IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Wheeling

KEITH REED, LISA DOLENCE,
ELIZABETH SCHENKEL,
EMILY WINES, MARK GARAN
CHRISTINA LUCAS, and **AUGUST ULLUM, II,**
individually and on behalf of others similarly situated,

Plaintiffs,

v.

CIVIL ACTION NO. 5:19-CV-263
Judge Bailey

ALECTO HEALTHCARE SERVICES, LLC, and
ALECTO HEALTHCARE SERVICES
WHEELING, LLC, d/b/a Ohio Valley Medical Group d/b/a OVMC Physicians,

Defendants.

ORDER

Pending before this Court is Plaintiffs' Motion to Certify Class [Doc. 123], filed April 7, 2022. Defendants filed a Response in Opposition [Doc. 149] on June 7, 2022. Plaintiffs filed a Reply [Doc. 152] on June 29, 2022. This Court held a Class Certification Hearing on July 25, 2022. The Motion is now ripe for adjudication.

I. BACKGROUND[1]

This case arises out of the closure of Ohio Valley Medical Center ("OVMC") in Wheeling, West Virginia. Plaintiffs bring this action pursuant to the Worker Adjustment and

[1] Most of the Background section is taken from Magistrate Judge Mazzone's June 28, 2021 Order Granting Plaintiffs' Motion [63] to Compel [Doc. 71].

Retraining Notification Act ("the WARN Act"), 29 U.S.C. § 2101 *et seq.*, alleging violations thereof. Specifically, plaintiffs contend that Alecto Healthcare Services, LLC ("AHS") and Alecto Healthcare Services Wheeling, LLC ("AHSW") (hereinafter collectively "defendants") violated the notice provisions of the WARN Act. In doing so, plaintiffs allege that AHS and AHSW operated as an integrated enterprise. *See* [Doc. 37 at 2]. Plaintiffs further aver that whether defendants comprise a "single employer" or a single enterprise" under applicable legal authority is an issue in this matter. *See* [Id. at 5]. Defendants deny plaintiffs' allegations and maintain that it complied with all applicable laws in the closing of OVMC.

AHS is a Delaware Limited Liability Company based in Irvine, California. *See* [Doc. 39]. AHSW is a Delaware Limited Liability Company. *See* [Id.]. Plaintiffs aver that AHSW has principal offices in Wheeling, West Virginia, and was formed in connection with AHS's acquisition of certain assets of Ohio Valley Health Services and Education Corporation ("OVHSE"). *See* [Doc. 37].

OVHSE previously owned and operated OVMC in Wheeling, West Virginia. *See* [Doc. 39]. Subsequently, AHSW became the parent corporation of OVMC and continued operating the same. *See* [Docs. 39 & 66]. AHS is 80% owner of Alecto Healthcare Services Ohio Valley ("AHSOV"); MPT of Wheeling – Alecto Hospital LLC is 20% owner of AHSOV.[2] *See* [Doc. 66 at 4]. AHSOV is the sole member of AHSW, which is the parent company of the hospital formerly known as OVMC. *See* [Id.].

This action was commenced on September 9, 2019. *See* [Doc. 1]. Plaintiffs filed an Amended Complaint on August 24, 2020. *See* [Doc. 37]. In the Amended Complaint,

[2] Neither AHSOV nor MPT of Wheeling – Alecto Hospital LLC are parties to this litigation.

plaintiffs assert one count against defendants: Violation of the WARN Act. *See* [Id. at 7]. Plaintiffs specifically allege that:

1. Plaintiffs and putative Class members are "affected employees" under 29 U.S.C. § 2101(a)(5);
2. Defendants are "employers" under 29 U.S.C. § 2101(a)(1)
3. Defendants ordered a "plant closing" under 29 U.S.C. § 2101(a)(3); and
4. Defendants failed to provide plaintiffs and the proposed Class with 60-days' written notice, as required by the WARN Act.

See [Id. at ¶¶ 37–40]. For relief, plaintiffs seek this Court to declare this action a class action under Federal Rule of Civil Procedure 23; appoint proposed Class counsel; approve proposed Class notice; find and declare that defendants violated the WARN Act; award plaintiffs and the proposed Class 60-days' back pay and benefits; award plaintiffs and the proposed Class pre- and post-judgment interest; award plaintiffs and the proposed Class reasonable attorneys' fees and costs; and award any other relief as this Court may deem just and proper. *See* [Id. at 7–8].

On August 8, 2019, defendants filed a notice with the West Virginia Dislocated Worker Unit, announcing that OVMC would cease operations on October 7, 2019, affecting 736 employees. *See* [Doc.37-1]. In a press release dated August 7, 2019, defendants announced that OVMC had begun closing its operations

> after a thorough evaluation of all available options, losses o more than $37 Million over the past two years, and an exhaustive but unsuccessful search for a strategic partner or buyer. . . .

See [Doc. 37-2]. The press release further stated that the closure process for facilities like OVMC "typically takes 60 to 90 days and . . . OVMC . . . will share a definitive timeline with all interested parties in the coming days. *See* [Id.].

Less than a month later, defendants announced that "at 11:59pm on September 4, 2019," OVMC would "suspend Acute and Emergency Medical services." *See* [Doc. 37-3]. Plaintiffs allege that on September 3, 2019, defendants told OVMC employees not to report after September 5, 2019, except for a handful of employees needed for a few days to pack. *See* [Doc. 37 at ¶ 20]. Moreover, plaintiffs allege that defendants advised managers that most employees' work hours would be reduced to zero by September 6, 2019. *See* [Id.].

After multiple scheduling order amendments, plaintiffs filed a Motion to Certify Class on April 7, 2022. *See* [Doc. 123]. Thereafter, both parties filed Motions for Summary Judgment. *See* [Docs. 163 & 165]. This Court held a Class Certification Hearing on July 25, 2022. *See* [Doc. 147].

II. CLASS CERTIFICATION

According to plaintiffs, this case is ideally suited for class certification because the putative class satisfies the elements of Rule 23 and a class action is superior to all other available methods for the fair and efficient adjudication of this controversy. Plaintiffs seek to certify the following class:

> All employees employed at Ohio Valley Medical Center ("OVMC") who suffered an employment loss as a result of OVMC's plant closing in 2019, without receiving sixty [60] days advance notice as required by the Worker Adjustment and Retraining Notification Act.

Plaintiffs assert the proposed Class has the following questions of fact and law in common:

a. Whether defendants are an "employer" under the WARN Act;

b. Whether Defendants comprise a "single employer" or "single enterprise" under applicable legal authority;

c. Whether Defendants' discontinuation of OVMC operations was a "plant closing" under the WARN Act. 29 U.S.C. § 2101(a)(2); and

d. Whether Defendants' reduction of Class members' hours was a "termination" or other "employment loss" under the WARN Act.

See [Docs. 37 at 5 & 124 at 20]

"A district court 'has broad discretion in deciding whether to certify a class, but that discretion must be exercised within the framework of Rule 23.'" ***Lienhart v. Dryvit Sys., Inc.***, 255 F.3d 138, 146 (4th Cir. 2001) (quoting ***In re American Med. Sys., Inc.***, 75 F.3d 1069, 1079 (6th Cir. 1996)). "[P]laintiffs bear the burden . . . of demonstrating satisfaction of the Rule 23 requirements and the district court is required to make findings on whether the plaintiffs carried their burden . . .." ***Thorn v. Jefferson-Pilot Ins. Co.***, 445 F.3d 311, 317 (4th Cir. 2006) (quoting ***Gariety v. Grant Thornton, LLP***, 368 F.3d 356, 370 (4th Cir. 2004)).

In an action such as this, class certification may be granted only if the plaintiffs satisfy the requirements of numerosity, commonality, typicality, representativeness,

predominance, and superiority of Rule 23(a)[3] and (b)(3)[4] are met. ***Lienhart***, 255 F.3d at 146.

"[N]umerosity requires that a class be so large that 'joinder of all members is impracticable.' Fed.R.Civ.P. 23(a)(1). Commonality requires that 'there are questions of law or fact common to the class.' Fed.R.Civ.P. 23(a)(2). The common questions must be dispositive and over-shadow other issues." ***Id***. (citing ***Stott v. Haworth,*** 916 F.2d 134, 145

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[3] Rule 23(a) provides:

> **(a) Prerequisites**. One or more members of a class may sue or be sued as representative parties on behalf of all members 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; and
> (4) the representative parties will fairly and adequately protect the interests of the class.

[4] Rule 23(b)(3) provides:

> **(b) Types of Class Actions**. A class action may be maintained if Rule 23(a) is satisfied and if:
> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
> (D) the likely difficulties in managing a class action.

(4th Cir. 1990)). "In a class action brought under Rule 23(b)(3), the 'commonality' requirement of Rule 23(a)(2) is 'subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement that questions common to the class "predominate over" other questions.'" ***Id.***, at n.4 (quoting ***Amchem Prods., Inc. v. Windsor,*** 521 U.S. 591, 609 (1997)).

"Typicality requires that the claims of the named class representatives be typical of those of the class; 'a class representative must be part of the class and possess the same interest and suffer the same injury as the class members.' ***General Tel. Co. of Southwest v. Falcon,*** 457 U.S. 147, 156 (1982) (internal quotation marks omitted). Representativeness requires that the class representatives 'will fairly and adequately protect the interests of the class.' Fed.R.Civ.P. 23(a)(4). . . . [T]he final three requirements of Rule 23(a) 'tend to merge, with commonality and typicality "serv[ing] as guideposts for determining whether . . . maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence."' ***Broussard v. Meineke Discount Muffler Shops, Inc.,*** 155 F.3d 331, 337 (4th Cir. 1998) (quoting ***Falcon,*** 457 U.S. at 157 n. 13)." ***Id.*** at 146–47.

"Apart from the enumerated requirements, 'Rule 23 contains an implicit threshold requirement that the members of a proposed class be "readily identifiable."'" ***Krakauer v. Dish Network, L.L.C.***. 925 F.3d 643, 654–55 (4th Cir. 2019) (quoting ***Hammond v. Powell***, 462 F.2d 1053, 1055 (4th Cir. 1972)). Under this principle, sometimes called "ascertainability," "a class cannot be certified unless a court can readily identify the class

members in reference to objective criteria." ***EQT Prod. Co.***, 764 F.3d 347, 358 (4th Cir. 2014).

"In contrast to actions under Rule 23(b)(1) and (b)(2), Rule 23(b)(3) actions are '[f]ramed for situations in which class-action treatment is not clearly called for,' but 'may nevertheless be convenient and desirable.' ***Amchem Prods., Inc. v. Windsor***, 521 U.S. 591, 615 (1997) (internal quotation marks omitted). In addition to the four Rule 23(a) requirements, Rule 23(b)(3) actions such as this one must meet two requirements: predominance and superiority. Predominance requires that '[common] questions of law or fact ... predominate over any questions affecting only individual members.' Fed.R.Civ.P. 23(b)(3). The predominance inquiry 'tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.' ***Amchem***, 521 U.S. at 623. Superiority requires that a class action be 'superior to other methods for the fair and efficient adjudication of the controversy.' Fed.R.Civ.P. 23(b)(3)." ***Id.*** at 147.

These questions present common legal issues which are susceptible to class action treatment. Trial courts have great discretion to conduct and manage litigation in an efficient and equitable manner. Manual for Comp. Litig., at Introduction,10.13 (4th ed. 2005). Particularly in the context of a class action, Rule 23 "allows district courts to devise imaginative solutions to problems created by… [determining] individual damages issues." ***Carnegie v. Household Int'l, Inc.***, 376 F.3d 656, 661 (7th Cir. 2004); *see also* ***In re Scientific Atlantic Inc., Sec. Litig.***, 571 F.Supp.2d 1315, 1343 (N.D. Ga. 2007) (quoting ***Carnegie*** for this proposition and certifying class upon finding, "even if the Court ultimately concludes that aggregate damages models are not sufficiently reliable for use in this case,

the Court is convinced that other viable alternatives exist to address any individual damages issues that may arise."). Accepted methods of assessing the individual issues relating to class members include:

> (1) bifurcating liability and damage trials with the same or different juries; (2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages; (4) creating subclasses; or (5) altering or amending the class.

Id. (citing ***In re Visa Check/MasterMoney Antitrust Litig.***, 280 F.3d 124, 141 (2d Cir. 2001)).

A. Ascertainability:

Under the principle called ascertainability, a class cannot be certified unless a court can readily identify the class members in reference to objective criteria. Fed. R. Civ. P. 23; Syl. Pt. 12, ***Krakauer***, 925 F.3d 643.

Here, the proposed Class can be readily identified based on objective criteria such as employee status, reason for separation, compensation, and dates of work at OVMC. Thus, this Court finds that the proposed Class is ascertainable.

B. Numerosity:

The first requirement of Rule 23(a) is that the class must be of such a size that joinder of all members is impracticable. "'Impracticable does not mean impossible.' ***Robidoux v. Celani***, 987 F.2d 931, 935 (2d Cir.1993). Practicability of joinder depends on

factors such as the size of the class, ease of identifying its numbers and determining their addresses, facility of making service on them if joined and their geographic dispersion. ***Buford*** [***v. H & R Block, Inc.***], 168 F.R.D. at 348 (citing ***Kilgo v. Bowman Transp., Inc.***, 789 F.2d 859, 878 (11th Cir.1986)). The size of individual claims is another factor to consider; where individual claims are so small as to inhibit an individual from pursuing his own claim, joinder is less likely. ***Id***. (citing ***Luyando v. Bowen***, 124 F.R.D. 52, 55 (S.D.N.Y.1989))." ***Hewlett v. Premier Salons International, Inc.***, 185 F.R.D. 211, 215 (D. Md.1997) (Chasanow, J.).

"There is no bright line test for determining numerosity; the determination rests on the court's practical judgment in light of the particular facts of the case. [***Buford v. H & R Block, Inc.***, 168 F.R.D. 340, 348 (S.D.Ga.1996)] (citing ***Deutschman v. Beneficial Corp.***, 132 F.R.D. 359, 371 (D. Del.1990)). The class representatives are not required to specify the exact number of persons in the proposed class. ***Kernan v. Holiday Universal, Inc.***, 1990 WL 289505, at *2 (D.Md.1990) (Howard, J.) (citing ***Marcial v. Coronet Ins. Co.***, 880 F.2d 954, 957 (7th Cir.1989)). An unsubstantiated allegation as to numerosity, however, is insufficient to satisfy Rule 23(a)(1). ***Buford***, 168 F.R.D. at 348 (citing ***Zeidman v. J. Ray McDermott & Co.***, 651 F.2d 1030, 1038 (5th Cir.1981))." ***Id***.

In this case, according to defendants' records, as of August 8, 2019, there were 736 employees. *See* [Doc. 124-24]. Even if a few affected employees had non-qualifying separations, the Class number would still be in the hundreds. Based upon the foregoing, this Court finds that plaintiffs have satisfied the requirement of numerosity.

C. Commonality:

Rule 23(a)(2) requires a showing of the existence of "questions of law or fact common to the class." Rule 23(b)(3) requires that questions of law or fact common to the class predominate over any questions affecting only individual members. The Fourth Circuit has held that "[i]n a class action brought under Rule 23(b)(3), the 'commonality' requirement of Rule 23(a)(2) is 'subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement that questions common to the class "predominate over" other questions.'" ***Lienhart v. Dryvit Sys., Inc.***, 255 F.3d 138, 147 n. 4 (4th Cir. 2001)(quoting ***Amchem***, 521 U.S. at 609). Because this is a class action brought under Rule 23(b)(3), this Court will analyze the two factors together in the predominance section of this opinion. *See* ***In re LifeUSA Holding Inc.***, 242 F.3d 136, 144 (3d Cir. 2001) (analyzing the two factors together).

D. Typicality:

"To satisfy the typicality requirement under Rule 23(a)(3), the 'claims or defenses of the representative parties [must be] typical of the claims or defenses of the class.' Fed.R.Civ.P. 23(a)(3). 'A sufficient nexus is established [to show typicality] if the claims or defenses of the class and class representatives arise from the same event or pattern or practice and are based on the same legal theory.' ***In re Terazosin Hydrochloride Antitrust Litig.***, 220 F.R.D. 672, 686 (S.D. Fla. 2004) (quoting ***Kornberg v. Carnival Cruise Lines, Inc.***, 741 F.2d 1332, 1337 (11th Cir. 1984)); *see also* ***In re Diet Drugs***, 2000 WL 1222042, at *43 (E.D. Pa. Aug. 28, 2000). The class representatives and class members need not have suffered identical injuries or damages. ***United Broth. of***

Carpenters v. Phoenix Assoc., Inc., 152 F.R.D. 518, 522 (S.D. W.Va. 1994) (Haden, C.J.); *see also* ***Mick v. Ravenswood Aluminum Corp.,*** 178 F.R.D. 90, 92 (S.D. W.Va. 1998) (Haden, C.J.)." ***In re Serzone Prods. Liab. Litig.***, 231 F.R.D. 221, 238 (S.D. W.Va. 2005) (Goodwin, J.).

"The typicality requirement has been observed to be a redundant criterion, and some courts have expressed doubt as to its utility. ***Buford,*** 168 F.R.D. at 350 (citing ***Sanders v. Robinson Humphrey/American Express, Inc.,*** 634 F.Supp. 1048, 1056 (N.D. Ga. 1986), *aff'd in part, rev'd in part on other grounds sub nom.,* ***Kirkpatrick v. J.C. Bradford & Co.,*** 827 F.2d 718 (11th Cir. 1987), *cert. denied,* 485 U.S. 959 (1988)). Some courts treat typicality as overlapping with commonality, *see* ***Zapata*** [***v. IBP, Inc.***], 167 F.R.D. at 160; *cf.* ***Falcon,*** 457 U.S. at 157 n. 13 (noting that typicality and commonality 'tend to merge'); other courts equate typicality with adequacy of representation. ***Buford,*** 168 F.R.D. at 350 (citing ***Alfus v. Pyramid Technology Corp.,*** 764 F.Supp. 598, 606 (N.D. Cal. 1991)). Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct. ***Zapata,*** 167 F.R.D. at 160 (citing 1 *Newberg on Class Actions* § 3.13). A plaintiff's claim may differ factually and still be typical if 'it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory.' ***Id.*** (quoting 1 *Newberg on Class Actions* § 3.13). So long as the plaintiffs and the class have an interest in prevailing in similar legal claims, then the typicality requirement is satisfied. ***Buford,*** 168 F.R.D. at 351 (citing ***Meyer v. Citizens and Southern Nat'l***

Bank, 106 F.R.D. 356, 361 (M.D. Ga. 1985)). The existence of certain defenses available against plaintiffs that may not be available against other class members has been held not to preclude a finding of typicality. *See* ***id.*** (citing ***International Molders' and Allied Workers' Local Union No. 164 v. Nelson,*** 102 F.R.D. 457, 463 (N.D. Cal. 1983)). The burden of showing typicality is not meant to be an onerous one, but it does require more than general conclusions and allegations that unnamed individuals have suffered discrimination. ***Kernan,*** 1990 WL 289505, at *3 (citing ***Paxton v. Union Nat'l Bank,*** 688 F.2d 552, 556 (8th Cir. 1982), *cert. denied,* 460 U.S. 1083 (1983))." ***Hewlett v. Premier Salons, Int'l, Inc.***, 185 F.R.D. 211, 216 (D. Md. 1997) (Chasanow, J.).

In this case, this Court finds that the representative plaintiffs' satisfy this requirement. As a few of the *many* who lost their jobs at OVMC, the representative plaintiffs suffered the same injury as did the other employees. Accordingly, the typicality requirement is satisfied.

E. Adequacy of Representation:

"The final requirement of Rule 23(a) is set forth in subsection (4), which requires that 'the representative parties will fairly and adequately protect the interests of the class.' *Fed.R.Civ.P.* 23(a)(4). This determination requires a two-pronged inquiry: (1) the named plaintiffs must not have interests antagonistic to those of the class; and (2) the plaintiffs' attorneys must be qualified, experienced and generally able to conduct the litigation. ***Hewlett v. Premier Salons Int'l, Inc.,*** 185 F.R.D. 211, 218 (D. Md. 1997)." ***Serzone***, 231 F.R.D. at 238.

In this case, this Court finds the representative claims in seeking redress for the alleged WARN Act violation are sufficiently interrelated with the claims of the purported class. "In the absence of proof to the contrary, courts presume that class counsel is competent and sufficiently experienced to prosecute vigorously the action on behalf of the class." ***Hewlett***, 185 F.R.D. at 218 (citing ***Zapata***, 167 F.R.D. at 161). Plaintiffs have retained counsel with experience in WARN Act cases and employee benefit class actions, with sufficient resources to represent the Class. *See* [Docs. 124–47, 124–48, 124–49, 124–50, 124–51 & 124–52]. Accordingly, this Court finds that plaintiffs have satisfied the requirement of adequacy of representation.

F. Predominance

The first factor under Rule 23(b)(3) requires that the questions of law or fact common to all class members predominate over questions pertaining to individual members. ***In re Serzone Prods. Liab. Litig.***, 231 F.R.D. at 239. Common questions predominate if class-wide adjudication of the common issues will significantly advance the adjudication of the merits of all class members' claims.

"The predominance inquiry 'tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.'" ***Lienhart***, 255 F.3d at 147 (quoting ***Amchem Prods., Inc. v. Windsor***, 521 U.S. 591, 623 (1997)); ***Gariety v. Grant Thornton, LLP***, 368 F.3d 356, 362 (4th Cir. 2004). Where significant common questions can be resolved for class members in one action, it is efficient to deal with class claims on a representative rather than an individual basis. *See* Charles Alan Wright & Arthur R. Miller, 7A ***Federal Practice and Procedure*** § 1778 (3d ed. 2009). "The predominance

inquiry focuses on whether liability issues are subject to class-wide proof or require individualized and fact-intensive determinations. Deciding whether common questions predominate over individual ones involves a qualitative, rather than quantitative, inquiry." ***Singleton v. Domino's Pizza, LLC***, 976 F.Supp.2d 665, 677 (D. Md. 2013) (Chasanow, J.)(citations omitted).

As noted by Judge Copenhaver in ***Good v. American Water Works Co., Inc.***, 310 F.R.D. 274 (S.D. W.Va. 2015):

> A principle often forgotten is that the balancing test of common and individual issues is qualitative, not quantitative. ***Gunnells v. Healthplan Services, Inc.***, 348 F.3d 427, 429 (4th Cir. 2003). Common liability issues may still predominate even when individualized inquiry is required in other areas. ***Id***. At bottom, the inquiry requires a district court to balance common questions among class members with any dissimilarities between class members. *See* ***Gunnells***, 348 F.3d at 427–30.
>
> While courts have denied certification when individual damage issues are especially complex or burdensome, *see, e.g.,* ***Pastor v. State Farm Mut. Auto. Ins. Co.***, 487 F.3d 1042, 1047 (7th Cir. 2007), where the qualitatively overarching issue by far is the liability issue of the defendant's [actions], and the purported class members were exposed to the same risk of harm every time, such as where a defendant violates a statute in the identical manner on every occasion, individual damages issues are insufficient to defeat class certification under Rule 23(b)(3). *See* ***Murray v. GMAC Mortg. Corp.***, 434

> F.3d 948, 953 (7th Cir. 2006); ***Smilow v. Southwestern Bell Mobile Systems, Inc.***, 323 F.3d 32, 40 (1st Cir. 2003). The same principle would apply here to the alleged liability [issues].

310 F.R.D. at 296-97.

Common issues will predominate if "individual factual determinations can be accomplished using computer records, clerical assistance, and objective criteria — thus rendering unnecessary an evidentiary hearing on each claim." Newberg on Class Actions § 4:50 (5th ed.). In addition, common issues predominate when adding more plaintiffs to the class would minimally or not at all affect the amount of evidence to be introduced. Id. Courts in every circuit have uniformly held that the 23(b)(3) predominance requirement is satisfied despite the need to make individualized damage determinations and a recent dissenting decision of four Supreme Court Justices characterized the point as "well nigh universal." Newberg on Class Actions § 4:54 (5th ed.) (citing ***Comcast v. Behrend***, 569 U.S. 27, 133 S.Ct. 1426, 1437 (2013)). *See also,* ***Gunnells***, 348 F.3d 417 at 428.

In this case, plaintiffs have identified numerous common questions of law and fact, whose resolution will advance the litigation of all members of the proposed Class. Thus, this Court finds the commonality factor is satisfied.

G. Superiority

"The superiority test of Rule 23(b)(3) requires the court to find that the class action instrument would be better than, not just equal to, other methods of adjudication. The four factors listed in this subsection (interest in controlling individual prosecutions, existence of other related litigation, desirability of forum, and manageability) are simply a guideline to

help the court determine the benefit of the proposed class action. Advisory Committee's Notes to Fed.R.Civ.P. 23." ***Hewlett v. Premier Salons, Intern., Inc.***, 185 F.R.D. 211, 220 (D. Md. 1997) (Chasanow, J.).

Rule 23(b)(3) requires the proposed class action to be superior to other methods of adjudication so that the class action will "achieve economies of time, effort and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." ***Amchem Prods., Inc. v. Windsor***, 521 U.S. 591, 615 (1997) (quotations omitted). A primary purpose of class actions lawsuits, particularly money damages claims aggregated under 23(b)(3), is to enable the litigation of small claims like most of these claims, that could not be pursued individually. Newberg on Class Actions § 4:65 (5th ed.). *Accord* ***Amchem***, 521 U.S. 591, 617 (such cases are the "core" of the class action mechanism.).

The efficiencies that a class action may achieve are greater when the class is large. ***Id***. The need to avoid duplicative litigation can be significant even when the class is relatively small in number, but it is when there are many potential claimants that class actions bring the greatest efficiencies. ***Id***. A class action may enhance judicial efficiency and legitimacy by preventing inconsistent results. ***Id***.

i. Interest in controlling individual prosecutions

"The first factor identified in the rule is 'the interest of members of the class in individually controlling the prosecution or defense of separate actions.' Fed.R.Civ.P. 23(b)(3)(A). 'This factor has received minimal discussion in Rule 23(b)(3) actions.'

Buford, 168 F.R.D. at 361 (quoting 1 *Newberg on Class Actions* § 4.29). According to the drafters of the rule:

> The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretic[al] rather than practical; the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable.

Advisory Committee's Notes to Fed.R.Civ.P. 23." ***Hewlett***, at 220–21.

This case falls into the latter category, considering the likely relatively small potential individual recoveries, and fact that no other cases appear to have been filed.

ii. Existence of other related litigation

"Under Rule 23(b)(3)(B), the court should consider the 'extent and nature of any litigation concerning the controversy already commenced by or against members of the class.' This factor is intended to serve the purpose of assuring judicial economy and reducing the possibility of multiple lawsuits. 7A *Federal Practice and Procedure* § 1780, at pp. 568-69. 'If the court finds that several actions already are pending and that a clear threat of multiplicity and a risk of inconsistent adjudications actually exist, a class action may not be appropriate since, unless the other suits can be enjoined, which is not always feasible, a Rule 23 proceeding only might create one more action. . .. Moreover, the existence of litigation indicates that some of the interested parties have decided that individual actions are an acceptable way to proceed, and even may consider them

preferable to a class action. Rather than allowing the class action to go forward, the court may encourage the class members who have instituted the Rule 23(b)(3) action to intervene in the other proceedings.' ***Id.*** at 569-70." ***Hewlett***, at 221.

This factor is, in this case, a non-factor, since this Court has been made aware of no other lawsuits against defendants concerning this issue.

iii. Desirability of forum

Rule 23(b)(3)(C) requires the court to evaluate the desirability of concentrating the litigation in a particular forum. This Court finds it desirable to concentrate the litigation in this judicial district, just 0.7 miles down the road where the facility is located and where the majority of the class members would presumably reside.

iv. Manageability

"The last factor that courts must consider in relation to superiority is the difficulty that may be 'encountered in the management of the class action.' Fed.R.Civ.P. 23(b)(3)(D). 'Of all the superiority factors listed in Rule 23, *manageability* has been the most hotly contested and the most frequent ground for holding that a class action is not superior.' ***Buford,*** 168 F.R.D. at 363 (quoting 1 *Newberg on Class Actions* § 4.32). Some courts have said, however, '[t]here exists a strong presumption against denying class certification for management reasons.' ***Id.*** (citing ***In re Workers' Compensation,*** 130 F.R.D. 99, 110 (D. Minn. 1990); ***In re South Central States Bakery Prod. Antitrust Litig.,*** 86 F.R.D. 407, 423 (M.D. La. 1980))." ***Hewlett***, at 221.

"The manageability inquiry includes consideration of the potential difficulties in identifying and notifying class members of the suit, calculation of individual damages, and

distribution of damages. ***Six Mexican Workers v. Arizona Citrus Growers,*** 904 F.2d 1301, 1304 (9th Cir. 1990); ***Maguire v. Sandy Mac, Inc.,*** 145 F.R.D. 50, 53 (D. N.J. 1992); ***Kernan*** [***v. Holiday Universal, Inc.***], 1990 WL 289505, at *7 [(D. Md. Aug. 14, 1990) (Howard, J.)]; ***In re Folding Carton Antitrust Litig.,*** 88 F.R.D. 211, 216 (N.D. Ill. 1980)." ***Hewlett,*** 185 F.R.D. at 221–22.

The question courts consider when they analyze manageability is not whether a class action is manageable in the abstract but how the problems that might occur in managing a class suit compare to the problems that would occur in managing litigation without a class suit. ***Amchem***, 521 U.S. at 617. Manageability should rarely, if ever, be in itself sufficient to prevent certification of a class. ***Id***.

While a judge on the Second Circuit, Justice Sonia Sotomayor wrote, in an oft-cited passage, that "failure to certify an action under Rule 23(b)(3) on the sole ground that it would be unmanageable is disfavored and 'should be the exception rather than the rule.'" ***In re Visa Check/MasterMoney Antitrust Litigation***, 280 F.3d 124, 141 (2d Cir. 2001). Before denying class certification (here for reasons concerning individualized damages), a court may consider whether any of a number of "management tools" might enable the case to proceed; the listed options included the following:

> (1) bifurcating liability and damage trials with the same or different juries; (2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to

prove damages; (4) creating subclasses; or (5) altering or amending the class.

Id. *See also*, *Newberg on Class Actions* § 4:80 (5th ed.); ***Pitt v. City of Portsmouth, Va.***, 221 F.R.D. 438, 447 (E.D. Va. 2004) (Jackson, J.).

Indeed, while certifying a class action can certainly create difficult management concerns, Judge Copenhaver points out that courts must also be:

> cognizant of the inefficient, costly and time consuming alternative. Absent the proposed liability issues certification, the issue of fault, for one, would have to be tried seriatim in every case for which a jury is empanelled. That consideration alone tips the balance heavily toward the limited issue certification sought by plaintiffs. *See* ***Gunnells***, 348 F.3d at 426 ("Proving these issues in individual trials would require enormous redundancy of effort, including duplicative discovery, testimony by the same witnesses in potentially hundreds of actions, and relitigation of many similar, and even identical, legal issues.").
>
> Additionally, absence of the class device would surely discourage potentially deserving plaintiffs from pursuing their rights under the circumstances here presented. That is another factor influencing the outcome sought by plaintiffs. *See* ***Gunnells***, 348 F.3d at 426 (noting in that case that "class certification will provide access to the courts for those with claims that would be uneconomical if brought in an individual action. As the Supreme Court put the matter, '[t]he policy at the very core of the class

action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.'" (quoting ***Amchem***, 521 U.S. at 617)).

Surely, the plaintiffs thus receive a benefit from the proposed issues certification. But so, too, do the defendants. As our court of appeals has noted, the focus of Rule 23(b)(3) in the mass tort context is to "ensure that class certification in such cases 'achieve economies of time, effort, and expense, and promote ... uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'" ***Gunnells***, 348 F.3d at 424 (quoting ***Amchem Products, Inc. v. Windsor***, 521 U.S. 591, 615 (1997)). As in ***Gunnells***, defendants benefit from procedural fairness by certification:

> "Furthermore, class certification 'provides a single proceeding in which to determine the merits of the plaintiffs' claims, and therefore protects the defendant from inconsistent adjudications.' This protection from inconsistent adjudications derives from the fact that the class action is binding on all class members. By contrast, proceeding with individual claims makes the defendant vulnerable to the asymmetry of collateral estoppel: If [the Defendant] lost on a claim to an individual plaintiff, subsequent plaintiffs could use offensive collateral estoppel to prevent [the Defendant] from litigating the issue.

> A victory by [the Defendant] in an action by an individual plaintiff, however, would have no binding effect on future plaintiffs because the plaintiffs would not have been party to the original suit. Class certification thus promotes consistency of results, giving defendants the benefit of finality and repose."
>
> ***Gunnells***, 348 F.3d at 427.

Good v. American Water Works Company, Inc., 310 F.R.D. 274, 297-98 (S.D. W.Va. 2015) (Copenhaver, J.).

In ***Gunnells v. Healthplan Servs., Inc.***, 348 F.3d 417 (4th Cir. 2003), the Fourth Circuit stated:

> First, it appears likely that in the absence of class certification, very few claims would be brought against TPCM, making "the adjudication of [the] matter through a class action ... superior to no adjudication of the matter at all." *See* 5 *Moore's Federal Practice* § 23.48[1] (1997). Thus, class certification will provide access to the courts for those with claims that would be uneconomical if brought in an individual action. As the Supreme Court put the matter, "[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." ***Amchem***, 521 U.S. at 617 (citation omitted).

348 F.3d at 426.

In this case, the plaintiffs' claims are easily susceptible to resolution on a classwide basis. In the event that the class would become unmanageable, this Court can decertify the class. ***Gunnells v. Healthplan Servs., Inc.***, 348 F.3d at 426 (4th Cir. 2003); ***Central Wesleyan College v. W.R. Grace & Co.***, 6 F.3d 177, 184 (4th Cir. 1993).

Likewise, in the event that damages issues would require individual inquiry, the damage issues may be bifurcated. "Rule 23 contains no suggestion that the necessity for individual damage determinations destroys commonality, typicality, or predominance, or otherwise forecloses class certification. In fact, Rule 23 explicitly envisions class actions with such individualized damage determinations. *See* Fed. R. Civ. P. 23 advisory committee's note (1966 Amendment, subdivision (c)(4)) (noting that Rule 23(c)(4) permits courts to certify a class with respect to particular issues and contemplates possible class adjudication of liability issues with 'the members of the class ... thereafter ... required to come in individually and prove the amounts of their respective claims.'); *see also* 5 Moore's Federal Practice § 23.23[2] (1997) ('[T]he necessity of making an individualized determination of damages for each class member generally does not defeat commonality.'). Indeed, '[i]n actions for money damages under Rule 23(b)(3), courts *usually* require individual proof of the amount of damages each member incurred.' *Id.* at § 23.46[2][a] (1997) (emphasis added). When such individualized inquiries are necessary, if 'common questions predominate over individual questions as to liability, courts generally find the predominance standard of Rule 23(b)(3) to be satisfied.' ***Id.***" ***Gunnells***, at 427–28.

"Courts have routinely rejected this argument, concluding, as we have in previous cases, that the need for individualized proof of damages alone will *not* defeat class certification. *See* ***Central Wesleyan,*** 6 F.3d at 189; ***Hill v. W. Elec. Co., Inc.,*** 672 F.2d 381, 387 (4th Cir. 1982) ('Bifurcation of ... class action proceedings for hearings on ... damages is now commonplace.'); ***Chisolm v. TranSouth Fin. Corp.,*** 184 F.R.D. 556, 566 (E.D. Va. 1999) (Jackson, J.) (collecting cases)." ***Gunnells***, at 429 (emphasis in original).

Rule 23(g) requires that a court certifying a class also appoint class counsel. The Rule directs a court to consider several factors, including "[t]he work counsel has done in identifying or investigating potential claims in the action; [c]ounsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action; [c]ounsel's knowledge of the applicable law; and [t]he resources counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(C)(i).

Proposed class counsel are qualified and able to represent the class. This Court appoints John Stember, Maureen Davidson-Welling, Timothy F. Cogan, Vincent J. Mersich, Bren J. Pomponio, Laura Christine Davidson, Frederick Alexander Risovich, and Aubrey Leigh Sparks as class counsel.

IV. CONCLUSION

For the reasons stated above:

1. Plaintiffs' Motion to Certify Class [**Doc. 123**] is **GRANTED**. This Court will certify the following class:

> All employees employed at Ohio Valley Medical Center ("OVMC") who suffered an employment loss as a result of OVMC's plant closing in 2019,

without receiving sixty [60] days advance notice as required by the Worker Adjustment and Retraining Notification Act.

Moreover, the parties are hereby **DIRECTED** to submit a Proposed Class Notice on or before **August 10, 2022**.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to all counsel of record herein.

DATED: July 27, 2022.

JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE