UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

HOLLY LLOYD, *Plaintiff,* *vs.* COVANTA PLYMOUTH RENEWABLE ENERGY, LLC, *Defendant.*	**No. 2:20-cv-4330-HB** [Electronically filed] JUDGE HARVEY BARTLE III **ORAL ARGUMENT REQUESTED**

DEFENDANT'S MEMORANDUM IN SUPPORT OF PARTIAL MOTION TO DISMISS AND STRIKE

FLORIO PERRUCCI STEINHARDT CAPPELLI TIPTON & TAYLOR LLC
Robert M. Donchez ID No: 209505
Robert Freedberg, ID No: 7855
60 West Broad Street, Suite 102
Bethlehem, PA 18018
(610) 691-7900
rdonchez@floriolaw.com
rfreedberg@floriolaw.com

BEVERIDGE & DIAMOND, P.C.
Michael G. Murphy (*pro hac vice* to be filed)
477 Madison Avenue, 15th Floor
New York, New York 10022
(212) 702-5400
mmurphy@bdlaw.com

James B. Slaughter (*pro hac vice* to be filed)
1350 I Street, N.W., Suite 700
Washington, DC 20005
(202) 789-6000
jslaughter@bdlaw.com

Collin Gannon (*pro hac vice* to be filed)
201 North Charles Street, Ste 2210
Baltimore, MD 21201-4150
(410) 230-1300
cgannon@bdlaw.com

Attorneys for Defendant Covanta Plymouth Renewable Energy, LLC

November 9, 2020

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT OF FACTS 3

I. The Facility's Permits Govern Every Aspect of its Operations 4

II. Plaintiff's Allegations 8

PROCEDURAL HISTORY 10

ARGUMENT 10

I. Plaintiff Fails to State a Negligence Claim Because There is no Duty in Pennsylvania to Prevent a Nuisance 11

A. Solid waste management facility operators in Pennsylvania owe no legal duty in tort to protect neighbors from odors, or from nuisance more generally. 11

B. Absent a proper allegation of physical harm, Plaintiff has just repackaged her nuisance claim as negligence. 16

II. Plaintiff's Demand for Punitive Damages Should be Dismissed 19

III. Plaintiff's Demand for Injunctive Relief Should be Dismissed 21

CONCLUSION 25

TABLE OF AUTHORITIES

FEDERAL COURT CASES

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 10
Baptiste v. Bethlehem Landfill Co.,
965 F.3d 214 (3d Cir. 2020) 15, 16
Baykeeper v. NL Indus., Inc.,
660 F.3d 686 (3d Cir. 2011) 22, 24
Bell Atlantic Corp. v. Twombly
550 U.S. 544 (2007) 10
Gates v. Rohm & Haas Co.,
No. 06-cv-1743, 2008 WL 2977867 (E.D. Pa. July 31, 2008) 15, 16
Getty Ref. & Mktg. Co. v. MT FADI B
766 F.2d 829 (3d Cir. 1985) 19
In re Paoli R.R. Yard PCB Litig.,
35 F.3d 717 (3d Cir. 1994) 13
James v. City of Wilkes-Barre
700 F.3d 675 (3d Cir. 2012) 10, 14
Malleus v. George
641 F.3d 560 (3d Cir. 2011) 10
Maroz v. Arcelormittal Monessen LLC,
No. 15-cv-0770, 2015 WL 6070172 (W.D. Pa. Oct. 15, 2015) 20
Menkes v. 3M Co.,
No. 17-cv-573, 2018 WL 2298620 (E.D. Pa. May 21, 2018) 13
Nw. Mut. Life Ins. Co. v. Babayan
430 F.3d 121 (3d Cir. 2005) 11
Reese v. Pook,
158 F. Supp. 3d 271 (E.D. Pa 2016) 14
Rivera v. Dealer Funding, LLC,
178 F. Supp. 3d 272 (E.D. Pa 2016) 10
Robins Dry Dock & Repair Co. v. Flint,
275 U.S. 303 (1927) 19
Russell v. Chesapeake Appalachia, L.L.C.,
No. 4:14-cv-00148, 2014 WL 6634892 (M.D. Pa. Nov. 21, 2014) 20, 21
United States v. Harris,
884 F. Supp. 2d 383 (W.D. Pa. 2012) 3
United States v. W. Pac. R.R. Co.,
352 U.S. 59 (1956) 22
Vizant Techs., LLC v. Whitchurch,
2016 WL 97923 (E.D. Pa. Jan. 8, 2016), *aff'd*, 675 F. App'x 201 (3d Cir. 2017) 14

STATE COURT CASES

Chambers v. Montgomery
192 A.2d 355 (Pa. 1963) 19

Ciamaichelo v. Indep. Blue Cross,
909 A.2d 1211 (Pa. 2006) 22
Clark v. Fritz
151 A.3d 1139, 2016 WL 2625235 (Pa. Super. 2016) 15
Cubano v. Sheehan,
146 A.3d 791 (Pa. Super. 2016)........ 3
Dittman v. UPMC
196 A.3d 1036 (Pa. 2018) 14, 15
Doe v. Wyoming Valley Health Care Sys., Inc.
987 A.2d 758 (Pa. Super. Ct. 2009)........ 19
Feld v. Merriam
485 A.2d 742 (Pa. 1984) 19
Gilbert v. Synagro Cent., LLC
131 A.3d 1 (Pa. 2015) 12
Gilbert v. Synagro Cent., LLC
90 A.3d 37 (Pa. Super. 2014)........ passim
Horne v. Haladay
728 A.2d 954 (Pa. Super. 1999)........ 16, 17, 18, 19
Hutchinson v. Luddy
870 A.2d 766 (Pa. 2005) 19
Jackson v. Centennial Sch. Dist.,
501 A.2d 218 (Pa. 1985) 21
Karpiak v. Russo,
450 Pa. Super. 471 (Pa. Super. 1996) 21
Kramer v. Pittsburgh Coal Co.
19 A.2d 362 (Pa. 1941) 17, 18
LaForm v. Bethlehem Twp.
499 A.2d 1373 (Pa. Super. 1985)........ 12
Lavelle v. Grace
34 A.2d 498 (Pa. 1943) 12
Lobozzo v. Adam Eidemiller, Inc.
263 A.2d 432 (Pa. 1970) 43
Phila. Elec. Co. v. James Julian, Inc.
228 A.2d 669 (Pa. 1967) 13
Phillips v. Cricket Lighters
883 A.2d 439 (Pa. 2005) 20
R.W. v. Manzek
888 A.2d 740 (Pa. 2005) 11
SHV Coal, Inc. v. Continental Grain Co.
587 A.2d 702 (Pa. 1991) 20
Simon v. Hudson Coal Co.
38 A.2d 259 (Pa. 1944) 12
Stoloff v. Neiman Marcus Group, Inc.,
24 A.3d 366 (Pa. Super. Ct. 2011) 22
Walters v. UPMC Presbyterian Shadyside,
187 A.3d 214 (2018) 12

FEDERAL STATUTORY AUTHORITIES

42 U.S.C. § 7409 6
42 U.S.C. § 7410 6
42 U.S.C. § 7411 6
42 U.S.C. § 7429 7
42 U.S.C. 7429(c) 6
42 U.S.C. 7429(e) 7
42 U.S.C. § 7470 6
42 U.S.C. § 7501 6
42 U.S.C. § 7661 7

STATUTORY AUTHORITIES

3 P.S. §§ 951-957 17
25 Pa. Code § 122.3 3
25 Pa. Code § 123 .... 5, 23, 24
25 Pa. Code Chapter 123.31 .... 5, 23, 24
25 Pa. Code Chapter 127, Subchapter G 4, 5, 23, 24
25 Pa. Code Chapter 271 .... 4, 5 23, 24
25 Pa. Code Chapter 283 .... 4, 5 23, 24
35 P.S. § 6018 23
35 P.S. § 6018.102 .... 5, 25
35 P.S. § 6018.104 23
35 P.S. §§ 6018.601-606 23
35 P.S. § 6018.613 23
71 P.S. § 510-17 23
73 P.S. § 1648.2 .... 5, 25

FEDERAL RULES AND REGULATIONS

40 C.F.R. § 51 5
40 C.F.R. § 52 5
40 C.F.R. § 60, subpart Cb 5, 6
40 C.F.R. § 60.13 5
Fed. R. Civ. P. 12 10
Fed. R. Civ. P. 12(b)(6) 10, 25
Fed. R. Civ. P. 12(f) 10, 25

ADDITIONAL AUTHORITIES

Restatement (Second) of Torts, § 371 .... 12, 13, 14, 15
Restatement (Second) of Torts, § 497 .... 12, 13
Restatement (Second) of Torts, § 908(2) 19

INTRODUCTION

Plaintiff Holly Lloyd's vague Complaint about her experience with odor allegedly coming from a waste-to-energy facility cannot state a claim for negligence under Pennsylvania law. The Complaint fails to allege any cognizable physical harm to Plaintiff or her property, rendering the negligence claim impermissibly duplicative of Plaintiff's nuisance claims and subject to dismissal. Nor is there any duty under Pennsylvania negligence law that is enforceable here; Pennsylvania courts have rejected imposing a duty to prevent off-site nuisance conditions like odors.

Defendant Covanta Plymouth Renewable Energy, LLC ("Covanta Plymouth") is the operator of a heavily regulated and state permitted waste-to-energy facility (the "Facility") that serves the essential waste management needs of thousands of individuals, local governments, businesses, and institutions in southeastern Pennsylvania. Covanta Plymouth combusts municipal solid waste that otherwise would be disposed at a landfill, produces electricity for distribution to the power grid, and recovers metals for recycling. The Facility processes around 1,200 tons of municipal solid waste per day to generate over 32 megawatts of electricity, enough to annually power 18,000 homes. Covanta Plymouth has served the community for many decades with minimal off-site odors, and this Complaint is a defective and improper effort to substitute Plaintiff's judgment for the governance of the Pennsylvania Department of Environmental Protection ("PADEP"), which permits and regulates this and other waste-to-energy facilities across the Commonwealth. Indeed, Plaintiff's Complaint demonstrates that during the Facility's long history of providing waste management services and renewable energy production, there is no significant record of odor-related complaints against the Facility by local residents to public authorities.

Ms. Lloyd's home is located a half-mile from the Facility, separated from it by Interstate I-476 and a large retail strip mall that includes an Ikea and Home Depot. The entire putative class area actually includes numerous businesses and other industrial and commercial sources of odors and noise. There is significant motor vehicle traffic and congestion, too.

Because Ms. Lloyd's Complaint only alleges the existence of nuisance conditions affecting the use and enjoyment of her property, it cannot simultaneously state a claim for negligence. Plaintiff has not pled the additional elements required to make an independent negligence claim in Pennsylvania, and instead attempts to repackage her nuisance claims and call the resulting, redundant claim "negligence." Pennsylvania courts have long held that negligence is distinct from nuisance, and that there is no duty in tort to prevent nuisances that result in no physical harm. Rather, a Pennsylvania negligence claim must specifically plead physical injury to body or property, and Plaintiff has not done so. Plaintiff's negligence claim should be dismissed.

The claim for punitive damages is spurious and also demands dismissal. There is no plausible allegation of malicious intent as required to support a demand for punitive damages. Pennsylvania law holds that the permitted operation of a business – particularly one like this waste-to-energy Facility that provides an essential public service – are not subject to punitive damages absent extraordinary circumstances not pled here.

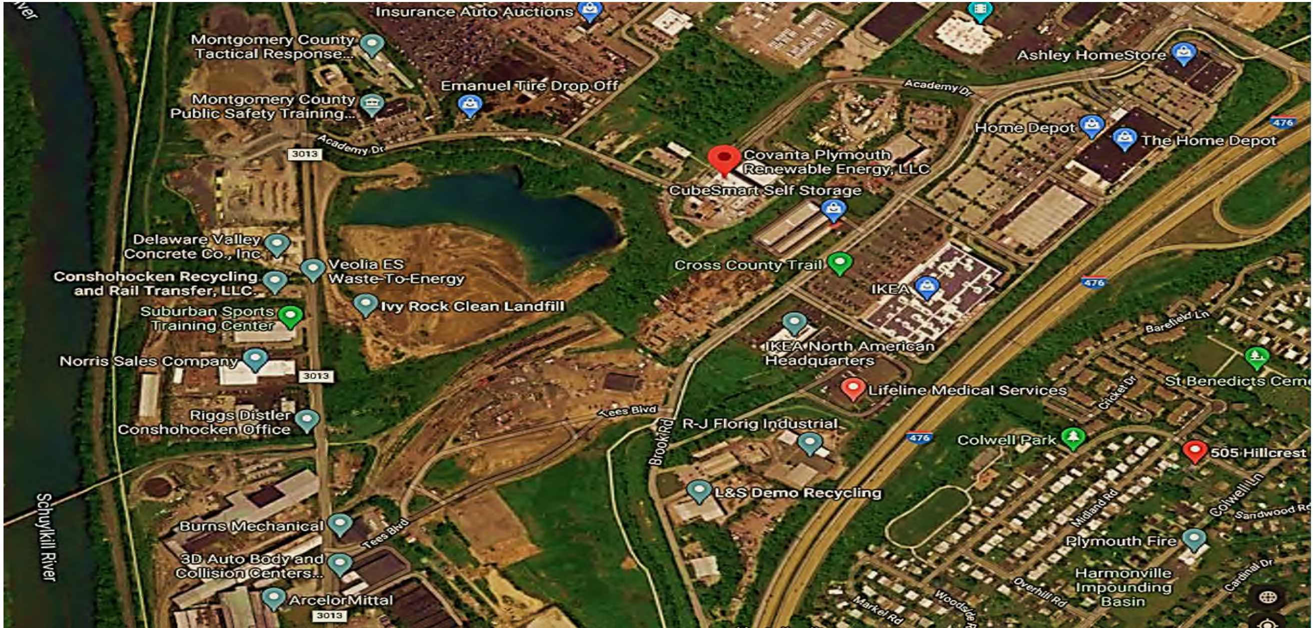
Lastly, PADEP's primary jurisdiction bars Ms. Lloyd's demand for injunctive relief. Plaintiff asks this Court to order Covanta Plymouth to comply with its permit, a wholesale infringement on the primacy of PADEP, which, in conjunction with the U.S. Environmental Protection Agency ("EPA"), has overseen all aspects of waste-to-energy facilities in the Commonwealth for decades. The Facility at issue here is permitted and highly regulated by

PADEP, which the Complaint admits. Plaintiff herself invokes occasions of PADEP enforcement following isolated malfunctions at the Facility, reflecting the exclusive regulatory hierarchy the Commonwealth envisioned when adopting the statutory and administrative procedures for permitting the Facility. The Complaint thus embraces that PADEP monitors and enforces against the Facility, fulfilling a statutory duty that private litigants cannot supplant. Ultimately, any injunctive relief could require Covanta Plymouth to amend its permits and those amendments would have to be approved by PADEP, reinforcing that injunctive relief here is an improper intrusion on the agency's statutorily authorized jurisdiction.

STATEMENT OF FACTS

Covanta Plymouth, located at 1155 Conshohocken Road in Plymouth Township, Pennsylvania, is sited east of the Schuylkill River, near the Conshohocken Recycling & Rail waste transfer station and ArcellorMittal's Conshohocken steel plate finishing facility. Since its construction and commencement of operations in 1992, the Facility has been an important waste management fixture for use by residents and businesses to process waste into energy in the greater Montgomery County area. *See* Compl. ¶¶ 9, 11. The Facility in part services multiple major municipalities, including Plymouth Township.

As shown in the image below, commercial and industrial land uses surround the Facility, including major interstate highways. The Facility has few residential neighbors; the named Plaintiff's residence is actually a half-mile southeast of the Facility, at 505 Hillcrest Road, Conshohocken, Pennsylvania. *Id.* ¶ 4.



* Google Maps print out of the Facility and surrounding area, including the named Plaintiff's and Facility's addresses marked in red. Printed November 9, 2020.[1]

I. The Facility's Permits Govern Every Aspect of its Operations

The Facility holds a solid waste "Resource Recovery and Other Processing" ("Solid Waste") permit from PADEP, which oversees the Facility's compliance with the Commonwealth's regulations governing solid waste processing/disposal, under authority delegated to Pennsylvania by U.S. EPA under Subtitle D of the Resource Conservation and Recovery Act. *See* Compl. at 19, ¶ F; *see also generally* 25 Pa. Code Chapters 271, 283. The Facility's air emissions are governed by a Title V operating permit issued by PADEP pursuant to the Clean Air Act ("CAA") and the Commonwealth's Air Pollution Control Act ("APCA"), and the Facility also holds various other permits governing management and discharge of its sanitary wastewater and stormwater. *See* Compl. at 19, ¶ F; *see* 25 Pa. Code Chapter 127, Subchapter G.

[1] "[I]t is well-settled that courts . . . may take judicial notice of the map of a general area and consider the location of events in rendering a decision." *United States v. Harris*, 884 F. Supp. 2d 383, 395 (W.D. Pa. 2012); *see also Cubano v. Sheehan*, 146 A.3d 791, 795 (Pa. Super. 2016).

Covanta Plymouth is at the forefront of recycling and renewable energy. Pennsylvania provides waste-to-energy plants alternative energy tax credits to incentivize resource recovery and the production of renewable energy. *See* 35 P.S. § 6018.102 (prioritizing "resource recovery"); 73 P.S. § 1648.2 (providing tax credits for waste-to-energy generation). As critical infrastructure, the Facility was designated essential when COVID-19 restrictions were imposed on businesses in Pennsylvania.

PADEP regularly inspects Covanta Plymouth pursuant to the Facility's Solid Waste permit, which grants PADEP access to the Facility at any time. *E.g.*, *id*. ¶¶ 26-27. Pennsylvania's regulations, as enforced by PADEP through the Solid Waste permit, govern all aspects of the Facility's operations through numerous permit conditions and technical operational plans approved by PADEP. *See id*. ¶ 14; 25 Pa. Code Chapters 271, 283. Among other things, the regulations dictate the types and quantities of waste that the Facility may accept and combust, 25 Pa. Code §§ 283.201, 283.214, 283.223; the location where the Facility may operate, *id.* § 283.202; the manner of construction and maintenance for the Facility's waste unloading areas, *id.* § 283.216; the operation of the Facility's combustion system, *id.* § 283.218; and the facility's ash management practices, *id*. § 283.403, all of which can play a role in odor control. *See also* Compl. ¶ 14.

Additionally, as mandated by federal and Commonwealth regulations, the Facility uses effective, PADEP-approved technology to control and treat emissions and any related odors. *See, e.g.*, *id*. While waste-to-energy combustion can create odor, the applicable regulatory and permit schemes exist to oversee, control, and limit such odor. *See id*. ¶¶ 14, 17. Primarily, the Facility's air permit dictates how the Facility captures, manages, and treats combustion emissions. Both the federal Clean Air Act and the Commonwealth's Air Pollution Control Act

create a complete and interlocking series of federal and state air pollution control regulations for nearly all sources of air pollution in the United States, including waste-to-energy facilities like Covanta Plymouth's. EPA has set National Ambient Air Quality Standards ("NAAQS") at levels that are protective of public health with an adequate margin of safety. *See* 42 U.S.C. § 7409. States must prepare, for approval by EPA, State Implementation Plans ("SIPs") designed to meet the NAAQS. *See* 42 U.S.C. § 7410. The CAA and APCA also require emission reductions through installation of air pollution control technology and impose strict preconstruction permit requirements that apply to major sources, like this Facility. These requirements have been incorporated into regulations known as Prevention of Significant Deterioration ("PSD") and Nonattainment New Source Review ("NNSR") as adopted by PADEP. *See* 42 U.S.C. § 7470, *et seq.*; 42 U.S.C. § 7501, *et seq.*; 40 C.F.R. §§ 51-52, *et seq*. Waste-to-energy facilities, including Covanta Plymouth, which is defined as a major source under the CAA and APCA, are subject to strict emissions controls to meet these regulations and Pennsylvania's State Implementation Plan.

As dictated by the Clean Air Act, EPA originally established New Source Performance Standards ("NSPS") governing new waste-to-energy facilities and Emission Guidelines ("EG") for existing waste-to-energy facilities under CAA Section 111. *See* 42 U.S.C. § 7411; 40 C.F.R. § 60, subpart Cb. In addition to requiring emission reductions, the NSPS and EG mandate continuous emission monitoring systems ("CEMS"), which measure actual emission levels of pollutants and verify compliance with the regulations. 42 U.S.C. 7429(c); 40 C.F.R. § 60.13. In 1990 Congress increased the scope and stringency of air pollution controls for waste-to-energy facilities, adding a new Section 129 to the CAA requiring EPA supplement Section 111 by promulgating stricter NSPS and EG for waste-to-energy facilities reflecting the maximum

achievable control technology ("MACT") for numerous air pollutants. *See* 42 U.S.C. § 7429. EPA issued final New Source Performance Standards and Emissions Guidelines for waste-to-energy facilities in 1995 and 1997, which states were required to implement in their own rules, subject to EPA approval. *See id.*; 60 FR 65387; 62 FR 48348. EPA has since revised the Emissions Guidelines for existing waste-to-energy facilities, making the regulations stricter for certain pollutants, and tightened requirements for the minimum amount of time that the continuous monitoring equipment must be online. *See, e.g.*, 71 FR 27324; 25 Pa. Code §122.3 (relating to adoption of 40 C.F.R. § 60, subpart Cb standards); Chapter 123 (air emission standards for specific contaminants, including odors (§ 123.31)); Chapter 127, Subchapter G (requirements for Title V operating permits).

The CAA additionally establishes a "Title V" operating permit program under which all federal and state air pollution emission limits, monitoring, recordkeeping, and reporting requirements must be combined into one permit that is subject to public, state, and EPA review. *See* 42 U.S.C. § 7661 et seq., 40 C.F.R. § 70. Relevant facilities must obtain a Title V permit, operate in compliance with that permit, and certify annually compliance or noncompliance with relevant permit requirements. *See* 42 U.S.C. § 7661 et seq., 42 U.S.C. § 7429(e); 25 Pa. Code Chapter 127, Subchapter G.

Covanta Plymouth operates the Facility in compliance with its 58 page CAA Title V permit (issued in 2001), which sets forth detailed permit conditions with which the Facility must comply and that PADEP has renewed three times after agency review and public comment. The Title V permit incorporates the aforementioned CAA and APCA regulations and directly applies them the Facility and its unique emission units. PADEP has made the Title V permit publicly

available: http://files.dep.state.pa.us/Air/AirQuality/AQPortalFiles/Permits/PermitDocuments/1161400[46-00010]_Issued_v1.pdf.

In sum, this complex body of technology mandates, air emissions controls, and close federal and state oversight assures the protection of public health and the minimization of nuisances. The blunt tools of tort litigation for money damages and court-administered injunctive relief undermine this long standing and carefully calibrated administrative scheme.

II. Plaintiff's Allegations

Ms. Lloyd's Complaint alleges that the Facility "releases noxious odors and air contaminants onto the private properties of Plaintiff and the Class, causing property damage through nuisance and negligence." Compl. ¶ 3. The Complaint asserts three causes of action – public nuisance, private nuisance, and negligence – and seeks compensatory and punitive damages, as well as "injunctive relief not inconsistent with Defendant's state and federal regulatory obligations." *Id.* at 11-19. Plaintiff does not seek relief merely on behalf of property owners and residents adjacent or proximate to the Facility; rather, the claims are asserted on behalf of "owners/occupants and renters" of more than 7,900 households – in the range of 19,000 people – within a 1.5-mile radius in every direction from the Facility. *Id.* ¶ 39. This geographically expansive and varied landscape encompasses nearly 8 square miles, including large commercial and industrial operations, interstate highways, dense woodlands, steep hills and valleys, and a large stretch of the Schuylkill River. *Id.* ¶¶ 1, 35-36.

Claiming – with little detail – that the Facility has been the subject of "numerous complaints" and a "well documented pattern" of compliance problems, Plaintiff appears to focus on malfunctions resulting in isolated compliance incidents that might yield off-site odors. *See id.* ¶¶ 26-27. But a malfunction – like a power failure – is sudden and unforeseen, and is not a

reasonably preventable event; it does not result in ongoing deviations or violations of the applicable regulations so long as it is appropriately rectified and reported, as this Facility does. *See, e.g.*, 25 Pa. Code Chapter 122. Despite the isolated nature of these incidents, Plaintiff nonetheless alleges "harm" on behalf of the proposed class because the Facility's "odorous emissions have [impacted] their lives and their ability to use and enjoy their homes and properties." *See id.* ¶ 23.

While Plaintiff also makes some conclusory allegations of "physical property damage," throughout the Complaint she conflictingly equates physical property damage with the Facility's alleged "interfere[nce] with the use and enjoyment of that property." *Id.* ¶ 30; *see also id.* ¶¶ 29, 55 (conflating physical damage with nuisance conditions). In fact, there is no allegation of physical harm to property. Plaintiff thus makes no particularized allegation of cognizable physical damage, and instead exclusively focuses her Complaint on odors that allegedly emanate from the Facility and interfere with her property interests. *See id.*[2]

---

[2] While the Court must accept well-pleaded allegations as true at this stage, Covanta Plymouth will ultimately prove that it is a well-run operation, that it uses state-of-the-art odor mitigation technology, that it is compliant in all respects with state and federal environmental law, and that Plaintiff's odor allegations are untrue. If Plaintiff is indeed experiencing odors on her property, all or most of those odors must come from elsewhere – in Plaintiff's particular case, potentially any one of the many industrial and commercial sources located near Plaintiff's residence.

Covanta Plymouth will oppose certification of any class as to any of Plaintiff's claims. The alleged existence of a class is based on the incorrect assumption that airborne odors simply spread outward from their source, evenly, for miles in every direction, like ripples from a stone dropped into a still pond. On the basis of this core misunderstanding, Plaintiff proposes to define her class by simply drawing a circle around the Facility on a map. Compl. ¶ 39. But odor migration, where it actually occurs, works nothing like this. Even an odorous source, which this Facility is not, would emit odors in uneven, unidirectional, and constantly shifting ways, depending on variations in geography, topography, air pressure, wind speed and direction, weather, and other factors. Here, 19,000 people living across a varied patchwork of nearly 8 square miles drawn artificially in a circle would certainly not experience odor, if and when it occurred, in a remotely common way. Plaintiff's class will not be certified.

PROCEDURAL HISTORY

Plaintiff filed her proposed class action Complaint against Covanta Plymouth on September 3, 2020. *See* ECF No. 1. Covanta Plymouth received the Complaint on September 9, 2020, and returned an executed waiver of service on October 19, 2020. Plaintiff filed the waiver of service on October 20, 2020. *See* ECF No. 8. Covanta Plymouth now timely responds to Plaintiff's Complaint under Rule 12 of the Federal Rules of Civil Procedure.

ARGUMENT

Courts must dismiss a claim if the plaintiff has not pled "enough facts to state a claim to relief that is plausible on its face," including supporting facts for each of the identified elements. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Malleus v. George*, 641 F.3d 560, 563 (3d Cir. 2011) (citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)); Fed. R. Civ. P. 12(b)(6). The court must "disregard rote recitals of the elements of a cause of action, legal conclusions, and mere conclusory statements," *James v. City of Wilkes-Barre*, 700 F.3d 675, 679 (3d Cir. 2012), becuase such allegations "are not entitled to the assumption of truth." *Malleus*, 641 F.3d at 563 (quoting *Iqbal*); *see also Rivera v. Dealer Funding, LLC*, 178 F. Supp. 3d 272, 281 (E.D. Pa 2016) (providing further that a "demand for damages that is not recoverable as a matter of law may be stricken pursuant to Rule 12(f)").

Here, to survive a motion dismiss, Ms. Lloyd's negligence claim must be premised on the breach of a recognized duty. But Pennsylvania does not recognize a duty to protect neighbors from offsite odors resulting from a property owner's legal use of its land, unless those odors cause physical injury. Plaintiff fails to allege any such physical, cognizable injury to body or property under the pleading standards of Pennsylvania law. Plaintiff's negligence claim cannot be based on nuisance conditions that do not cause physical injury. The Complaint fails to state

an independent negligence claim.

Plaintiff has also not plausibly alleged any wanton or reckless conduct by Covanta Plymouth, and Plaintiff has thus pled no basis under Pennsylvania law for the Court to award punitive damages.

Plaintiff last urges this Court to award injunctive relief under causes of action that do not allow for such recovery, as that relief would infringe on a highly detailed regulatory scheme and public policy. PADEP is the proper entity to impose injunctive relief in the event such relief were warranted. The Complaint even acknowledges that when there is a compliance incident, PADEP acts to enforce the applicable regulations and permit provisions. There is no basis to ask the Court to supplant PADEP's jurisdiction in this highly regulated area, and Plaintiff has thus pled no basis under Pennsylvania law for the Court to intrude on the primary jurisdiction of PADEP to award injunctive relief.

I. Plaintiff Fails to State a Negligence Claim Because There is no Duty in Pennsylvania to Prevent a Nuisance

Pennsylvania law imposes no legal duty, as a matter of negligence law, to prevent a nuisance. Plaintiff's negligence claim is a repackaged nuisance claim, and as such, Pennsylvania law disallows it as an independent claim.

A. Solid waste management facility operators in Pennsylvania owe no legal duty in tort to protect neighbors from odors, or from nuisance more generally.

A Pennsylvania plaintiff complaining of negligence must establish that (i) the defendant has a legal duty to conform to a certain standard of care to prevent unreasonable risks to the plaintiff, (ii) the defendant's conduct breached that duty, (iii) the breach caused an injury to the plaintiff, and (iv) the injury resulted in actual losses or damages. *See Nw. Mut. Life Ins. Co. v. Babayan*, 430 F.3d 121, 139 (3d Cir. 2005); *R.W. v. Manzek*, 888 A.2d 740, 746 (Pa. 2005). The

court alone determines whether there is a duty and the duty's parameters. *See Walters v. UPMC Presbyterian Shadyside*, 187 A.3d 214, 221 (2018).

The Pennsylvania Superior Court set forth the rule applicable for this case in its 2014 decision in *Gilbert v. Synagro Central*: There is no legal duty under Pennsylvania law "that requires a property owner to use his or her property in such a manner that it protects neighboring landowners from offensive odors or other nuisance conditions." 90 A.3d 37, 51 (Pa. Super. 2014), *aff'd in part and rev'd in part*, 131 A.3d 1, 23 (Pa. 2015). The Supreme Court of Pennsylvania affirmed this holding. *Gilbert v. Synagro Cent., LLC*, 131 A.3d 1, 23 (Pa. 2015) (affirming without discussion all aspects of the Superior Court order not directly addressed, including the negligence holding). The rule – which recognizes that odors are ubiquitous in many land uses like farming and waste management facilities and are the province of regulators and nuisance law – is dispositive of Plaintiff's negligence claim.

The *Gilbert* rule is a particular application of the more general rule stated in Restatement (Second) of Torts, § 371 for the liability of possessors of land to people outside of the land for activities carried out on the land. Section 371 provides that a possessor of land is subject to "liability for <u>physical harm</u> to others outside the land caused by an activity carried on by him thereon which he realizes or should realize will involve an unreasonable risk of <u>physical harm</u> to them under the same conditions as though the activity were carried on at a neutral place." *Id.* (emphases added).[3] For the purpose of a negligence analysis, "physical harm" in Section 371 includes both bodily harm and harm to the physical condition of property. *See* Restatement

[3] Pennsylvania courts regularly apply Section 371 to bar negligence claims. *See, e.g.*, *Lavelle v. Grace*, 34 A.2d 498, 501 (Pa. 1943) (highway injuries where steam obstructed visibility); *Simon v. Hudson Coal Co.*, 38 A.2d 259, 260 (Pa. 1944) (drowning death where water discharged across plaintiffs' property); *LaForm v. Bethlehem Twp.*, 499 A.2d 1373, 1384 (Pa. Super. 1985) (drowning death alleged on basis of town stormwater management activities).

(Second) of Torts, § 497 (cmt. b: "Where the rule stated is applicable to harm to property as well as harm to the person, the phrase used throughout is 'physical harm.'"); *see also Phila. Elec. Co. v. James Julian, Inc.*, 228 A.2d 669, 670 n.1 (Pa. 1967) (applying Section 497 in case involving physical damages to underground gas distribution main).

The duty of care at issue here is the duty to prevent *physical harm* to persons or property, not the duty to prevent intangible nuisance impacts, like odor. But Plaintiff does not allege physical harm in this case – neither to persons nor property. The gravamen of the complaint is odor, and the alleged harm is the loss of use and enjoyment of property as a result of the odor. Plaintiff makes no substantive physical damage allegations beyond such odor nuisance.

While Ms. Lloyd makes a cursory effort to allege property damages, in Pennsylvania property damages require physical damage to property, and Plaintiff makes no allegation regarding what physical damage her property might have incurred, nor could she in an odor case. *See Menkes v. 3M Co.*, No. 17-cv-573, 2018 WL 2298620, at *7 (E.D. Pa. May 21, 2018) (Tucker, J.) ("In Pennsylvania, property damages require physical damage to property.") (citing *In re Paoli R.R. Yard PCB Litig*., 35 F.3d 717, 798 (3d Cir. 1994)). Her property damage claims are conclusory and point to no discernible physical harm: She claims the "odors from the facility are offensive . . . and have caused physical property damages," Complaint ¶ 29, and that the odors have caused her to "suffer[] damages," including "loss of the full value of Plaintiff's property, and diminution in the value of Plaintiff's property," Complaint ¶ 79. Plaintiff's perfunctory pleading is unsurprising because odors of course are transient, triggered by minuscule amounts of a substance, and leave no trace, much less damage.

Plaintiff's "property damage" allegations are words without content and do not actually point to physical harm. Embarrassment and annoyance are not physical injury. *See* Compl. ¶ 55.

Plaintiff offers no facts about how odors might have physically damaged her property, or which components of the property were damaged, or how such damage might or might not be reparable, or the alleged cost of such repairs. And the only example she provides constitutes economic (*i.e.*, property value diminution), not physical, harm. The conclusory recitation of an element of a claim – like "physical property damage" – is insufficient. *See James v. City of Wilkes-Barre*, 700 F.3d 675, 679 (3d Cir. 2012) ("[W]e disregard rote recitals of the elements of a cause of action, legal conclusions, and mere conclusory statements."); *Reese v. Pook & Pook, LLC.*, 158 F. Supp. 3d 271, 289 (E.D. Pa. 2016) (Stengel, J.) (discussing implausible allegations that failed to satisfy federal pleading standards).[4]

Plaintiff alleges only nuisance damages – the invasion of a property interest – not any physical harm, either to body or property. Nuisance damages do not support a negligence claim, because there is no legal duty in tort to prevent nuisance damages. Accordingly, while an "affirmative act" may impose a duty "to exercise the care of a reasonable man to protect [others] against an unreasonable risk of harm to them arising out of the act," *see Dittman v. UPMC*, 196 A.3d 1036, 1046-47 (Pa. 2018), the duty is to protect others against an unreasonable risk of *physical harm*. And the law is clear that in this context, "harm" means physical harm, not mere nuisance. That is what Section 371 and *Gilbert* collectively dictate: Someone conducting

[4] Plaintiff's vague claim for "lost property value" is further unavailable under Pennsylvania law in the absence of the requisite allegation that there has been permanent property damage. *See Lobozzo v. Adam Eidemiller, Inc.*, 263 A.2d 432, 437 (Pa. 1970). Where physical damage to property is remediable, the measure of damages is the cost of repair, unless that cost would exceed the value of the property. *Id.* Here, Plaintiff has not alleged permanent damage, and she has not pled repair costs. *Cf. also Vizant Techs., LLC v. Whitchurch*, 2016 WL 97923, at *16 (E.D. Pa. Jan. 8, 2016) (Bartle, J.), *aff'd*, 675 F. App'x 201 (3d Cir. 2017), *as amended* (Feb. 2, 2017) (discussing Pennsylvania law barring "claims arising from negligence that result[] solely in economic damages unaccompanied by physical or property damage" (internal quotation marks omitted)).

activities on property is obligated to prevent physical harm to outsiders, Restatement § 371; but a property owner has no duty to protect outsiders from a nuisance, like odors. *Gilbert*, 90 A.3d at 51; *cf. Clark v. Fritz*, 151 A.3d 1139, 2016 WL 2625235, at *6 n.22 (Pa. Super. 2016) ("[W]here an injury is sustained to real property as a result of the negligence of another, the property owner is entitled to damages …." (emphasis added)). Here, Plaintiff does not allege an "injury to real property."

Plaintiff alleges only nuisance damages – the invasion of a property interest – not any physical harm, either to body or property. Nuisance damages are not enough to support a negligence claim, because there is no legal duty in tort to prevent nuisance damages, which are inherently speculative. Accordingly, while an "affirmative act" may impose a duty "to exercise the care of a reasonable man to protect [others] against an unreasonable risk of harm to them arising out of the act," *see Dittman v. UPMC*, 196 A.3d 1036, 1046-47 (Pa. 2018), the duty is to protect others against an unreasonable risk of *physical harm*. And the law is clear that in this context, "harm" means physical harm, not mere nuisance. That is what Section 371 and *Gilbert* collectively dictate: Someone conducting activities on property is obligated to prevent physical harm to outsiders, Restatement § 371; but a property owner has no duty to protect outsiders from a nuisance, like odors. *Gilbert*, 90 A.3d at 51; *cf. Clark v. Fritz*, 151 A.3d 1139, 2016 WL 2625235, at *6 n.22 (Pa. Super. 2016) ("[W]here an injury is sustained to real property as a result of the negligence of another, the property owner is entitled to damages …." (emphasis added)). Here, Plaintiff does not allege an "injury to real property."

In the very few cases finding a physical harm from nuisance invasions, the contaminant was not transient odor but carcinogens that came to rest in the property. One unpublished opinion from the Eastern District of Pennsylvania – applying Illinois law – concluded that "the

physical presence of vinyl chloride in the air, even if undetectable, constitutes a physical injury to the property for purposes of common law property damage claims." *Gates v. Rohm & Haas Co*., No. 06-cv-1743, 2008 WL 2977867, at *3 (E.D. Pa. July 31, 2008). But *Gates* found there was "ample evidence in the record of past physical injury to the Plaintiffs' property in the form of groundwater contamination" and whether the property "continue[d] to be contaminated with vinyl chloride, a hazardous substance" was still controverted at the time of the motion. *Id.* The court also relied heavily on the distinction between when an "invading substance is a hazardous chemical" as compared to "non-hazardous." *Id. Gates* thus determined that a cognizable physical harm existed because the allegedly invading substance was, as a carcinogen, highly hazardous. *See id.*[5] Plaintiff's Complaint, does not allege the invasion of hazardous substances onto Plaintiff's property. Ms. Lloyd brought a classic nuisance complaint for odor and has tried to shoehorn it into a negligence theory ("Defendant's emission control processes . . . fail to prevent noxious offsite odors[.]"). Compl. ¶ 18. Such a complaint does not sound in negligence under Pennsylvania law.

B. Absent a proper allegation of physical harm, Plaintiff has just repackaged her nuisance claim as negligence.

A cause of action is determined by its content, not its label: If a claim sounds in nuisance, it does not become a negligence claim merely because a plaintiff wishes to frame it that way. *See, e.g., Horne v. Haladay*, 728 A.2d 954, 960 (Pa. Super. 1999) ("Since appellant's negligence claim is really a nuisance claim, we find it is time-barred by operation of [the statute of repose in the Pennsylvania Right to Farm Act]."); *see also Gilbert*, 90 A.3d at 51. Here, Plaintiff labels

---

[5] The Third Circuit recently considered a similar case involving alleged odor nuisance conditions caused by a landfill, and reserved opinion on whether mere odor nuisance conditions could ever yield the requisite physical harm needed to state a claim for negligence. *See Baptiste v. Bethlehem Landfill Co*., 965 F.3d 214, 217 (3d Cir. 2020).

her third claim "negligence," but it is actually just a nuisance claim in a different guise. The differences between nuisance and negligence were examined by the Supreme Court of Pennsylvania in *Kramer v. Pittsburgh Coal Co*., in which the court held that a key difference was in the harm alleged:

> In legal phraseology, the term 'nuisance' is applied to that class of wrongs that arise from the unreasonable, unwarrantable, or unlawful use by a person of his own property, real or personal, or from his own improper, indecent, or unlawful personal conduct, working an obstruction or injury to a right of another, or of the public, and producing such material annoyance, inconvenience, discomfort or hurt that the law will presume a consequent damage. Nuisance is distinguishable from negligence.

19 A.2d 362, 363 (Pa. 1941) (quoting 46 C.J. 645, 646, 650) (citations omitted) (emphasis added). *Kramer* distinguished between negligence and nuisance harms: Nuisance damages are "annoyance, inconvenience, discomfort or hurt" that are sufficiently material to require a presumption of damage. *Id.* Negligence damages are by contrast actual, physical injuries to person or property. This is true even where nuisance claims are founded on allegedly "unlawful" use of property or personal conduct; a defendant's conduct may be "unlawful" and still constitute only a nuisance, not negligence, if the resulting harm is in the "annoyance/ inconvenience" category rather than a physical injury. *Id.* at 381.[6]

[6] The plaintiff in *Kramer* brought a negligence claim but wanted it to be treated as a nuisance claim – in some ways a mirror image of the instant case. In *Kramer*, the plaintiff alleged actual property damage "caused by dust deposited on and in [the property]" from a coal cleaner in a nearby mine, 19 A.2d at 363, and having alleged actual property damage, the plaintiff permissibly framed his complaint as a negligence claim. *Id.* at 363-64. The jury, however, found no negligence liability, so the plaintiff on appeal questioned whether negligence was actually the proper standard, *id.* at 364, apparently arguing that the case should have been evaluated by the jury under a more forgiving "absolute liability" nuisance standard instead. *Id.* The court held that negligence and nuisance are distinguishable, and that the plaintiff, "having stated and tried his case solely as one of negligence, could not expect to have it passed upon as one of nuisance generally, irrespective of negligence." *Id.*

Based on *Kramer*, the Superior Court of Pennsylvania has twice held in cases focused on nuisance odors that a negligence action may not be based on the same facts as a nuisance action – in other words, that a plaintiff may not repackage a pure nuisance claim as a negligence claim. *See Horne*, 728 A.2d at 955-60 (holding that negligence claim was barred as a de facto nuisance claim because "the exact same facts support both appellant's nuisance and negligence claims"); *Gilbert*, 90 A.3d at 51 ("As in *Horne*, the operative facts here establish that the Residents have asserted nuisance claims, not negligence claims"). In *Gilbert*, the Superior Court wrote that "while it is true that a nuisance claim can be founded on negligent conduct, a negligence claim cannot be based solely on facts that establish a nuisance claim." *Id*. (plaintiffs' purported negligence claim regarding farm odors was actually a nuisance claim, requiring evaluation whether the nuisance claim was barred by the one-year statute of repose in the Pennsylvania Right to Farm Act, 3 P.S. §§ 951-957). That is, negligence claims require physical injury, and may only coexist with nuisance claims if there are adequate allegations of physical damage. *Id.*

These holdings are doctrinally sound: To allow a plaintiff to plead a negligence claim on mere nuisance facts would mean that there is a legal duty of care in tort that requires reasonable actors to prevent nuisances. This is in direct conflict with the rules discussed above in Restatement Section 371 and *Gilbert*. It would also make nuisance a mere subtype of negligence, notwithstanding the *Kramer* holding that the two claims are distinguished by virtue of the resulting harm.

The holding is also well-grounded in policy: A legal duty in tort for a property owner to refrain from lawful activities that might create a mere nuisance condition offsite – but no physical harm – would make activities like waste-to-energy facilities and farming functionally impossible, notwithstanding approval and regulation by public authorities. As Justice Holmes

held, "where the negligence does not result in physical harm [there is] no basis for an independent tort[.]" *Getty Ref. & Mktg. Co. v. MT FADI B*, 766 F.2d 829, 833 (3d Cir. 1985) (interpreting *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927)).

Here, Plaintiff has only pled a nuisance claim, because she has not pled negligence harm – physical injury. A negligence claim cannot be based on the "exact same facts" as a nuisance claim. *Horne*, 728 A.2d at 955-960.

II. <u>Plaintiff's Demand for Punitive Damages Should be Dismissed</u>

Nothing plausibly alleged in the Complaint approaches the high threshold for recovering punitive damages in Pennsylvania. "[P]unitive damages are an extreme remedy available only in the most exceptional circumstances." *Doe v. Wyoming Valley Health Care Sys., Inc.*, 987 A.2d 758, 768 (Pa. Super. Ct. 2009) (internal quotations omitted). Pennsylvania has adopted Section 908(2) of the Restatement (Second) of Torts regarding the imposition of punitive damages, and permits punitive damages only for conduct that is "outrageous because of the defendant's evil motives or his reckless indifference to the rights of others." Restatement (Second) of Torts § 908(2); *Feld v. Merriam*, 485 A.2d 742 (Pa. 1984) (no punitive damages against a landlord who failed to protect tenants from violent assault and death); *Chambers v. Montgomery*, 192 A.2d 355 (Pa. 1963) (no punitive damages where the intent of the defendant in committing an assault was not determined).

To establish the facts necessary to entitle a plaintiff to punitive damages, "the state of mind of the actor is vital" and the alleged tortfeasor's act or failure to act "must be intentional, reckless or malicious." *Hutchinson v. Luddy*, 870 A.2d 766, 770-71 (Pa. 2005) (remanding question of punitive damages for negligent supervision where church had knowledge of priest sexually abusing minors and failed to act). A showing of mere negligence, or even gross

negligence, will not support punitive damages. *Phillips v. Cricket Lighters*, 883 A.2d 439, 445 (Pa. 2005) (disallowing punitive damages against a lighter manufacturer for failing to include child safety features when three children died in a resulting fire).

A plaintiff seeking punitive damages is required to allege that the defendant's conduct was outrageous, showing intentional, wanton, reckless or malicious conduct. *SHV Coal, Inc. v. Continental Grain Co.*, 587 A.2d 702 (Pa. 1991) (declining to disturb the judgment of the trier of fact where evidence supported that a managing employee deliberately sent a key client to a competitor prior to quitting in order to join that competitor). However, a rote recital of intent or knowledge, whether characterized as "reckless," "wanton," or otherwise, is insufficient to survive a motion to dismiss. *See Maroz v. Arcelormittal Monessen LLC*, No. 15-cv-0770, 2015 WL 6070172, at *7 (W.D. Pa. Oct. 15, 2015) (finding allegations of frequent complaints from neighbors, capacity for production, and knowledge of odorous impacts insufficient to overcome motion to dismiss claim for punitive damages relief); *Russell v. Chesapeake Appalachia, L.L.C.*, No. 4:14-cv-00148, 2014 WL 6634892, at *2 (M.D. Pa. Nov. 21, 2014) (dismissing punitive damages claim for failure to plead facts that "meet the high standard for 'evil motive' or 'reckless indifference' necessary to impose punitive damages in Pennsylvania") (internal citation omitted).

On a motion to dismiss, the court in *Russell* considered allegations that "some or all of the acts and/or omissions of [the Defendants]… including those of its officers, agents, contractors, and/or employees, were intentional and/or grossly, recklessly, and/or wantonly negligent, and were done with utter disregard for the [Plaintiff's] rights, properties, safety, and well-being," and dismissed the prayer for punitive damages, reasoning that such "threadbare recitals" could not meet the high pleading standard to support a prayer for punitive damages. *Id.*

at *2 (internal quotation marks and citations omitted). Here, as in *Russell*, the Complaint recites only conclusory, threadbare allegations in support of the prayer for punitive damages—that "Defendant knowingly, intentionally, and recklessly failed to properly design, operate, repair, and/or operate the facility[.]" Compl. ¶ 37; *see also* ¶ 66 ("Defendant . . . continues to act, intentionally, negligently, and with a conscious disregard to public health, safety, peace, comfort, and convenience"); *id.* ¶ 82 ("Defendant knowingly breached its duty . . . when it improperly designed, maintained and/or operated its Facility[.]"). Nowhere in the Complaint does Ms. Lloyd allege any facts plausibly showing that the Facility subjectively knew or intended to expose her to harm as required to state a claim entitling Plaintiff to punitive damages.

This litigation concerns the operation of a waste-to-energy facility pursuant to express PADEP authorization, not egregious conduct that warrants punishment. Plaintiff cannot premise her alleged entitlement to punitive damages on the lawfully permitted and regulated operations of Covanta Plymouth. *See Karpiak v. Russo*, 450 Pa. Super. 471, 481 (Pa. Super. 1996) ("[C]onduct in engaging in a legitimate business can hardly be viewed as evil, outrageous, or indifferent," and does not support a claim for punitive damages). Here, Plaintiff's Complaint alleges that Defendant's operations create a nuisance that has caused Plaintiff to suffer injuries including the loss of use and enjoyment of her property. Compl. ¶ 30. Even accepting every allegation in the Complaint as true, Plaintiff's allegations do not state a claim or plausibly allege any facts meeting the high threshold necessary to support a demand for punitive damages. Plaintiff's demand for punitive damages must be dismissed and stricken as to all counts.

III. <u>Plaintiff's Demand for Injunctive Relief Should be Dismissed</u>

Ms. Lloyd seeks relief that would directly contravene the authority of PADEP to regulate waste management in the Commonwealth, demanding "injunctive relief not inconsistent with

Defendant's state and federal regulatory obligations." Compl. at 19. Plaintiff essentially asks the Court to order Covanta Plymouth to comply with its permit, which can solely be the function or legal claim of the Commonwealth. Plaintiff's request for injunctive relief should be dismissed and stricken because any such relief would contradict and undercut the primary jurisdiction of PADEP and the Pennsylvania Environmental Hearing Board ("EHB") to regulate the Facility. This Court should not be placed in the untenable position of exercising its equitable powers to oversee and second guess an expert state agency charged with overseeing complex air pollution control issues.

The primary jurisdiction doctrine mandates that "where an agency has been established to handle a particular class of claims, the court should refrain from exercising its jurisdiction until the agency has made a determination." *Stoloff v. Neiman Marcus Group, Inc.*, 24 A.3d 366, 371 (Pa. Super. Ct. 2011) (quoting *Jackson v. Centennial Sch. Dist.*, 501 A.2d 218, 221 (Pa. 1985)) (Revenue Department's refund authority and expertise gave agency primary jurisdiction over tax refund claims). The doctrine reflects a policy that courts defer to the appropriate agency for consideration of claims involving questions that a regulatory scheme has been put in place to address. *See, e.g., Ciamaichelo v. Indep. Blue Cross*, 909 A.2d 1211, 1218 (Pa. 2006) ("Primary jurisdiction . . . comes into play whenever enforcement of the claim . . . requires resolution of issues which . . . have been placed within the jurisdiction of an administrative body."); *Baykeeper v. NL Indus., Inc.*, 660 F.3d 686, 691 (3d Cir. 2011) (same); *see also* United *States v. W. Pac. R.R. Co.*, 352 U.S. 59, 64 (1956) (primary jurisdiction applies "whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.").

The Pennsylvania General Assembly vested authority in PADEP and EHB to oversee the management of solid wastes, including the authority to abate nuisances. 71 P.S. § 510-17; *see also* 35 P.S. § 6018, *et seq*. PADEP has authority to investigate, issue enforcement orders, suspend, modify or revoke permits, seek fines and/or injunctive relief, institute a lawsuit to restrain a violation of the Solid Waste Management Act ("SWMA"), assess civil or criminal penalties against those who violate the SWMA and its regulations, and recover costs of abating a public nuisance in court. *See* 35 P.S. §§ 6018.104, 6018.601-.606, 6018.613.[7] EHB has jurisdiction over actions to recover costs of abating any violation of the SWMA, its regulations, any term or condition of a permit, or an order of the department. *See* 35 P.S. §§ 6018.601, 6018.613. EHB is also tasked with reviewing PADEP actions and, pursuant to its statutory authority, has handled cases relating to waste-to-energy facilities. *See id.* § 7514. PADEP and EHB have unique expertise with the highly specialized subject matter of resource recovery and waste management.

Pennsylvania's regulations, as enforced by PADEP through the Facility's Solid Waste and Title V permits, govern the Facility's operations in detail via numerous permit conditions and technical operational plans approved by PADEP. *See* 25 Pa. Code Chapters 271, 283. Among other strict regulatory requirements, PADEP has dictated the types and quantities of waste that the Facility may accept and incinerate, 25 Pa. Code §§ 283.201, 283.214, 283.223; the location where the Facility may operate, *id.* § 283.202; the manner of construction and

---

[7] *See also* 71 P.S. § 510-17 (granting PADEP general authority to "protect the people of this Commonwealth from . . . nuisances," and order such nuisances abated and removed); *Cnty. of Berks*, 66 Pa. D. & C. 4th at 435-36 (Pa. Comm. Pl. Berks Cnty. Apr. 30, 2004) ("SWMA . . . empowers the DEP to . . . abate public nuisances to implement the purposes and provisions of the Act and the rules, regulations and standards adopted pursuant to the Act") (internal citations omitted)).

maintenance for the Facility's impervious waste unloading areas, *id.* § 283.216; the operation of the Facility's incineration system, *id.* § 283.218; the nature and manner of the Facility's emissions, *id.* § 123 (air emission standards for specific contaminants, including odors (§ 123.31)), § 127, Subchapter G (requirements for Title V operating permits), § 122.3 (adopting relevant federal air emission standards); and the Facility's ash management practices, *id*. § 283.403. Through these many regulations, PADEP controls the scope of any odors a regulated entity may emit. Citizens complaining of odors have recourse to PADEP; the Complaint reflects that PADEP has acted against Covanta Plymouth for alleged odors.

PADEP and EHB have the requisite expertise in overseeing solid waste and waste-to-energy facilities to determine whether injunctive relief is appropriate, be it administrative or legal in nature, under the Facility's permit or applicable regulations, and to fashion relief that is consistent with the requirements of the SWMA. *See Baykeeper*, 660 F.3d at 691 (discussing the importance of primary jurisdiction where issues are committed to an agency's discretion and fall within the agency's particular field of expertise). Here, Plaintiff acknowledges PADEP's jurisdiction, and even relies on PADEP's compliance oversight in her allegations and specifically seek "injunctive relief consistent with Defendant's state and federal regulatory obligations." Compl. at 19.

An injunction requiring that the Facility "comply with its permits," or take specific steps related to the design, construction, or operation of the Facility necessitating one or more permit amendments, would supplant the primary jurisdiction of, and direct oversight role played by, PADEP. Plaintiff asks this Court to substitute for PADEP and EHB in determining Covanta Plymouth's compliance with regulations and permit conditions, which would circumvent the statutorily prescribed method for regulating the operations of a lawfully permitted waste-to-

energy facility. Deference to PADEP is particularly salient where the Legislature has stated that, by its SWMA, it intended to "encourage the development of *resource recovery* as a means of managing solid waste." 35 P.S. § 6018.102 (emphasis added); *see also* 73 P.S. § 1648.2 (defining waste-to-energy as renewable energy for the purpose of entitling relevant generators to alternative energy tax credits in Pennsylvania). The Court should dismiss and strike Plaintiff's demand for injunctive relief as to all counts of the Complaint.

CONCLUSION

Ms. Lloyd seeks to expand negligence liability to impose a duty in tort on a critical part of the state's solid waste infrastructure for alleged occasional odors. Pennsylvania law squarely holds that offsite odors are a subject of nuisance law, not a duty enforceable in negligence. Likewise, negligence actions cannot be based solely on nuisance harms, a principle underscored by the Superior Court in recent years. Nor can this Court be the vehicle to supplant PADEP by imposing complex injunctive relief over the air pollution and solid waste regulations governing a large industrial plant. This Court should dismiss Plaintiff's negligence claim, and dismiss and strike her prayer for punitive damages and injunctive relief, under Fed. R. Civ. P. 12(b)(6) and Fed. R. Civ. P. 12(f).

Dated: November 9, 2020

BY: /s/ *Robert M. Donchez*

FLORIO PERRUCCI STEINHARDT CAPPELLI TIPTON & TAYLOR LLC
Robert M. Donchez ID No: 209505
Robert Freedberg, ID No: 7855
60 West Broad Street, Suite 102
Bethlehem, PA 18018
(610) 691-7900
rdonchez@floriolaw.com
rfreedberg@floriolaw.com

Respectfully submitted:

BY: /s/ *Collin Gannon*

BEVERIDGE & DIAMOND, P.C.
Michael G. Murphy (*pro hac vice* to be filed)
477 Madison Avenue, 15th Floor
New York, New York 10022
(212) 702-5400
mmurphy@bdlaw.com

James B. Slaughter (*pro hac vice* to be filed)
1350 I Street, N.W., Suite 700
Washington, DC 20005
(202) 789-6000
jslaughter@bdlaw.com

Collin Gannon (*pro hac vice* to be filed)
201 North Charles Street, Ste 2210
Baltimore, MD 21201-4150
(410) 230-1300
cgannon@bdlaw.com

Attorneys for Defendant Covanta Plymouth Renewable Energy, LLC