University Hospital, which is a state affiliated institution, disclosed that public record pursuant to that request. (5/17/23 Status Conf. 14:3-10, Bruno). See W. Va. Code, Ch. 29B, Art. 1, Freedom of Information, § 29B-1-1, et seq. As defined by West Virginia at WV ST § 29B-1-2, "Definitions": (5) "Public record" includes any writing containing information prepared or received by a public body, the content or context of which, judged either by content or context, relates to the conduct of the public's business. (6) "Writing" includes any books, papers, maps, photographs, cards, tapes, recordings or other documentary materials regardless of physical form or characteristics. WV ST § 29B-1-4, "Exemptions," sets forth in pertinent part: (a) There is a presumption of public accessibility to all public records, subject only to the following categories of information which are specifically exempt from disclosure under this article: . . . . (2) Information of a personal nature such as that kept in a personal, medical, or similar file, if the public disclosure of the information would constitute an unreasonable invasion of privacy, unless the public interest by clear and convincing evidence requires disclosure in this particular instance: Provided, That this article does not preclude an individual from inspecting or copying his or her own personal, medical, or similar file; . . . . (5) Information specifically exempted from disclosure by statute[.]

[37] See (5/17/23 Status Conf. 5:3, Grail). It is noted that Attorney Grail insisted that the Court make a ruling on the applicability of the Wiretap Act regarding the disclosure of the recording and Transcript; notwithstanding this Court's inquiry as to whether "the jury would have to make the determination as to whether it was an illegal wiretap[.]" (5/17/23 Status Conf. 12:20-24, Ignelzi, J.). See also Attorney Grail responses to Court inquiries. (Id. at 6:6-11; 15:19-22 and 21:13 to 22:9, Grail).

[38] See also footnote 15, infra, re: Suboxone is a pharmaceutical combination of buprenorphine and naxolone. Suboxone contains buprenorphine, a partial opioid agonist; and naloxone, an opioid antagonist. See https://www.accessdata.fda.gov/drugsatfda_docs/label/2019/020733s024lbl.pdf.

[39] This Court admonished Dr. D'Cunha's Counsel for misstating Dr. Luketich's responses on cross-examination. THE COURT: Counsel, that is a complete and utter misstatement of that statement. Now, look, I've given you leeway on cross-examination. The horse is dead. You're cutting the legs off with chainsaws at this point, okay. The man has admitted his Suboxone use. He has admitted what he has done to address it. How much more are we going to question about this issue? I'm at the point on the next question it's stopping, it's done, it's over with. I understand the issue, counsel. This isn't my first rodeo. What is aggravating me, counsel, is you are playing to the fact that there is media here and you just want to throw this man under the bus. Well, it is not happening in this courtroom. We're going to take a break. I think it's despicable. (8/22/22 Hrg. 204:17 to 205:9, Ignelzi, J.) (emphasis added).

[40] See https://www.britannica.com/topic/muckraker

[41] Latin "from a dishonorable cause an action does not arise" is a legal doctrine which states that a plaintiff will be unable to pursue legal relief and damages if it arises in connection with their own tortious act. See http://www.legal-glossary.org/2013/01/19/ex-turpi-causa-non-oritur-actio/. A similar variation of this legal maxim is: Commodum ex injuria sua non habere debet. Latin for "No man ought to derive any benefit of his own wrong." See Black's Law Dictionary, note 82, at 1821 (9th ed. 2009). See also https://www.oxfordreference.com/display/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-379 and Nullus commodum capere (potest) de sua iniuria propria whereby "No advantage (may be) gained from one's own wrong." A maxim meaning that the law will not recognize or validate any profit a person derives from his own wrongdoing. For example, one may not destroy evidence of the extent of damages caused by one's illegal act, then counter a claim for damages based on that act by pointing to the lack of evidence. https://www.oxfordreference.com/display/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-1500.

[42] See 18 P.S. §5725(a), "Cause of action" (any person shall … have a civil cause of action against any person who intercepts, discloses, or uses … such communication).

[43] See https://idioms.thefreedictionary.com/you+can't+unring+a+bell: proverb – You can't rescind information that has been shared publicly, especially when it is damaging to a person or organization's reputation. Attempting to do so is usually as futile as "unringing" a bell. How confident are you in this information? Because once we announce it, there's no changing it—you can't unring a bell. You can't unring a bell, even with the best lawyers. So I doubt this scandal is going away anytime soon. Id. (font as in original).

[44] The Court takes note that: The Pennsylvania Supreme Court has specifically found that a criminal conviction is not a condition precedent to civil liability under the Wiretapping Act. In Marks v. Bell Telephone Company of Pennsylvania, 460 Pa. 73, 85 n.6, 331 A.2d 424, 430 n.6 (1975), the court stated that "since the purpose of the damage provision is to encourage civil enforcement of the Act all that is required to make the damage provision of the Act operative is a determination by the [trial] court ... that the Act was violated." Accordingly, we conclude that the plaintiff may pursue his civil cause of action. The defendants' motion for summary judgment on this issue is denied. Simmers v. Packer, 1997 WL 1050723 at *2, 36 Pa.D.&C. 4th 182, 185-186 (Dauphin Cty. 1997) (footnote omitted).

[45] This Court does not prejudge nor prognosticate additional evidence, testimony, or discovery, that may impact future analysis of the merits of any party's claim(s). This Court is limited to the record before it at this time and the standards set forth in evaluating the petitioner's fulfillment of the prerequisites for issuance of a preliminary injunction. Counsel would be well-suited to adhere to concise argument sans extraneous balderdash and codswallop thereby creating an accessible, clear, and comprehensible record for any appellate review.

[46] Per SEIU Healthcare Pennsylvania v. Com., 104 A.3d 495, 501 (Pa. 2014): (5) Whether the injunction sought is reasonably suited to abate the offending activity; and (6) Whether a preliminary injunction will not adversely affect the public interest.

MADELYN G. GIOFFRE, CAA INVESTMENTS, INC. and MARK and ANNIE LANDMAN vs. ALLEGHENY COUNTY BOARD OF PROPERTY ASSESSMENT, APPEALS AND REVIEW

Real Estate Tax Assessment Appeals – Common Level Ratio

Plaintiffs initiated this proceeding for an injunction directing BPAAR to apply the 63.6 CLR established by STEB on June 15, 2022 to their market values. After overruling BPAAR's preliminary objections, on March 23, 2023, the court granted the Plaintiffs' motion for judgment on the pleadings and ordered BPAAR to use the CLR of 63.6 established by STEB in deciding each Plaintiff's year 2022 real estate tax assessment appeal. BPAAR has appealed that decision to the Commonwealth Court of Pennsylvania and filed a statement of matters complained of on appeal. Pursuant to Pennsylvania Rule of Appellate Procedure 1925(a), the matters complained of on appeal are addressed in this opinion.

Case No.: GD22-12556. Commonwealth Court docket no. 424 CD 2023. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. Hertzberg, J. June 22, 2023.

OPINION

Defendant Allegheny County Board of Property Assessment, Appeals and Review ("BPAAR") allows real estate tax assessment appeals to be filed between January 1 and March 31 of the year being appealed. BPAAR applies Allegheny County's common level ration ("CLR"), which is the median ratio of assessed values divided by sales prices during a calendar year (see 72 P.S. §5020-102), to reduce the fair market values of properties subject to appeals to their base year, 2012, values. The CLR for sales in any calendar year does not have to be established by the State Tax Equalization Board ("STEB") until June 30 of the following year. See 71 P.S. §1709.1516a. BPAAR's regular practice is to begin hearing cases in April, two to three months before the CLR from the previous calendar year has been established. Because no other CLR is available when hearings begin in April, BPAAR applies the CLR from sales that occurred two calendar years before the tax assessment year being appealed. Even after the CLR for the immediate past year is established, BPAAR, to make its decisions uniform, applies the CLR from two years earlier.

STEB established Allegheny County's CLR for 2020 sales in June of 2021 at 81.1. However, this court entered a preliminary injunction at GD21-7154 on September 1, 2022 that reduced the CLR from 2020 sales to 63.53[1]. After Plaintiffs filed tax assessment appeals in 2022, BPAAR refused to determine their tax assessments until an appeal from the injunction at GD21-7154 was decided by the Commonwealth Court of Pennsylvania at 992 C.D. 2022. It is my understanding that BPAAR has also refused to rule on all other tax assessment appeals pending a decision by Commonwealth Court at 992 C.D. 2022. On June 15, 2022 STEB established Allegheny County's CLR from sales during the 2021 calendar year at 63.6[2]. Plaintiffs, on October 4, 2022, initiated this proceeding for an injunction directing BPAAR to apply the 63.6 CLR established by STEB on June 15, 2022 to their market values. After overruling BPAAR's preliminary objections, on March 23, 2023 I granted the Plaintiffs' motion for judgment on the pleadings and ordered BPAAR to use the CLR of 63.6 established by STEB in deciding each Plaintiff's year 2022 real estate tax assessment appeal. BPAAR has appealed my decision to the Commonwealth Court of Pennsylvania and filed a statement of matters complained of on appeal. Pursuant to Pennsylvania Rule of Appellate Procedure 1925(a), the matters complained of on appeal are addressed below.

BPAAR first contends my decision "is contrary to Section 5452.10 of the Second Class County Assessment Law and the definition of Common Level Ratio set forth at 72 P.S. sec. 5452.1." However, it is apparent from an examination of these statutory provisions that my ruling is consistent, and not contrary to them. Section 5452.10 directs BPAAR to determine the current market value, the CLR and the fair market value, with section 5452.1a defining CLR as "the ratio of assessed value to current market value used generally in the county as last determined by the State Tax Equalization Board…." On March 23, 2023, when I decided the order appealed, the CLR "as last determined" by STEB was 63.6 on June 15, 2022. Additionally, in establishing the CLR for each County on June 15, 2022, STEB specifies the CLRs are "ratios to be used from July 1, 2022 to June 30, 2023." Complaint, p. 11. Hence, my decision is not contrary to those provisions.

BPAAR next contends "the plaintiffs failed to join necessary parties to the Complaint." BPAAR believes the three different municipalities and three different school districts where the Plaintiffs' properties are located, as well as Allegheny County, are "indispensable parties" that had to be named as defendants. See Pennsylvania Rule of Civil Procedure 1032(b). If no decree could be made without impairing the rights of the municipalities, school districts and county, they are indispensable parties. See Sprague v Casey, 520 Pa. 38 at 48, 550 A.2d 184 at 189 (1988). But, a party against whom no redress is sought need not be joined. Id. BPAAR was the sole party deciding the CLR to be used in Plaintiffs' appeals. With the school districts, municipalities and county not being responsible for making the decision, no redress was sought against them. Another reason they can be omitted as parties is their interests in the CLR are indirect or incidental. See City of Philadelphia v. Com., 575 Pa. 542 at 568, 838 A.2d 566 at 582 (2003). Finally, in tax matters, the Declaratory Judgments Act[3] does not require taxing authorities to be named as parties if they are served, do not enter appearances and the court considers that their interests are adequately represented. See 42 Pa. C.S. §7540(b). The municipalities, school districts and county were served (see Certificate of Service filed 10/5/2022), did not enter appearances and I consider their interests adequately represented by BPAAR. Therefore, they were not parties that had to be joined.

BPAAR next contends that ordering it to use the 63.6 CLR established by STEB "is contrary to the Pennsylvania Constitution's requirement of uniformity in property tax assessments because it was limited to the plaintiffs in this action and does

not apply to all BPAAR 2022 determinations of market value." However, BPAAR delayed rulings in all 2022 tax assessment appeals pending the Commonwealth Court's decision at 922 C.D. 2022. Hence, it is within BPAAR's discretion to apply the 63.6 CLR to all BPAAR 2022 determinations of market value. Additionally, the uniformity clause of the Pennsylvania Constitution is a requirement for rough uniformity, but not perfect uniformity. See Clifton v. Allegheny County, 600 Pa. 662, 969 A.2d 1197 at 1211 (2009). If BPAAR elects to use a different CLR on the thousands of other 2022 appeals, the Pennsylvania Constitution will not be violated.

BPAAR's final contention is no factual record was developed if my order to use the 63.6 CLR is a summary judgment ruling. My March 23, 2023 order, however, specifically references Plaintiff's motion for judgment on the pleadings and was not a ruling on a motion for summary judgment.

BY THE COURT:
/s/The Hon. Alan Hertzberg

[1] First there were objections filed with STEB from its determination that the CLR was 81.1. When STEB denied the objections, an appeal was taken to the Commonwealth Court of Pennsylvania at 1100 C.D. 2021. After a delay arising from an appeal of the preliminary injunction at GD21-7154, Commonwealth Court entered an order on April 25, 2023 at 1100 C.D. 2021 remanding the matter to STEB for recalculation of Allegheny County's 2020 CLR. On May 17, 2023 STEB established a revised 2020 CLR for Allegheny County of 63.5.

[2] Objections were also filed with STEB from its determination that Allegheny County's CLR from 2021 sales was 63.6. A hearing officer granted STEB's motion for judgment on the pleadings and transferred the objections to this court for disposition, where they are pending at GD23-4044.

[3] While a declaratory judgment was not formally requested by Plaintiffs, it is the nature of the relief that was both requested and awarded.

LINDA HERNANDEZ, REITA DERRICK, LISA HARRIER, ANNA HEINZE, JACQUELYN SCHMIDT and LINDA SUPERNOVICH on behalf of themselves and all other similarly situated individuals vs. UNITED STATES STEEL CORPORATION, a Delaware corporation

Class Certification

Starting on August 11, 2022, the Court held a four-day class certification hearing in the above-captioned matter. All parties were provided ample opportunity to present their evidence, argue their positions, and submit their proposed findings of fact and conclusions of law. After careful review of the parties' evidence, testimony, briefings, etc., the Court concludes class certification is proper in this action.

Case No.: GD-19-005325. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division – Class Action. Ignelzi, J.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PLAINTIFFS' MOTIONS FOR CLASS CERTIFICATION

Starting on August 11, 2022, the Court held a four-day class certification hearing in the above-captioned matter. All parties were provided ample opportunity to present their evidence, argue their positions, and submit their proposed findings of fact and conclusions of law. After careful review of the parties' evidence, testimony, briefings, etc., the Court concludes class certification is proper in this action.

I. Introduction and Class Allegations

United States Steel Corporation ("US Steel") operates an integrated coke and steel-making operation at three separate manufacturing sites in the Mon Valley region of Allegheny County, Pennsylvania: the Clairton Coke Works in Clairton, the Irvin Plant in West Mifflin, and the Edgar Thomson Works in Braddock, collectively known and referred to as the "Mon Valley Works." (Plaintiffs' Proposed Findings of Fact and Conclusions of Law at P. 1, L. 1, Linda Hernandez v. United States Steel Corporation, No. 19-005325 (Allegheny Cty. Ct. Com. Pl. Oct. 21, 2022), ECF No. 96) ("Plaintiffs' Proposed Findings"). This action arises out of a fire/explosion which occurred on December 24, 2018 at US Steel's Clairton Plant in the Mon Valley. (Id. at P. 2, L. 4); (Defendant's Proposed Findings of Fact and Conclusions of Law at P. 2, L. 6, Linda Hernandez v. United States Steel Corporation, No. 19-005325 (Allegheny Cty. Ct. Com. Pl. Oct. 21, 2022), ECF No. 95) ("Defendant's Proposed Findings"). As a result, until April 4, 2019, coke oven gas generated at the Clairton Plant could not be treated by the plant's desulfurization equipment due to fire damage, which emitted sulfur dioxide ("SO_2") and hydrogen sulfide ("H_2S") into the air of the Mon Valley. (Plaintiffs' Proposed Findings, supra, at P. 2, L. 5); (Defendant's Proposed Findings, supra, at P. 2, L.7).

The Named Plaintiffs are six Mon Valley residents who lived in the Jefferson Hills, Glassport, and West Mifflin areas during the pollution control outage at the Clairton Plant (Plaintiffs' Proposed Findings, supra, at P. 2, L. 6). Plaintiffs allege that the fire, and the continued production after the fire, resulted in a months-long nuisance to them and the surrounding neighborhoods. (Id. at L. 7). The proposed class area includes twenty-two community areas in the Mon Valley: Braddock, Clairton, Dravosburg, Duquesne, East McKeesport, East Pittsburgh, Elizabeth Borough, Elizabeth Township, Forward, Glassport, Jefferson Hills, Liberty, Lincoln, McKeesport, North Braddock, North Versailles, Pleasant Hills, Port Vue, Versailles, Wall, West Elizabeth, and West Mifflin. (Id.)

The Named Plaintiffs sued US Steel in April 2019 alleging negligence and private nuisance of behalf of the class-area residents to recover non-economic damages for lost-use-and-enjoyment of their properties. (Id. at L. 8); (Defendant's Proposed Findings, supra, at P. 2, L.4). The Plaintiffs seek to represent a class consisting of approximately 123,000 persons who resided in the twenty-two-community area of the Mon Valley between December 24, 2018 and April 4, 2019. (Defendant's Proposed Findings, supra, at P. 1, L.1).

II. The Laws at Issue & Evidence Submitted by the Parties

The Named Plaintiffs allege negligence and private nuisance (intentional and unintentional) on behalf of the class-area residents to recover damages for lost-use-and-enjoyment. (Plaintiffs' Proposed Findings, supra, at P. 2, L. 8); (see generally Plaintiffs' First Amended Complaint, Linda Hernandez v. United States Steel Corporation, No. 19-005325 (Allegheny Cty. Ct. Com. Pl. Dec. 17, 2019), ECF No. 16) ("Plaintiffs' Amended Complaint"). Plaintiffs allege that the events that occurred during and after a catastrophic explosion at US Steel's Clairton plant, which caused the operation's sulfur pollution controls to fail, were a direct result of Defendant's negligence. (See generally Plaintiffs' Proposed Findings, supra). Plaintiffs allege that the emissions of SO_2 and H_2S from the Clairton Plant resulted in a months-long nuisance which caused the Plaintiffs and other class-residents eye and throat irritations, coughs, and headaches. (Id.) Plaintiffs seek lost-use-and-enjoyment damages to vindicate private property rights, not enforcement of environmental statutes, regulations, or regulatory permits; they seek monetary damages, not injunctive relief. (Plaintiffs' Amended Complaint, supra, at P. 2, L. 3).

To hold a defendant liable for negligence, Plaintiffs have the burden to prove the elements of negligence: duty, breach of duty, causation, and damages. Reason v. Kathryn's Korner Thrift Shop, 169 A.3d 96, 101 (Pa. Super. 2017).

"The burden is upon the plaintiffs to make out their case by a fair preponderance of the credible evidence. They must not only prove that the defendant was negligent, but they must prove that the negligence caused an injury to the . . . plaintiff for which they are entitled to recover damages. Proof of one without the other affords no right to recovery."

Kirby v. Carlisle, 116 A.2d 220, 221 (Pa. Super. 1955).

The Court in Karpiak v. Russo held that the Restatement (Second) of Torts §822 contains the authoritative definition of a private nuisance tort:

§ 822. General Rule

One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either

(a) intentional and unreasonable, or

(b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

The Restatement indicates that a defendant is not subject to liability for an invasion unless the invasion caused significant harm, which is defined as:

§ 821F. Significant Harm

There is liability for a nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose.

Comment C to section 821F further explains the meaning of significant harm:

c. Significant harm. By significant harm is meant harm of importance, involving more than slight inconvenience or petty annoyance. The law does not concern itself with trifles, and therefore there must be a real and appreciable invasion of the plaintiff's interests before he can have an action for either a public or private nuisance.... [I]n the case of a private nuisance, there must be a real and appreciable interference with the plaintiff's use or enjoyment of his land before he can have a cause of action.

Karpiak v. Russo, 676 A.2d 270, 272 (Pa. Super. 1996).

The Court granted the parties a total of four days of oral argument on class certification, the longest class certification hearing this Court has ever held. Because of the magnitude of testimony and evidence presented by the parties and the fact that the court cannot rule on the merits of the allegations, only whether class certification is proper, the court will recapitulate the parties' positions briefly to determine whether class action is appropriate.

Plaintiffs presented evidence of numerous common factual and legal issues regarding U.S. Steel's alleged negligence leading up to the fire, including: (a) whether the long-term corrosion of the sprinkler piping, rotor shaft, and flapper that led to the fire was part of a pattern of neglect and failed maintenance; (b) whether specific, feasible measures would have prevented the fire; (c) whether U.S. Steel had a duty of care to its class-member neighbors; (d) whether U.S. Steel breached that duty by its continued production after the fire, its failure to reduce emissions by extending coking times as it had in the past, and/or "hot idling" at least some coke batteries as it had also done; and (e) whether U.S. Steel considered, in continuing production without pollution controls, the malodor and eye, nose, and throat irritant effects associated with H_2S and SO_2, or how these effects were likely to impact neighboring properties during the control outage after the fire. (Plaintiffs' Proposed Findings, supra, at P. 22, L. 17).

Plaintiffs also presented evidence of common issues regarding the impacts of U.S. Steel's conduct after the fire, including: (a) whether the excess SO_2 and H_2S emitted after the fire dispersed throughout the class area; (b) whether – applying Pennsylvania's objective "normal person" test for nuisance – the excess pollutant concentrations caused odors, discomforts, and worry that "normal persons" living in the class area found definitely offensive, seriously annoying, or intolerable; (c) whether these odors, discomforts, and worry impeded the neighbors' ability to use and enjoy their class-area properties; and thus (d) whether U.S. Steel's actions and failures to act created a class-area nuisance. (Id. at L. 18).

Plaintiffs presented testimony in support of the "normal person" test for nuisance. The excerpts of testimony presented were from fact witnesses, which included some Named Plaintiffs and non-residents that experienced the results of the outage. The testimony included complaints of smells, headaches, throat irritations, and worries during the outage months.[1] All of the testimony was varied, with each person having differing experiences during the outage months. These experiences ranged from not having any discomforts to suffering from coughing, sore throat, eye irritations, and more.

Plaintiffs also presented a damages model for the Court to consider if intentional and/or unintentional nuisance is established. (Plaintiffs' Proposed Findings, supra, at P. 22, L. 19). Plaintiffs presented their air-modeling expert, David Sullivan, who explained at the class certification hearing that he used AERMOD, an EPA-approved computer program, to model the path of SO_2 after release, accounting for variations throughout the class area and accounting for various conditions such as speed, weather, terrain, and land use. (Id. at P. 9, L. 39); (Transcript, supra, at (8/15/22, ECF No. 88) at P. 79, L. 22 – P. 82, L. 17 (Sullivan)). The air model and demonstrations Mr. Sullivan presented showed a time-lapse of pollutant plumes spreading throughout the class area. (Plaintiffs' Proposed Findings, supra, at P. 9, L. 40); (Transcript, supra, at (8/15/22, ECF No. 88) at P. 122, L. 17-23 (Sullivan)). Mr. Sullivan explained that the SO2 modeling results served as a rough proxy for H_2S. (Plaintiffs' Proposed Findings, supra, at P. 10, L. 41); (Transcript, supra, at (8/15/22, ECF No. 88) at P. 94, L. 9 – P. 95, L. 13, P. 116, L. 9 – P. 118, L. 3 (Sullivan)).

Defendant presented testimony to refute Plaintiffs' nuisance claims, namely their own air-modeling expert, physician expert, and fact witnesses. Defendants argue that because each Named Plaintiff or class-resident all had individual experiences, there is no

singular "class-wide" nuisance condition about which a jury can make a significant harm determination to rule on Plaintiffs' negligence and nuisance claims, nor would the jury be able to determine class-wide damages. (Defendant's Proposed Findings, supra, at P. 30, L.98). Defendant argues that individual cases/trials are necessary to prove negligence and nuisance.

Defendant presented evidence that the emissions from the Clairton Plant were not at the levels necessary to cause the experiences described, namely the physical discomforts. (See generally Transcript, supra, at (8/11/22, ECF No. 94)).

Dr. Christopher Long, Defendant's toxicology expert, testified that in his opinion, an individual experiencing pollutant effects would have a different experience based on a variety of factors such as genetics, age, health history, smoking habits, and more. (Id. at (8/11/22, ECF No. 94) at P. 42, L. 11 – P. 43, L. 9, P. 45, L. 15 – P. 48, L. 19 (Long)). Dr. Robert McCunney, Defendant's physician expert, testified to determine whether pollution from U.S. Steel caused a particular medical condition, an individualized assessment looking at medical records, physical findings, lab tests, and other factors would be necessary. (Id. at P. 154, L. 5 – P. 155, L. 20 (McCunney)).

Defendant also presented testimony by their own air-modeling expert, Christopher DesAutels. While Mr. DesAutels agreed with Plaintiffs' air-modeling expert on some of his opinions, he disagreed on others. Mr. DesAutels agreed with Mr. Sullivan that the incomplete combustion of H_2S at any location burning coke oven gas would result in the emission of both H_2S and SO_2. (Id. at (8/12/22, ECF No. 92) at P. 117, L.11 – P. 118, L. 4, P. 119, L. 16 – P. 120, L. 9 (DesAutels)).

He also agreed that the amount of H_2S could not be quantified because US Steel reported it all as SO_2. (Id.) Because of this, Mr. DesAutels opines that SO_2 should not be characterized as a proxy for H_2S because the H_2S levels could not be quantified. (Id. at P. 46, L. 6-16, P. 56, L. 8-9 (DesAutels)). Mr. DesAutels also testified that AERMOD was too uncertain of a computer program to determine air concentrations at specific locations and times. (Id. at P. 23, L. 14 – P. 27, L. 11 (DesAutels)).

Defendant argued that the testimony from fact witnesses by Plaintiffs could not be used to prove class-wide nuisance at trial. However, they presented testimony by residents who did not experience the odors and discomforts the Plaintiffs' witnesses described. For example, two witnesses testified that they had never experienced any odor they would attribute to US Steel. (Id. at (8/15/22, ECF No. 88) at P. 13 (Pfarr), P.27-28 (Urbassik)).

The court will not and cannot make a ruling on the merits of the allegations and evidence presented. The court must merely use this evidence to determine whether class action certification is proper.

III. Standards for Class Certification

The Standards for Class Certification in Pennsylvania are found in Title 231, Chapter 1700 (Class Actions) of the Pennsylvania Rules of Civil Procedure, as well as relevant caselaw. More specifically, Pa.R.C.P. §1702: Prerequisites to a Class Action outlines the specific criteria to certify a class: 1) Numerosity, 2) Commonality, 3) Typicality, 4) Adequacy, and 5) Fairness and Efficiency. Pa.R.C.P. §1708 and §1709 also provide additional guidance on adequacy of representation and fairness and efficiency.

During certification proceedings, the proponent of the class bears the burden to establish that the Rule 1702 prerequisites were met. The burden is not heavy at the preliminary stage of the case. Indeed, evidence supporting a prima facie case "will suffice unless the class opponent comes forward with contrary evidence; if there is an actual conflict on an essential fact, the proponent bears the risk of non-persuasion." It is essential that the proponent of the class establish requisite underlying facts sufficient to persuade the court that the Rule 1702 prerequisites were met.

Samuel-Bassett v. Kia Motors America, Inc., 34 A.3d 1, 16 (Pa. 2011) (citations omitted).

The trial court is vested with broad discretion in determining whether the criteria for maintaining a class action have been met, and its decision will not be disturbed on appeal unless the court neglected to consider the requirements of the rules governing class certification, or unless the court abused its discretion in applying the class certification rules. Braun v. Wal-Mart Stores, Inc., 24 A.3d 875, 892-93 (Pa. Super. 2011), aff'd, 106 A.3d 656 (Pa. 2014), citing Liss & Marion, P.C. v. Recordex Acquisition Corp., 937 A.2d 503, 505 (Pa. Super. 2007).

The hearing is confined to a consideration of the class action allegations and is not concerned with the merits of the controversy or with attacks on the other averments of the complaint. Its only purpose is to decide whether the action shall continue as a class action or as an action with individual parties only. In a sense, it is designed to decide who shall be the parties to the action and nothing more. Viewed in this manner, it is clear that the merits of the action and the right of the plaintiff to recover are to be excluded from consideration.

Pa.R.C.P. §1707 Explanatory Comment.

It is the strong and oft-repeated policy of this Commonwealth that, in applying the rules for class certification, decisions should be made liberally and in favor of maintaining a class action. Braun, supra at 892-93. Again, "[t]his is because such suits enable the assertion of claims that, in all likelihood, would not otherwise be litigated." Id. at 893.

As Pennsylvania law requires, the court will not consider the merits of the allegations, but only whether this class can be certified under the criteria above.

IV. Conclusions of Law

PA. R.C.P. § 1710 governs how a court may certify, refuse to certify, or even revoke a certification of a class:

Rule 1710. Order Certifying or Refusing to Certify a Class Action. Revocation. Amendment. Findings and Conclusions.

(a) In certifying, refusing to certify or revoking a certification of a class action, the court shall set forth in an opinion accompanying the order the reasons for its decision on the matters specified in Rules 1702, 1708 and 1709, including findings of fact, conclusions of law and appropriate discussion.

(b) In certifying a class action, the court shall set forth in its order a description of the class.

(c) When appropriate, in certifying, refusing to certify or revoking a certification of a class action the court may order that

(1) the action be maintained as a class action limited to particular issues or forms of relief, or

(2) a class be divided into subclasses and each subclass treated as a class for purposes of certifying, refusing to certify or revoking a certification and that the provisions of these rules be applied accordingly.

(d) An order under this rule may be conditional and, before a decision on the merits, may be revoked, altered or amended by the court on its own motion or on the motion of any party. Any such supplemental order shall be accompanied by a memorandum of the reasons therefor.

(e) If certification is refused or revoked, the action shall continue by or against the named parties alone.

Pa. R.C.P. §1710.

A. This action satisfies Pa.R.C.P. §1702

PA. R.C.P. § 1702 provides the requirements of a class:

Rule 1702. Prerequisites to a Class Action.

One or more members of a class may sue or be sued as representative parties on behalf of all members in a class action only if

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class;

(4) the representative parties will fairly and adequately assert and protect the interests of the class under the criteria set forth in Rule 1709; and

(5) a class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708.

Pa.R.C.P. §1702.

1. 1702(1): Numerosity

Rule 1702(1) states that "the class is so numerous that joinder of all members is impracticable." The numerosity requirement is satisfied where "the number of potential individual plaintiffs would pose a grave imposition on the resources of the court and an unnecessary drain on the energies and resources of the litigants." Janicik v. Prudential Ins. Co. of Am., 451 A.2d 451, 456 (Pa. Super. 1982). There is no need to prove the specific number of class members, only an ability to define the class with enough precision that the court is afforded sufficient indication that the class consists of more members than would be practicable to join. Id. While there is no specific minimum number needed for a class to be certified, there is a general presumption that if the number of potential plaintiffs exceeds forty then numerosity is satisfied. Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 595 (3d Cir. 2012).[2]

Plaintiffs seek to represent a class of approximately 123,000 residents whom may have been affected by the outage at US Steel's Clairton plant. There is no question that the potential class size far exceeds the generally accepted number required. Defendant made no argument against numerosity, either during the certification hearing or subsequent briefings. See generally (Transcript, supra); (Defendant's Proposed Findings, supra).

The court finds that joinder of all purported members of the class would be impracticable based on the approximated number of residents. This case would continue for years, perhaps even decades, if attempted to individually join all or a large number of residents. The strain on the court's resources, as well as the parties', would be insurmountable. The Court finds that the numerosity requirement, Rule 1702(1), is satisfied.

2. 1702(2): Commonality

Rule 1702(2) states that "there are questions of law or fact common to the class." Common questions will generally exist if the class members' legal grievances arise out of the "same practice or course of conduct" on the part of the class opponent. Janicik, supra at 457, quoting Ablin, Inc. v. Bell Telephone Co. of Pennsylvania, 435 A.2d 208, 213 (Pa. Super. 1981). The critical inquiry for the certifying court is whether the material facts and issues of law are substantially the same for all class members. Samuel-Bassett, supra at 408, citing Liss & Marion, P.C. v. Recordex Acquisition Corp., 983 A.2d 652, 663 (Pa. 2009). The court should be able to envision that the common issues could be tried such that "proof as to one claimant would be proof as to all" members of the class. Id. at 408-09. The Court in Samuel-Bassett held that the certifying court found commonality, stating "the class's claims were based on 'a common source of liability' and were susceptible to common proof." Id. at 411.

All six of the Named Plaintiffs brought the lawsuit based on allegations that US Steel negligently allowed pollutants, SO_2 and H_2S, to be released into the air of Mon Valley for over four months, causing either intentional or unintentional nuisance. The Named Plaintiffs seek recovery for lost-use-and-enjoyment of property caused by the Defendants actions. Each of the Named Plaintiffs claims arise out of the same incident, the outage at the US Steel Clairton Plant. The claims are also substantially similar: the Plaintiffs allege suffering from smells such as a rotten egg smell, headaches, throat irritations, and more, as a result of Defendant's actions.

Defendants argue that relying on testimony of a few nuisance complainants cannot be used to determine the conditions, experiences, or claims of the entire class. (Defendant's Proposed Findings, supra, at P. 69-70, L. 55). Defendant argues further that whether a condition constitutes nuisance would require individual determination because each resident did not have the exact experiences. (Id. at P. 70, L. 55). However, the existence of individual questions essential to a class member's recovery is not necessarily fatal to the class, and is contemplated by the rules. Janick, supra at 457, see Pa.R.C.P. 1708(a)(1) (whether common questions "predominate" over individual ones), 1710 (power to limit issues).

The court finds that common questions of law and fact exist with respect to Plaintiffs' claims. The claims arise out of the same series of unfortunate events and each of the Named Plaintiffs have similar-enough experiences to be common amongst each other. The commonality requirement, Rule 1702(2), is satisfied.

3. 1702(3): Typicality

Rule 1702(3) states that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." The typicality requirement is closely akin to the requirements of commonality and the adequacy of representation. Id., quoting Ablin, Inc. v. Bell Telephone Co. of Pennsylvania, 435 A.2d 208, 212 (Pa. Super. 1981).

The purpose of the typicality requirement is to ensure that "the class representative's overall position on the common issues is sufficiently aligned with that of the absent class members to ensure that her pursuit of her own interests will advance those of the proposed class members." Typicality exists if the class representative's claims arise out of the same course of conduct and involve the same legal theories as those of other members of the putative class. The requirement ensures that the legal theories of the representative and the class do not conflict, and that the interests of the absentee class members will be fairly represented. But, typicality does not require that the claims of the representative and the class be identical, and the requirement "may be met despite the existence of factual distinctions between the claims of the named plaintiff and the claims of the proposed class."

Samuel-Bassett, supra at 421-22 (citations omitted).

The claims and defenses of the representative parties are typical of the class. All six of the Named Plaintiffs have alleged negligence and private nuisance as a result of the emissions from US Steel's actions at its Clairton Plant. The class representatives' overall position aligns with the entire class: the claims that US Steel's emissions caused lost-use-and-enjoyment. The class representatives seek to represent the entire class of residents in the Mon Valley to recover for the lost-use-and-enjoyment of their properties. Advancement of the Named Plaintiffs' interests will undoubtedly advance those of the class.

US Steel has attempted to argue that typicality is defeated because of the differing experiences amongst not only the Named Plaintiffs, but amongst the residents, especially considering relevant factors such as age, health, location of property, etc.

However, as the Court held in Samuel-Bassett, claims need not be identical and factual distinctions may exist for typicality to remain intact.

The Court finds that all claims and defenses of the representative parties are typical of the class. The typicality requirement, Rule 1702(3), is satisfied.

4. 1702(4): Adequacy

Rule 1702(4) states that "the representative parties will fairly and adequately assert and protect the interests of the class under the criteria set forth in Rule 1709."

Pa.R.C.P. (1709) Criteria for Certifications. Determination of Fair and Adequate Representation:

In determining whether the representative parties will fairly and adequately assert and protect the interests of the class, the court shall consider among other matters

(1) whether the attorney for the representative parties will adequately represent the interests of the class,

(2) whether the representative parties have a conflict of interest in the maintenance of the class action, and

(3) whether the representative parties have or can acquire adequate financial resources to assure that the interests of the class will not be harmed.

Pa.R.C.P. §1709.

Preliminarily, a litigant must be a member of the class which he or she seeks to represent at the time the class is certified by the court in order to ensure due process to the absent class members and to satisfy requirements of standing. Janicik, supra at 458. There has been no evidence to suggest that the named Plaintiffs are not themselves members of the class, having been residents of the Mon Valley during the outage period; they are themselves members of the class.

Generally, until the contrary is demonstrated, courts will assume that members of the bar are skilled in their profession. Id. Courts may also infer the attorney's adequacy from the pleadings, briefs, and other material presented to the court, or may determine these warrant further inquiry. Id. at 459. No argument has been made that the attorneys won't adequately represent the class members' interests. See generally (Transcript, supra); (Defendant's Proposed Findings, supra); (Plaintiffs' Proposed Findings, supra). Rule 1709(1) is satisfied.

To assure that the interests of the class will not be harmed the court must consider whether the representative parties have or can acquire adequate financial resources to prepare the litigation and carry it to completion. Janicik, supra at 459. No argument has been made that the representative parties will not be able to obtain adequate financial resources. The Court sees no reason to doubt that the representative parties will adequately represent the interests of the class and obtain adequate financial resources to assure their interests. Rule 1709(3) is satisfied.

The Court finds that the only conflict with regards to Rule 1709 falls under 1709(2): whether the representative parties have a conflict of interest in the maintenance of the class action.

Defendant has made the argument that a conflict concerning the allocation of remedies amongst class members exists. (Defendant's Proposed Findings, supra, at P. 67, L. 47). Defendant argues that the Named Plaintiffs' circumstances vary from each other (and from the proposed class) and that selection of one of these Named Plaintiff's properties as the "Reference Property" will benefit some and not others (Id. at P. 67-68, L. 47). Picking one Reference Property for damages inherently benefits some and creates disadvantages for others because the emissions from the Clairton plant were not equally dispersed; some properties and residents were more affected than others. Defendant uses Dr. Anstreicher's testimony as an example: Plaintiffs' selection of the number of modeled days used to compute an "Exposure Score" can result in one property receiving as much as 36% more in damages and other receiving as much as 33% less in damages. (Id. at P. 28, L. 91). Defendant argues that the Named Plaintiffs cannot maximize recovery for the majority of the class and minimize it for others and therefore, they are inadequate to represent the class. (Id. at P. 28, L. 93).

Defendant also argues that because the Named Plaintiffs are not seeking personal injury damages, participation in the class will extinguish these claims due to the claim-splitting doctrine. (Id. at P. 68, L. 48, citing Spinelli v. Maxwell, 243 A.2d 425, 427 (Pa. 1968); Clark v. Pfizer Inc., 990 A.2d 17, 31 (Pa. Super. 2010)). Defendant argues that this would cause a res judicata effect of barring any class member from bringing personal injury claims.[3] Defendant argues the potential res judicata effect would render the Named Plaintiffs inadequate to represent the class because they don't allege all of the potential class members' claims. Plaintiffs argue in response that the issues US Steel raises are based on hypothetical situations. (Plaintiffs' Proposed Findings, supra, at P. 25, L.31). The Court agrees.

As for the proposed conflict that a single Reference Property will benefit some and not others, Plaintiffs argue that there is no single set of inputs that will advantage the Named Plaintiffs. (Id. at L. 32). The Court agrees. The Defendant has not presented enough evidence to the Court that one single Reference Property will significantly negatively impact any class members. For example, Dr. Anstreicher's Report calculated damages for different properties based on exposure scores and recommended a Reference Property with a high, but not the highest exposure score. See generally (Plaintiff's Appendix 2, supra, at Exhibit 25, Dr. Anstreicher's Report).[4] Plaintiffs' counsel have a duty, in consultation with their experts, to maximize recovery for the class members.

As for the other conflict, Defendant claims that participation in the class would extinguish potential personal injury claims. (Defendant's Proposed Findings, supra, at P. 68, L. 48). Plaintiffs assert that no claim for personal injury has been made since the fire, thus resulting in hypotheticals, which would not render the class inadequate. (Plaintiffs' Proposed Findings, supra, at P. 25-26, L. 33). The Court agrees with the Plaintiffs. After a class has been certified and notice has been sent to the potential class members, class members will be able to opt-out of the class. Pa.R.C.P. §1711(a). If a potential class member has a personal injury claim, that resident would be able to bring their own claim and the separate claim would not render the class inadequate. Braun, supra, at 895.

There has been no evidence presented that would support Defendant's arguments under this criterion. Because of the difficulty of proving a negative, courts have generally presumed that no conflict of interest exists unless otherwise demonstrated and have relied upon the adversary system and the court's supervisory powers to expose and mitigate any conflict. Janicik, supra, at 136. Counsel for Plaintiffs have a duty to their clients and the class members to obtain the best possible outcome for the class. The court finds no conflict exists under these hypotheticals. Considering all the factors set forth in Rule 1709 and evidence provided by the parties, the Court finds that Plaintiffs and their counsel will adequately represent the class. Rule 1702(4) is satisfied.

5. 1702(5): Fairness and Efficiency

Rule 1702(5) states that "a class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708." Because the Plaintiffs are seeking monetary relief, the Court must consider the seven factors outlined in 1708(a):

1708(a): where monetary recovery alone is sought, the court shall consider:

(1) whether common questions of law or fact predominate over any question affecting only individual members;

(2) the size of the class and the difficulties likely to be encountered in the management of the action as a class action;

(3) whether the prosecution of separate actions by or against individual members of the class would create a risk of

(i) inconsistent or varying adjudications with respect to individual members of the class which would confront the party opposing the class with incompatible standards of conduct;

(ii) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;

(4) the extent and nature of any litigation already commenced by or against members of the class involving any of the same issues;

(5) whether the particular forum is appropriate for the litigation of the claims of the entire class;

(6) whether in view of the complexities of the issues or the expenses of litigation the separate claims of individual class members are insufficient in amount to support separate actions;

(7) whether it is likely that the amount which may be recovered by individual class members will be so small in relation to the expense and effort of administering the action as not to justify a class action.

Pa.R.C.P. §1708(a).

Rule 1708 grants a great deal of discretion to the trial court, e.g., by not according any specific weight to the listed criteria and by not insisting on the exclusivity of the list. Dickler v. Shearson Lehman Hutton, Inc., 596 A.2d 860, 866 (Pa. Super. 1991), appeal denied, 616 A.2d 984 (Pa. 1992).

The Rule (1708) does not tell a court how to decide the question before it, nor which criteria are to be considered the most or least important, nor how to exercise the obvious discretion which the Rule provides; rather the Rule requires a court to keep all of the criteria in mind when it is ready to rule on a motion for certification and forces a court to decide, after considering all of the criteria or as many of them as may be applicable to a particular case, and after considering such "other matters" as may be appropriate to its decision, whether a requested class action is "a fair and efficient method of adjudicating the controversy."

5A Goodrich Amram 2d § 1708:2 (clarification added); see also, Dickler, supra and ABC Sewer Cleaning Co. v. Bell of Pennsylvania, 438 A.2d 616 (Pa. Super. 1981).

Considering 1708(a)(1), the court has found that common questions of law and fact predominate over questions affecting individual members. As stated above, there are no individual claims either by the Plaintiffs or potential class members separate from the allegations in this case. There are common questions of law and fact, all based on the alleged actions of the Defendant. The Court is aware of the potentiality of individual claims, but respectfully will not rule on hypotheticals. There is no question that the common issues of law and fact predominate over the nonexistent individual claims. Defendants argue that each resident has individual claims based on their experiences during the outage. However, as the Court held above, all the claims are common and relate to each other.

Concerning 1708(2), regarding the number of individuals in the class and its potential management difficulties, it is axiomatic that the purported class is large, even for a class action. There are possible difficulties Plaintiffs' counsel will encounter when managing the approximate 123,000 member-class. Several of the potential difficulties that the Court anticipates are class notification as well as distribution of potential monetary damages. However, Plaintiffs' counsel has argued that they are more than capable of handling the task ahead of them.[5] The Named Plaintiffs have only alleged negligence and private nuisance as opposed to multiple claims that would require separate actions. The Court sees no reason not to certify the class based on the approximate size of the class; Pennsylvania courts have certified classes of larger sizes.[6] The Court does not foresee any manageability issues that counsel could not handle.

Concerning 1708(3), prosecution of separate actions out of this same event would cause not only the court enormous time and resources, but would also greatly burden the parties as well, even though Defendant has made the argument for separate actions. Defendant argues certification would violate their due process rights for a jury to hear individual defenses. (Defendant's Proposed Findings, supra, at P. 64-65, L. 36). Defendant also argues that collateral estoppel prevents a risk to individual class members of inconsistent verdicts. (Id. at P. 82, L. 84-86). The Court is not convinced. Many individuals in the class would not have the opportunity or resources to litigate their own claims of negligence or nuisance in court. If multiple, separate lawsuits were filed based on the same events and allegations (and those cases were not certified or consolidated) it is inevitable that different verdicts would occur, as well as different amounts of damages, resulting in lack of fairness to multiple plaintiffs. Defendant's suggestion of individual cases is inefficient and unfair to the parties. There are more feasible problems if the Court were to not certify the class and adjudicate each claim separately. It would cause the Court and parties exorbitant amounts of time and resources. Not only would time and resources become an obstacle, but the potential for different juries to reach varied conclusions is unfair.

Regarding 1708(4), the parties have disclosed there are no previous suits commenced by the Named Plaintiffs or class members against US Steel during the outage period. However, it was disclosed that there is a case pending in this judicial district against US Steel, but the case concerns events after the fire: "The one individual lawsuit U.S. Steel disclosed at the class certification hearing, Ford v. U.S. Steel Corp., No. GD 21-006061 (Pa. Com. Pl. Allegheny Cty.), alleges a personal injury claim arising after the 102 days of pollution at issue here." (Plaintiffs' Proposed Findings, supra, at P. 25, n.78).[7]

Regarding 1708(5), the parties do not dispute that the Allegheny Court of Common Pleas is the appropriate forum for Plaintiffs' claims. The Court agrees, as the events took place in Allegheny County and Plaintiffs make allegations based on Pennsylvania law.

Regarding 1708(6), the costs and complexities of this case (such as experts, depositions, discovery, air-modeling, understanding pollution effects, and more) would likely outweigh the benefit for individuals to bring their own cases. The issues are very complex in this matter, such as the process behind making steel, whether Defendant was negligent in their actions before and after the outage, air-modeling, pollutant effects on the environment and humans, which all require expert testimony. The costs for the experts, legal fees, filing motions, etc., will be expensive for this matter, let alone for an individual claim. The costs would likely outweigh potential damages awarded for most individuals to bring their claims. For example, in Dr. Anstreicher's Expert Report, he estimates that depending on the property, damages could range anywhere from a few hundred dollars to below ten thousand dollars. (Plaintiff's Appendix 2, supra, at Exhibit 25, Dr. Anstreicher's Report). A class action is more financially feasible regarding these facts and allegations as well as understanding the complexities of pollutants, air-modeling, the steel-making process, and more.

Regarding 1708(7), the potential amount of recovery cannot be determined by the Court absent a crystal ball, and there will always be the possibility for a Defense verdict by the jury that would render no financial recovery for the class. The possibility of loss or a low damages verdict is the risk every Plaintiff, or class member, takes in litigation. The Court will not begrudge the class their opportunity to be heard when it is impossible to predict what a jury will decide.

The Court finds that the only fair and efficient adjudication for these claims is a class action and therefore finds Rule 1702(5) and 1708 satisfied.

VI. Conclusion/Class Certification

The Court finds that all requirements to certify a class action have been met under Pa.R.C.P. §1702. The Court hereby grants class certification in the above-captioned matter.

BY THE COURT:
/s/The Hon. Philip A. Ignelzi

[1] (See generally, Transcript of Class Certification Hearing at (8/11/22 – 8/16/22), Linda Hernandez v. United States Steel Corporation, No. 19-005325 (Allegheny Cty. Ct. Com. Pl. Sept. 27, 2022), ECF No. 88, 90, 92, 94) ("Transcript"). Plaintiffs presented excerpts of class-member depositions and declaration testimony during the class certification hearing; these can be found at Plaintiffs' Exhibits 19 and 20 to their Proposed Findings of Fact. (Plaintiffs' Appendix, Volume I Part 2, Linda Hernandez v. United States Steel Corporation, No. 19-005325 (Allegheny Cty. Ct. Com. Pl. Oct. 21, 2022), ECF No. 98) ("Plaintiffs' Appendix 2").

[2] Federal precedent is instructive in construing Pennsylvania's class action rules. Janicik, supra, at 464, n.3, citing McMonagle v. Allstate Insurance Co., 331 A.2d 467, 471–72 (Pa. 1975).

[3] Defendant cites Cochran v. Oxy Vinyls, LP, No. 3:06-CV-364-H, 2008 WL 4146383, at *10 (W.D. Ky. Sept. 2, 2008) to argue res judicata effect. The Court does not find this caselaw convincing, as this case would not be precedential.

[4] Dr. Anstreicher calculated exposure scores by taking the level of SO_2 experienced at a property as the measure of pollutant exposure and applying it to the reference property. The maximum of the hourly concentration per day at a property became the exposure score for that property. Those exposure scores were used to calculate damage amounts. For example, a property with an exposure score of 135 saw an estimated damages amount of $5,000. (Plaintiff's Appendix 2, supra, at Exhibit 25, Dr. Anstreicher's Report).

[5] See generally (Transcript, supra, at (8/16/22, ECF No. 90) at P. 4-88 (Plaintiffs' Closing Argument)).

[6] See, e.g., Dunn v. Allegheny Cty. Prop. Assessment Appeals & Rev., 794 A.2d 416, 427 (Pa. Commw. Ct. 2002) (certifying class of over 400,000, finding "no significant management concerns," and emphasizing court's "extensive powers to ensure the efficient conduct of the action").

[7] Other disclosed cases involving US Steel are listed below, though they are unrelated to the underlying facts in this matter: "Clean Air Act enforcement litigation is pending in the Western District of Pennsylvania, PennEnvironment, Inc. v. United States Steel Corp., No. CV 19-484 (W.D. Pa.), but the Clean Air Act claims do not and cannot address Plaintiffs' private nuisance claims. A class action asserting nuisance harms similar to the harms in this case, but years before the fire, was settled, with this Court's approval, in July 2021. Ross v. U.S. Steel, No. G.D. 17-008663 (Pa. Com. Pl.). And a single personal injury lawsuit over a permanent lung injury allegedly caused by an emissions spike after the damages period in this case was filed in May 2021 and is still pending." (Plaintiffs' Proposed Findings, supra, at P. 28, n.79).

MICHAEL D. TOTH and LINAWATI TOTH vs. BRYAN E. TOTH, EUGENE W. TOTH, MARIE TOTH and LEARNING SCIENCES INTERNATIONAL, LLC

Dissolution – Custodian

Court found no abuse of discretion or error in approving custodian's actions.

Case No.: GD-21-000372. In the Court of Common Pleas of Allegheny County, Pennsylvania. Civil Division. Ward, J.

OPINION

I. Background

This case arises out of Plaintiffs' action to dissolve an LLC, Learning Sciences International ("LSI"), in which Plaintiff Michael Toth and Defendants Bryan, Eugene, and Marie Toth are members. Michael Toth ("Michael") is the founder, and former president and CEO of LSI. This Court has previously found that the parties to this case are in significant deadlock and disagreement with each other, both personally and with respect to the management and future of LSI. Having thus found, this Court ordered the dissolution of LSI by order dated April 5, 2022. The Defendants appealed that order and sought a stay of the dissolution pending the outcome of that appeal, which the Superior Court granted by order dated June 16, 2022.

During the pendency of the appeal, Michael Toth initially continued to manage the company as CEO. However, the uncertainty surrounding this litigation and the future existence of LSI have created roadblocks to maintaining business as usual. Employees, some of whom are key personnel, have been leaving LSI and it has become understandably difficult to recruit and retain new employees. Due to LSI's primary clients being school districts, its contracts typically begin in August and last for the entire school year. The uncertainty and low retention of employees has made it impossible to anticipate whether LSI is able to enter into and perform new contracts for the school year or whether such contracts would create greater liability for the company. As such, LSI formed no new contracts and currently has no new income. The litigation and deadlock has gone so far as to cause hesitancy among LSI's existing clients about its ability to perform. Also contributing to this de facto slowing down and winding up of LSI is Michael's decision to step down as CEO. Despite the stay of this Court's dissolution order, Michael has allegedly taken steps to form a new company in anticipation of LSI's eventual dissolution, such as creating a website and hiring former LSI employees.

As a result of these developments, on June 28, 2022 Plaintiffs sought temporary relief from the Superior Court's stay order so as to petition this Court to appoint a custodian to manage the company's remaining affairs and pay its debts as they come

due pending the resolution of Defendants' appeal. By order dated June 29, 2022, the Superior Court granted the relief and temporarily lifted the stay order for the limited purpose of having this Court rule on Plaintiffs' petition to appoint a custodian. On July 15, 2022 this Court heard argument on the petition and, by order dated July 21, 2022, granted the petition and appointed James Chiafullo, Esq. ("Mr. Chiafullo") as custodian. The Defendants opposed the appointment of a receiver, and appealed that Order.

The present appeal arises from a Report and Recommendation, filed by the custodian, Mr. Chiafullo, on November 22, 2022, which recommended that this Court approve the sale and/or license of certain of LSI's assets to the Plaintiff, Michael Toth, and his new company. By Order of Court, dated April 19, 2023, this Court adopted the recommendations of the custodian. The Defendants appealed that Order on the basis that the custodian's recommendations amounted to an unauthorized dissolution of the LCC.

II. Statement of Errors

On appeal, the Defendants assert the following errors in the Court's April 19, 2023 Order approving the custodian's recommendations:

1. Whether this Court erred in approving the recommendation of James Chiafullo, Esquire, whom this Court appointed as Custodian, to liquidate certain assets of Learning Sciences International, LLC ("LSI") and wind-up its affairs when this Court appointed Mr. Chiafullo to "assume the operations, management and control of [LSI], pay obligations and invoices as they come due, preserve dwindling assets and otherwise operate the businesses," rendering this Court's approval of the recommendation even inconsistent with Mr. Chiafullo's charge from this Court?

2. Whether this Court erred in approving the recommendation of James Chiafullo, Esquire, to accept the proposed Bill of Sale and Software License Agreement, effectively transferring LSI's valuable proprietary software to a direct competitor, where Mr. Chiafullo's appointment by this Court as Liquidating Trustee has been stayed twice by the Pennsylvania Superior Court, thereby precluding the liquidation and encumbering of LSI's assets as recommended by Mr. Chiafullo?

3. Whether this Court erred by approving the recommendation of James Chiafullo, Esquire, to sell and assign certain assets of LSI to Michael Toth and to license LSI's most valuable intellectual property, including its iObservation software and Tracking application, all data contained in the iObservation software and Tracking application, and hundreds of thousands of dollars of hotel rooms in Disney World (that were prepaid by LSI), to LSI's direct competitor, which is operated by Michael Toth, in exchange for a de minimis monthly fee of $1,000?

4. Whether this Court erred in approving the recommendation of James Chiafullo, Esquire, which countenances Michael Toth's self-dealing and maneuvering, to secure for himself and his new corporation, Instructional Empowerment, the valuable right to use LSI's intellectual property, all under the guise of "assuming" LSI's rights, obligations, and potential liabilities in the form of liquidated damages under prepaid Conference Contracts when the "assumed" liquidated damages will never be triggered, rendering Michael Toth's purported consideration illusory and wholly inadequate?

III. Discussion

A. Whether the Custodian Acted Outside the Scope of Authority Granted by this Court

Firstly, the Defendants argue that Mr. Chiafullo had no authority to sell and/or license certain of LSI's assets as that would exceed the scope of Mr. Chiafullo's initial charge from this Court. In this Court's Order of July 15, 2022 Mr. Chiafullo was charged with "assum[ing] the operations, management and control of [LSI], pay[ing] obligations and invoices as they come due, preserving dwindling assets and otherwise operat[ing] the business pending further direction and order of this Court…." While it is arguable that Mr. Chiafullo acted within the scope defined by this Court's July 15, 2022 Order, such an argument is not necessary. Because this Court subsequently approved of Mr. Chiafullo's recommended actions by order of court, Mr. Chiafullo acted with the necessary authority.

This Court has the power to appoint a receiver pendente lite upon the filing of a petition for involuntary dissolution. 15 Pa. C.S.A. § 5984. That receiver has "such powers and duties as the court from time to time may direct." Id. The powers of a receiver are subject to the court, as reflected in the orders of the court empowering the receiver. Katz v. Katz, No. 1014, 2014 WL 10575352, *7 (Pa. Super. Sept. 3, 2014) (quoting Duplex Printing Press Co. v. Clipper Pub. Co., 62 A. 841-42 (Pa. 1906)). Moreover, "[s]ubsequent ratification and approval by a court also offers safe harbor for a receiver's activities." Id. at *8. Thus, this Court's initial charge in no way limits this Court from ordering, ratifying, or approving further actions of the receiver.

Here, Mr. Chiafullo sought explicit approval from this Court for the sale and licensing of certain of LSI's assets. Having approved Mr. Chiafullo's recommendation by order of court, this Court authorized Mr. Chiafullo to so act. Whether or not the custodian's actions were within the scope of authority initially granted to him when he was appointed is irrelevant. Therefore, the Defendants' contention that Mr. Chiafullo acted outside of the authority granted by this Court is without merit and should be dismissed.

B. Whether the Custodian's Actions Violate the Superior Court's Stay Order

Defendants next argue that Mr. Chiafullo's actions – or rather this Court's approval of those actions – violate the Superior Court's Orders staying the dissolution of LSI and the liquidation of its assets by a receiver. The Defendants make much of the narrow legal distinction between a receiver, as liquidator, and a custodian. See O'Malley v. Desmond, Inc., 62 Pa. D.&C.2d 645, 647 (C.P. Phila. 1973) (A "receiver" liquidates a corporations, while a "custodian" conducts the business of the corporation). However, this distinction means little in practice as a custodian or a receiver is authorized to act as the Court so directs.

A receiver or custodian is "the officer – the executive hand – of a court of equity. His duty is to protect and preserve, for the benefit of the persons ultimately entitled to it, an estate over which the court has found it necessary to extend its care." Warner v. Conn, 32 A.2d 740, 741 (Pa. 1943) (quoting Schwartz v. Keystone Oil Co., 25 A. 1018, 1019 (Pa. 1893). While Pennsylvania's business corporations statute contains a separate section for the appointment of a "custodian," it notably provides that "[a] custodian appointed under this section shall have all the power and title of a receiver appointed under Subchapter G of Chapter 19…." 15 Pa. C.S.A. § 1767(c). Under Subchapter G of Chapter 19, the statute provides that a receiver pendente lite – or a custodian – may have "such powers and duties as the court from time to time may direct and proceed as may be requisite to preserve the corporate assets wherever situated and to carry on the business of the corporation…." 15 Pa. C.S.A. § 1984. The only caveat to the appointment of a "custodian" that the statute provides is that the custodian shall not "liquidate [the corporation's] affairs and distribute its assets except when the court shall otherwise order." 15 Pa. C.S.A. § 1767(c).

Thus, the question is whether this Court ordered Mr. Chiafullo to liquidate LSI's affairs and distribute its assets, thereby dissolving the business in violation of the Superior Court's stay. Selling and/or licensing certain assets of a business as may be necessary to preserve the assets' value or to avoid liabilities is notably different from the liquidation and dissolution of a business. When a business is involuntarily dissolved, the legal existence of the business ceases and articles of dissolution are filed with the Department of State. 15 Pa. C.S.A. § 1989. Additionally, all of the business's remaining assets are distributed to its shareholders. Id.

This Court's Order of April 19, 2023 falls far short of liquidating and distributing all of LSI's assets and dissolving the business's legal existence. The Order directed Mr. Chiafullo to sell two of LSI's assets and license a third. These assets were (1) textbooks and tradeshow materials stored in warehouses, (2) contracts for conference rooms at Disney Land, and (3) LSI's proprietary iObservation software. In the case of two of those assets, the current state of LSI's affairs renders them useless and depreciating. The remaining asset presents more of a liability to LSI than an asset. In order to understand why the sale and licensing of these assets was necessary to preserve LSI's value for the benefit of all parties, it is important to look at the current state of LSI's business affairs.

Significantly, the Defendants' initiation of the series of events which lead to this lawsuit has caused numerous tangible effects on LSI's ability to continue operating as a going concern. The Defendants either fail to see, or willfully choose to ignore, that their real-world actions have real-world consequences. The Defendants' actions and the specter of this litigation have alienated Plaintiff, Michael Toth, and caused key employees and business partners to leave LSI. This has hamstrung LSI's operations to the point where it formed no new contracts to provide services due to doubts that it would be able to perform. The Superior Court's stay order is not a magic salve that can preserve LSI as it existed before these events took place. Michael Toth cannot be forced to continue to work for LSI. U.S. Const. amend. XIII, § 1. Even if the Superior Court would reverse this Court's dissolution of LSI, there is simply no going back.

Particularly important, as it relates to LSI's iObservation software, Michael's stepping down as CEO caused a key partner in LSI's business, Dr. Robert Marzano ("Dr. Marzano"), to cease licensing his proprietary teacher evaluation model to LSI. In order to allow its clients to administer Dr. Marzano's model when evaluating teacher performance, LSI had developed a proprietary evaluation software, called iObservation. The iObservation software is one of LSI's few remaining assets. However, its value as an asset is largely, if not solely, tied to the concurrent licensure of Dr. Marzano's evaluation model.

Without being able to sell its iObservation software tool to school districts, and having formed no new contracts to provide services, Mr. Chiafullo made a calculated business decision to license the software in an attempt to generate some kind of revenue for LSI. Understandably, given its limited usefulness, the only market for licensing the software is Michael's new company which works with Dr. Marzano. It should also be noted that licensing use of the iObservation software for a period of 5 years is not the same as liquidating that asset. LSI remains the owner of that proprietary software. The alternative, which Defendants suggest was the better course of action, would have been to let the software remain unused and non-revenue-generating. The only conceivable motive the Defendants have for suggesting this alternative is simply to stymie Michael's new enterprise out of spite, which is consistent with their modus operandi throughout this litigation.

Aside from the iObservation software, this Court also approved the sale of contracts under which LSI promised to rent convention room space at Disney Land. Because of LSI's current inoperative state of affairs, it had no ability or intention to honor those contracts, which immediately made them a liability. The contracts with Disney contained liquidated damages provisions that would have been triggered in the event of breach. Thus, Mr. Chiafullo again made a prudent decision to assign the contracts in order to avoid the potential for significant liability to LSI.

The Defendants baldly assert in their statement of errors that the liquidated damages would never have been triggered without elucidating, either in their written filings or arguments before this Court, why the liquidated damages would not be triggered. The Defendants only point out that Michael "unlawfully" manufactured the conditions under which LSI became unable to perform under these contracts. However, as already stated, this Court has no power to compel Michael, Dr. Marzano, or any other employees and business partners to continue working with LSI. Whether or not Michael's unilateral actions in leaving and starting a competing business are legally justifiable, that does not bear on Mr. Chiafullo's and this Court's obligation to preserve LSI in the condition it is presently in. Thus, while the Defendants continue to grandstand about Micahel's "self-dealing and maneuvering" they offer no alternative to avoiding the liability of the liquidated damages in the contracts. As such, this Court approved the assignment of those contracts.

Lastly, this Court also authorized the sale of some of LSI's store of physical assets, such as textbooks and tradeshow material. While LSI remains inoperable, these assets were useless and continuing to incur storage expenses in warehouses. These assets were also depreciable. Therefore, this Court agreed with Mr. Chiafullo that maintaining these depreciable assets in storage facilities would only erode LSI's cash value to the detriment of all parties.

C. Whether the Custodian's Actions Were Inequitable, Unreasonable, or an Abuse of Discretion

Finally, in the Defendants' last two statements of error – to the extent that they can be construed as assigning any legal error at all – take issue with the prudence or equity of this Court's decision to sell and license some of LSI's assets. Put simply, the Defendants disagree with the business decision of the Custodian. However, there is no legal standard or authority with which to analyze or evaluate the prudence of this business decision, and therefore the Defendants have no basis to challenge this Court's order.

In examining the liability of a receiver for negligence or misconduct while operating the business under his or her care, our Supreme Court has said "[w]hile the receiver will be held to a rigid accountability, nothing more is required of him than that he act in good faith, and exercise the discretion and prudence of ordinarily careful men in pursuits of similar character." Pa. Eng'g Works v. New Castle Stamping Co., 103 A. 215, 217 (Pa. 1918). Similarly, the Superior Court has said that,

"[b]y definition, courts appoint receivers to oversee the operations of troubled entities … for the benefit of individuals or groups whose interests might not align precisely with those of the original owners…. Monitor and approval by the court offers the best solution to guard against poor stewardship in these unique situations. To allow claims predicated largely upon unsupported contentions that routine, daily business functions could have been performed 'better,' as Appellant seems to argue in the present case, would frustrate this process."

Katz, 2014 WL at *8, n. 8.

Thus, this Court's supervisory role over Mr. Chiafullo should be sufficient to guard against the gross misconduct, "self-dealing," and "maneuvering" that Defendants seem to think is occurring. Although the Defendants stated in their Objections to the Custodian's Recommendations that they "do not believe that Mr. Chiafullo is a willing participant" in Plaintiff's "self-serving arrangement," the implication to the contrary is clear.[1] For the reasons stated above, Mr. Chiafullo's recommendations were soundly reasoned business decisions to generate revenue and avoid expenses and liability while LSI remains inactive. Therefore, this Court can find no abuse of discretion or error in approving Mr. Chiafullo's actions.

BY THE COURT:
/s/The Hon. Christine A. Ward

[1] Defendants' Objections to Custodian's Recommendation to Approve Protective Sale and Assignment of Certain Assets ¶ 31.