2024-0166 (La.App. 4 Cir. 12/17/24)

2024 WL 5134474

Court of Appeal of Louisiana, Fourth Circuit.

DEBRA WINESBERRY

v.

ST. BERNARD PARISH GOVERNMENT

NO. 2024-CA-0166

|

December 17, 2024

APPEAL FROM ST. BERNARD 34TH JUDICIAL DISTRICT COURT NO. 23-1578, DIVISION "DIVISION D" Honorable Darren M Roy, Judge

REVERSED AND REMANDED.

Attorneys and Law Firms

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(Court composed of Chief Judge Terri F. Love, Judge Roland L. Belsome, Judge Dale N. Atkins)

Opinion

Judge Roland L. Belsome

***1** Plaintiff, Debra Winesberry ("Winesberry"), is a property owner who is seeking compensation from St. Bernard Parish ("the Parish") for flooding of her property. She alleges that the frequent flooding of the land surrounding her home is caused by "lack of maintenance" of works on adjacent property.

In 2006, the Parish installed underground drainage pipes on its property adjacent to Winesberry's home. She alleges that, since the pipes were installed, she has suffered flooding on her property whenever there is a substantial rain. Winesberry alleges that she is unable to access her home when it is flooded. The Parish filed an exception of prescription in response to Winesberry's petition. The trial court granted the exception, dismissing Winesberry's case. Winesberry appeals that judgment here. We disagree with the trial court's reasoning and vacate the judgment granting the exception.

Facts and prior proceedings

Winesberry alleges that the Parish failed to "level the ground," over and near the construction site. She alleges that the Parish created "hills which have caused flooding" continuously since the time of the construction. Winesberry characterizes her claim against the Parish as one for defective maintenance. The Parish argues that Winesberry had actual notice that the project was flooding her property as early as 2006 and that the three-year prescription for appropriation under La. R.S. 13:5111 applies. The Parish relies on the Supreme Court's construction of 13:5111 in *Crooks v. Dep't of Nat. Res.*, 2019-0160 (La. 1/29/20), 340 So. 3d 574. In *Crooks*, a federal navigation project increased flooding of property belonging to the **riparian** owners on the banks of the Little River.

In the judgment granting the Parish's exception, the trial court did not grant Winesberry leave to amend her petition to state a cognizable claim. For the reasons that follow below, we need not address that error. We focus our attention instead on the issue of prescription.

Continuous tort

Plaintiff's primary argument is that she has alleged a continuous tort for which she is entitled to damages from 2006 forward. This argument is supported by *S. Central Bell Telephone Co. v. Texaco, Inc.*, 418 So. 2d 531(La. 1982), in which the court held:

> When the tortious conduct and resulting damages continue, prescription does not begin until the conduct causing the damage is abated. ... Where the cause of the injury is a continuous one giving rise to successive damages, prescription

> dates from cessation of the wrongful conduct causing the damage.

Id., at 533. Our court most recently examined the continuous tort doctrine directly in *Lopez v. House of Faith Non-Denomination Ministries*, 2009-1147 (La. App. 4 Cir. 1/13/10), 29 So. 3d 680. In *Lopez*, a derelict building fell on the plaintiff's home causing damage that worsened with time. We held that, "...where the operating cause of injury is a continuous one and gives rise to successive damages, prescription dates from the cessation of the wrongful conduct causing the damage." *Lopez,* 2009-1147, p. 4, 29 So. 3d at 682. The reasoning in *Lopez* adopts the traditional Civilian view of continuous property torts as explained below:

> ***2** [A] distinction is made between continuous and discontinuous causes of injury and resulting damage. When the *operating cause of the injury* is 'not a continuous one of daily occurrence', there is a multiplicity of causes of action and of corresponding prescriptive periods. Prescription is completed as to each injury, and the action is barred upon the lapse of one year from the date in which the plaintiff acquired, or should have acquired, knowledge of the damage....[This is to be distinguished from the situation where] the '*operating cause of the injury* is a continuous one, giving rise to successive damages from day to day....'. A.N. Yiannopoulos, Predial Servitudes, § 63 (1983).

Lopez, 2009-1147, p.3, 29 So. 3d at 682. (emphasis in original). In *Lopez*, we applied Yiannopoulos' reasoning and held that prescription did not begin to run against the plaintiffs until the remains of the fallen building were cleared from their home. As applied in the case now before us, the *operating cause* of Winesberry's damage is "hills" created by the Parish's construction. Under continuing tort theory, as we have accepted in *Lopez*, prescription on Winesberry's claim would only begin after the offending hills were removed.

Inverse condemnation (appropriation)

Above, we noted that the public construction in *Crooks* was designed to raise the water level in Little River to improve its navigability. The plaintiffs were aware that the new river controls were designed to cause some increased cyclical flooding in the low-lying properties near the river. The aims of the construction project that is the subject of this litigation are distinctly different. Here, the Parish has spent time, energy and taxpayers' money to prevent flooding. Nothing in the *Crooks* reasoning leads us to believe that every time a public project causes flooding in a discrete area the private property owner loses a valuable property right.

In *Crooks*, the Supreme Court specifically overruled *Cooper v. Louisiana Department of Public Works*, 2003-1074 (La. App. 3 Cir. 3/3/04), 870 So. 2d 315. It appears that *Cooper* was singled out for extinction because it was also a flooded property case related to the same project that caused the flooding in the *Crooks* case. We believe that the coupling of those two cases signals an intent of the court to direct its appropriation rule only to cases in which the public taking already in effect would necessarily result in flooding. Our reading of the decision in *Crooks* is buttressed by the language of La. R.S. 13:5111(B) which provides:

> The rights of the landowner herein fixed are in addition to any other rights he may have under the constitution of Louisiana and existing statutes, and nothing in this Part shall impair any constitutional or statutory rights belonging to any person on September 12, 1975.

This subpart of the statute alerts us to the fact that the purpose of the statute was to bestow additional rights on private property owners, not to derogate from those rights already extant. To hold that a public project would take away private property rights by a quirk of design would decidedly impair Winesberry's constitutional and statutory rights. Such a holding would directly contradict the very statute on which the Parish rests its argument.

Conclusion

The longstanding Civilian doctrine of continuous tort would lead us to conclude that prescription had not yet begun to run against Winesberry's claim at the time she filed her suit. We do not believe that the Supreme Court's decision in *Crooks* was intended to apply to every incident of flooding caused by a public project. In keeping with that understanding and based on the reasons above, we overrule the trial court's opinion,

vacate the judgment granting the exception of prescription and remand for further proceedings in keeping with this decision.

***3 REVERSED AND REMANDED.**

ATKINS, J., CONCURS IN THE RESULT.

All Citations

--- So.3d ----, 2024 WL 5134474, 2024-0166 (La.App. 4 Cir. 12/17/24)

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United States Court of Appeals, Federal Circuit.

CITY OF FRESNO, Arvin-Edison Water Storage District, Chowchilla Water District, Delano-Earlimart Irrigation District, Exeter Irrigation District, Ivanhoe Irrigation District, Lindmore Irrigation District, Lindsay-Strathmore Irrigation District, Lower Tule River Irrigation District, Orange Cove Irrigation District, Porterville Irrigation District, Saucelito Irrigation District, Shafter-Wasco Irrigation District, Southern San Joaquin Municipal Utility District, Stone Corral Irrigation District, Tea Pot Dome Water District, Terra Bella Irrigation District, Tulare Irrigation District, Loren Booth LLC, Matthew J. Fisher, Julia K. Fisher, Hronis Inc., Clifford R. Loeffler, Maureen Loeffler, Douglas Phillips, Caralee Phillips, Plaintiffs-Appellants

v.

UNITED STATES, San Luis & Delta-Mendota Water Authority, Santa Clara Valley Water District, San Luis Water District, Westlands Water District, Grassland Water District, James Irrigation District, Byron Bethany Irrigation District, Del Puerto Water District, San Joaquin River Exchange Contractors Water Authority, Central California Irrigation District, Firebaugh Canal Water District, San Luis Canal Company, Columbia Canal Company, Defendants-Appellees

2022-1994
|
Decided: December 17, 2024

Appeal from the United States Court of Federal Claims in No. 1:16-cv-01276-AOB, Judge Armando O. Bonilla.

Attorneys and Law Firms

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Before Moore, Chief Judge, Clevenger and Stark, Circuit Judges.

Opinion

Stark, Circuit Judge.

***1** In this case, we are called upon to review how the federal government resolved a particular dispute over water distribution during the drought-ridden year of 2014. As we explain in more detail below, individual growers, irrigation districts (which provide water to farms), water districts (which provide water to municipalities), and the City of Fresno, all located within the area served by the Central Valley Project ("CVP" or "Project"), sued the United States ("government") over its failure to deliver water they contend they were entitled to under a series of contracts. The government defended its water allocation decisions by pointing to obligations it had under other contracts, to deliver water to another set of entities. Through adjudication of a series of motions, the Court of Federal Claims dismissed several of the plaintiffs' claims and granted summary judgment to the government on all remaining claims.

Because we agree with the disposition of the Court of Federal Claims, we affirm.

I

A

The Central Valley of California lies in the center of the state, to the west of the Sierra Nevada mountains and to the east of the Coastal Ranges. The Central Valley, through which the Sacramento River and the San Joaquin River flow, is home to the largest federal water management project in the United States: the CVP. The CVP consists of dams, reservoirs, hydropower stations, canals, and other infrastructure operated by the United States Bureau of Reclamation ("Reclamation"). Through its operation of the CVP, Reclamation controls water from the Sacramento and San Joaquin Rivers and allocates those waters throughout California.

The Sacramento River has substantial water resources, but the land abutting it is not generally suitable for agriculture. By contrast, the San Joaquin River lacks sufficient water to meet all the agricultural and other needs of the San Joaquin Valley. The CVP aims to "re-engineer its natural water distribution," *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 728, 70 S.Ct. 955, 94 L.Ed. 1231 (1950), addressing the mismatch between where water is abundant, but arguably less needed, and where it is scarce, yet could – if diverted – be put to more efficient agricultural benefit. *See generally Gustine Land & Cattle Co. v. United States*, 174 Ct. Cl. 556, 560-61 (1966).

The CVP consists of multiple "divisions." Most pertinent to this case is the Friant Division, which includes the Friant Dam, where Reclamation collects water originating in the San Joaquin River and stores that water in Millerton Lake. From Millerton Lake, the water is distributed to water and irrigation districts through the Madera and Friant-Kern Canals. [1]

Key features of the CVP that are pertinent to the background and analysis of the issues presented in this appeal are shown in Figure 1, an annotated map, below. [2]

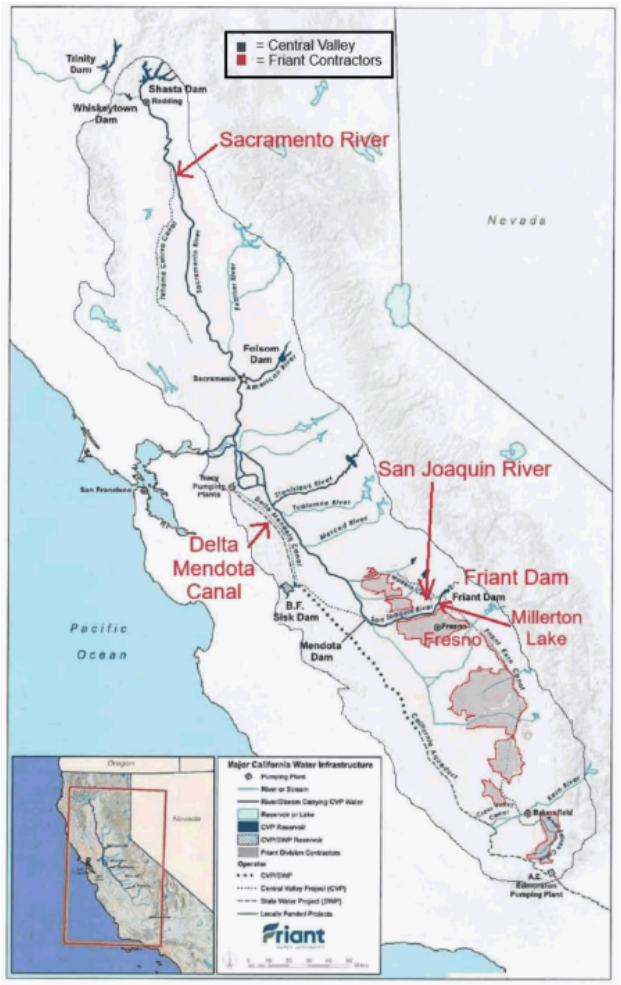

Figure 1. Map of Central Valley

B

Reclamation's role in the CVP includes obtaining rights to water resources in the Central Valley and undertaking commitments to deliver those waters. Prior to the inception of the CVP, various private entities owned rights to San Joaquin River water. These entities, which we (like the parties) refer to as the "Exchange Contractors," [3] are successors to parties that entered into various agreements with the government. In one such agreement, which we will call the "Purchase Contract," the predecessors of the Exchange Contractors sold the bulk of their rights to San Joaquin River water to the government while at the same time reserving their rights to San Joaquin River water "in excess of specified rates of flow" identified in Schedule 1 of the Purchase Contract ("reserved waters"). J.A. 232-83, 314. The same parties then executed a "Contract for the Exchange of Waters" (the "Exchange Contract"), which granted Reclamation authority to "store, divert, dispose of and otherwise use" even these "reserved waters" – that is, the Exchange Contractors' predecessors' Schedule 1 "reserved waters" from the San Joaquin River. [4] J.A. 315-16.

Because all the rights of the Exchange Contractors' predecessors now indisputably are held by the Exchange Contractors, we will at this point dispense with referring to the predecessors, except where relevant.

As consideration to the Exchange Contractors, the government agreed in the Exchange Contract to provide them with "substitute water." J.A. 315-16. Specifically, Reclamation's rights to the Exchange Contractors' "reserved waters" of the San Joaquin River exist "so long as, and only so long as, the United States does deliver to the [Exchange Contractors] by means of the Project or otherwise substitute waters in conformity with this contract." J.A. 316. Article 8 of the Exchange Contract requires that a specified "Quantity of Substitute Water" be delivered to the Exchange Contractors:

> During all calendar years, other than those defined as critical, the United States shall deliver to the [Exchange Contractors] for use hereunder an annual substitute water supply of not to exceed 840,000 acre-feet in accordance with the [specified] maximum monthly entitlements.

***3** J.A. 326. During critical years, which are those in which water is less abundant (according to specific measures set out in the Exchange Contract), the government is required to provide a lesser amount to the Exchange Contractors, a maximum of 650,000 acre-feet. Other provisions, most pertinently Article 4, describe Reclamation's obligations when there are certain interruptions to its ability to supply substitute waters to the Exchange Contractors. J.A. 315-17.

C

Having obtained from the Exchange Contractors rights to San Joaquin River water, Reclamation then contracted

to deliver water to municipal and private entities within the Friant Division. Specifically, the government entered into the "Friant Contract" with certain water districts and the City of Fresno ("Friant Contractors");[5] the Friant Contractors, in turn, deliver water to, among others, individual growers ("Friant Growers").[6] The Friant Contract requires Reclamation to deliver water, including water from the San Joaquin River, to the Friant Contractors. As consideration, the Friant Contractors agreed to pay the government for delivered water and paid part of the costs of constructing the infrastructure of the CVP.

The Friant Contract obligates the government to deliver specified amounts of water to the Friant Contractors each year, although this duty is "subject to the terms of" the pre-existing Exchange Contract. J.A. 368. In particular, Article 3(n) of the Friant Contract states that "[t]he rights of the [Friant] Contractor[s] under this Contract are *subject to the terms of the contract for exchange waters*," that is, the Exchange Contract. *Id.* (emphasis added). But crucially to Appellants' case here, the government also agreed in Article 3(n) that it "will not deliver to the Exchange Contractors [under the Exchange Contract] waters of the San Joaquin River unless and until required by the terms of [the Exchange Contract]." *Id.*

Other provisions of the Friant Contract relate to other aspects of potential conflicts between the government's water delivery obligations to the Friant Contractors and those it owes to other parties, such as the Exchange Contractors. Most pertinent to this appeal are Articles 13(b) and 19(a), which provide the government some measure of immunity from liability for some of its allocation decisions. J.A. 394, 402. The extent of this immunity is disputed among the parties.

***4** In sum, then, under the Friant Contract, the Friant Contractors are entitled to delivery of amounts of water from Reclamation, including water from the San Joaquin River. However, because the government only obtained rights to control San Joaquin River water by virtue of entering into the Exchange Contract – thereupon undertaking duties owed to the Exchange Contractors – the Friant Contract also addresses how Reclamation must navigate conflicts between its obligations to the Exchange Contractors and those it owes to the Friant Contractors.

D

As the Court of Federal Claims explained, and the parties do not dispute:

> Since 1951, Reclamation has stored and diverted the Exchange Contractors' reserved San Joaquin River water at the Friant Dam and supplied [the Exchange Contractors] with substitute water [from the Sacramento-San Joaquin River Delta] through the Delta-Mendota Canal. ... Since 1962, ... Reclamation has supplied the Friant Contractors with San Joaquin River water impounded at the Friant Dam and stored in Millerton Lake.

J.A. 25, 27. In all years until 2014, Reclamation was able to meet its contractual obligation to supply the Exchange Contractors with substitute water by delivering water sourced solely from the Sacramento-San Joaquin River Delta, without drawing on water from the San Joaquin River.

In early 2014, due to drought conditions, the Governor of California declared a state of emergency, which eventually lasted until 2017. Reclamation recognized it was not going to be able to meet its combined water-delivery obligations for 2014 to the Exchange Contractors and the Friant Contractors. Thus, on February 15, 2014, Reclamation informed the Exchange Contractors that 2014 would be a "critical year," as that term is defined in the Exchange Contract. Reclamation predicted it would only be able to allocate to the Exchange Contractors "336,000 acre-feet rather than the maximum 650,000 acre-feet critical year entitlement." J.A. 1859-60. Several months later, on May 13, 2014, Reclamation updated its forecasts and advised the Exchange Contractors that "[d]ue to the continued drought and unique hydrology, Reclamation [would] for the first time provide water [to the Exchange Contractors] from both Delta [i.e., Sacramento River water through the Delta-Mendota Canal] *and San Joaquin River sources*." J.A. 1660 (emphasis added). By drawing from

these multiple sources, including San Joaquin River water, Reclamation "anticipate[d] being able to meet [the] critical year demands for the months of April through October[,] which totals 529,000" acre-feet. *Id.*

Reclamation did, in fact, supply significant amounts of water to the Exchange Contractors between May 15 and September 27, 2014, although it thereafter released no San Joaquin River water to these entities in October, November, or December of that year. During 2014, Reclamation delivered approximately 540,000 acre-feet of water to the Exchange Contractors, of which roughly 209,000 acre-feet had originated in the San Joaquin River (before being sent to the Friant Dam and stored in Millerton Lake), and the other approximately 331,000 acre-feet having originated in the Sacramento River, released from the Delta-Mendota Canal.

In the meantime, in March 2014, Reclamation notified the Friant Contractors that it would not be supplying them with any water that year, other than the minimum needed for public health and safety considerations. Ultimately, while Reclamation delivered these "health and safety" waters to the Friant Contractors (as well as carryover water from the previous year's allocation), what the Friant Contractors received in 2014 was essentially a "zero allocation." J.A. 1888-89.

E

***5** In October 2016, the Friant Contractors and Friant Growers (collectively, "Friant Parties" or "Appellants") filed suit against the United States in the Court of Federal Claims. [7] The Friant Parties alleged that Reclamation's actions in 2014, and particularly Reclamation's diversion of San Joaquin River water to the Exchange Contractors instead of to them, constituted a breach of the Friant Contract. The alleged breach caused Appellants to "suffer[ ] huge losses of annual and permanent crops, loss of groundwater reserves, water shortages and rationing, and [to] incur[ ] millions of dollars [of losses] to purchase emergency water supplies." J.A. 198. The Friant Parties further claimed that "[t]he water and water rights of the Friant Division appropriated by the United States in 2014 were the property of Plaintiffs, and their landowners and water users, each of which are the beneficial owners of the water rights." J.A. 222. Thus, the Friant Parties alleged that the government's actions constituted takings without just compensation in violation of the Fifth Amendment.

The United States, joined by the Exchange Contractors, who intervened in the litigation, responded by arguing that Reclamation had been required under the Exchange Contract to deliver water from the San Joaquin River to the Exchange Contractors due to the drought conditions experienced in 2014, which left no other water available for Reclamation to use to meet its contractual obligations. Therefore, they contended, there had been no breach of the Friant Contract. Further, the government and Exchange Contractors (collectively, hereinafter, "Appellees") asserted that even if there had been a breach, the Friant Contract immunized the government from liability, because Reclamation's water allocation decisions had not been arbitrary, capricious, or unreasonable. Finally, Appellees insisted that the Friant Contractors and Friant Growers could not maintain a takings claim because none of these entities had a property interest in the water they expected Reclamation to deliver to them under the Friant Contract and lacked standing.

The Court of Federal Claims dismissed the Friant Growers' breach of contract claim because these entities were neither parties to nor third-party beneficiaries of the Friant Contract and, therefore, lacked standing. [8] The court also dismissed the Friant Growers' and the Friant Contractors' takings claims for lack of standing, as none of these parties possesses a property interest in water supplied to them directly (or through third parties) by Reclamation. The Friant Contractors' breach of contract claims proceeded and, after discovery, the trial court granted Appellees' motion for summary judgment and denied the Friant Contractors' cross-motions for summary judgment. These rulings were based on the court's conclusions that (a) the Friant Contractors' rights under the Friant Contract were subordinate to the rights of the Exchange Parties under the Exchange Contract; (b) the conditions in 2014 required Reclamation, under the Exchange Contract, to deliver San Joaquin River water to the Exchange Contractors, because San Joaquin River water may be treated as "substitute water;" and (c) the government was, regardless, immunized under the Friant Contract for its water allocation decisions because no reasonable factfinder could find its decisions to have been arbitrary, capricious, or unreasonable.

The Friant Parties timely appealed. We have jurisdiction under 28 U.S.C. § 1295(a)(3).

II

The Friant Parties' appeal presents solely issues of law. We review de novo a determination by the Court of Federal Claims to dismiss a claim for lack of subject matter jurisdiction or failure to state a claim, as well as that court's interpretation of a contract. *See Ute Indian Tribe of the Uintah & Ouray Indian Rsrv. v. United States*, 99 F.4th 1353, 1364 (Fed. Cir. 2024)*; Gould, Inc. v. United States*, 935 F.2d 1271, 1273 (Fed. Cir. 1991). Likewise, "[w]e review the Court of Federal Claims'[ ] grant of summary judgment under a de novo standard of review, with justifiable factual inferences being drawn in favor of the party opposing summary judgment." *Russian Recovery Fund Ltd. v. United States*, 851 F.3d 1253, 1259 (Fed. Cir. 2017). "For Fifth Amendment takings claims, we review de novo the existence of a compensable property interest." *Fishermen's Finest, Inc. v. United States*, 59 F.4th 1269, 1274 (Fed. Cir. 2023) (internal quotation marks omitted).

III

***6** On appeal, the Friant Contractors contend that the Court of Federal Claims misinterpreted both the Exchange Contract and the Friant Contract. In particular, they argue that the Exchange Contract did not require the United States to provide San Joaquin River water to the Exchange Contractors and, thus, Reclamation breached its obligations under Articles 3(a) and 3(n) of the Friant Contract by doing so. In the Friant Contractors' view, San Joaquin River water cannot constitute "substitute water" under the Exchange Contract because Articles 4(b) and 4(c) of that contract set out the only circumstances under which San Joaquin River water can be provided to the Exchange Contractors, and the conditions of those provisions were not met in 2014. The Friant Contractors alternatively contend that, even if Reclamation was required by the Exchange Contract to deliver San Joaquin River water to the Exchange Contractors, it nonetheless breached the Friant Contract by delivering an amount of such water that exceeded what was required. They also dispute the Court of Federal Claims' conclusion that the government is immune from liability for its breach of the Friant Contract. Finally, the Friant Parties challenge the trial court's dismissal of their takings claim.

The government and Exchange Contractors ask us, instead, to endorse the analysis of the Court of Federal Claims. They argue that the critical year circumstances Reclamation confronted in 2014, and the government's competing obligations to the Exchange Contractors and Friant Contractors, required Reclamation to source "substitute water" from the San Joaquin River for delivery to the Exchange Contractors, and required it to do so in the amounts that Reclamation actually delivered. They further contend that, in any event, the government is immunized from any breach of the Friant Contract as long as the government's determinations were not arbitrary, capricious, or unreasonable, and here they were not. Finally, the government and Exchange Contractors urge us to affirm the trial court's conclusion that none of the Friant Parties has a property interest in Reclamation water under state or federal law and, accordingly, there was no Fifth Amendment taking.

Our analysis of these various contentions proceeds as follows. First, we explain that the Exchange Contract broadly defines "substitute water" and expressly contemplates that Reclamation may be required, under certain circumstances, to deliver water originating in the San Joaquin River to the Exchange Contractors as "substitute water." Second, nothing about this interpretation of the Exchange Contractors' rights and Reclamation's obligations contradicts or renders meaningless Article 4 of the Exchange Contract. Third, Reclamation did not breach the Friant Contract by delivering the amounts of San Joaquin River water it supplied to the Exchange Contractors. Fourth, even if any of the actions undertaken by Reclamation were a breach of the Friant Contract, Reclamation enjoyed immunity from liability because its actions could not be found to be arbitrary, capricious, or unreasonable. Fifth, and finally, we affirm the Court of Federal Claims' dismissal of the takings claims.

A

The Friant Contractors allege that the government breached Articles 3(a) and 3(n) of the Friant Contract. Article 3(a) provides that, subject to certain conditions and limitations

(which are not at issue in this appeal), the government "shall make available for delivery to the [Friant] Contractor[s] from the Project" specified amounts of water. J.A. 362. Article 3(n) then states:

> The rights of the [Friant] Contractor[s] under this Contract are *subject to* the terms of the contract for exchange waters [i.e., the Exchange Contract] .... The United States agrees that it will not deliver to the Exchange Contractors thereunder waters of the San Joaquin River unless and until *required* by the terms of [the Exchange Contract], and the United States further agrees that it will not voluntarily and knowingly determine itself unable to deliver to the Exchange Contractors entitled thereto from water that is available or that may become available to it from the Sacramento River and its tributaries or the Sacramento-San Joaquin Delta those quantities required to satisfy the obligations of the United States under said Exchange Contract and under [the Purchase Contract].

***7** J.A. 368 (emphasis added). The Friant Contractors allege that the government breached these provisions by delivering San Joaquin River water to the Exchange Contractors in 2014 despite not being *required* to do so by the Exchange Contract.[9] We disagree.

To determine whether the government breached its contractual obligations, we start with the text of the relevant contracts, "the 'plain and unambiguous' meaning of which control[ ]." *Aspen Consulting, LLC v. Sec'y of Army*, 25 F.4th 1012, 1016 (Fed. Cir. 2022). An "[a]greement must be considered as a whole and interpreted so as to harmonize and give reasonable meaning to all of its parts." *Coast Fed. Bank, FSB v. United States*, 323 F.3d 1035, 1038 (Fed. Cir. 2003).

Because the issue of whether the government breached the Friant Contract turns on whether the government acted in a way that it was not *required* to act by the Exchange Contract, our analysis begins with the text of the Exchange Contract. We start with "substitute water," which Article 3 of the Exchange Contract defines:

> The term "substitute water" as used herein means all water delivered hereunder at the points of delivery hereinafter specified to the Contracting Entities [i.e., the Exchange Parties], *regardless of source*.

J.A. 315 (emphasis added). By stating that "all water" may be "substitute water" "*regardless of source*," this definition does not exclude any source from potentially providing substitute water. Thus, the Exchange Contract's definition of "substitute water" plainly does not exclude San Joaquin River water.

Other provisions of the Exchange Contract confirm that the contracting parties contemplated that San Joaquin River water might be required to be used as substitute water and delivered to the Exchange Contractors. *See, e.g.*, J.A. 321 (Article 5(d)(5)(e): "Whenever sufficient water is available *from the San Joaquin River* and/or Fresno Slough[10] to meet the needs of the [Exchange Contractors] at Mendota Pool, [Reclamation] reserves the right to make all deliveries to the [Exchange Contractors] at that point.") (emphasis added); J.A. 333 (Article 9(f): describing certain conditions applying "[w]hen less than 90 percent of the total water being delivered to the [Exchange Contractors] is *coming from the San Joaquin River* and/or the Fresno Slough") (emphasis added). Additionally, as the Court of Federal Claims correctly observed, these and other provisions of the Exchange Contract anticipate that water will be provided to the Exchange Contractors from the Mendota Pool, even though the parties understood the Mendota Pool could contain San Joaquin River-sourced water. J.A. 42 (citing Articles 5(d), 9(f), and 11).

None of this is to say that the United States is always entitled to supply San Joaquin River water as substitute water to the Exchange Contractors. The Friant Contract restricts the government's authority to do so to only those circumstances in which the government is *required* to use San Joaquin River

water to meet its obligations under the Exchange Contract. J.A. 445. In other words, only when Reclamation does not have sufficient water from other sources – including the Sacramento River, Sacramento-San Joaquin Delta, and Delta-Mendota Canal – to fulfill its contractual duty to supply the specified quantities of substitute water to the Exchange Contractors is Reclamation *permitted* to deliver San Joaquin River water to the Exchange Contractors, because it is only in those circumstances that Reclamation is *required*, under the Exchange Contract, to do so.

***8** Our conclusion is based on the contractual language we have discussed above, and it is also supported by two realities, which are reflected in the contracts. First, the rights to San Joaquin River water initially belonged to the predecessors of the Exchange Contractors, and they only relinquished those rights subject to the government's commitment to provide them (and their successors) with substitute water, with no limitation on the location from which that water may be sourced. As the government accurately explains:

> The context for the 1939 Exchange Contract was that the Exchange Contractors' predecessors-in-interest held senior water rights that Reclamation needed to obtain to make possible the Central Valley Project. ... Possessing that leverage, the Exchange Contractors' predecessors-in-interest were able to protect themselves by obtaining broad "substitute water" rights in the Exchange Contract that were not limited to Delta-sourced [or Sacramento River] water.

Gov't Br. at 32.

Second, as we noted earlier and now emphasize, Article 3(n) of the Friant Contract expressly makes "[t]he rights of the [Friant] Contractor[s]," including the Friant Contractors' rights to government delivery of water, "*subject to the terms*" of the Exchange Contract. J.A. 368 (emphasis added). Thus, we agree with the Court of Federal Claims:

> [T]he Exchange Contractors are entitled to San Joaquin River water over ... the Friant Contractors, even though it is relegated to a last resort source [for the Exchange Contractors] under the Friant Contract. A contrary interpretation would prioritize the clearly subordinated contractual rights of the Friant Contractors over the superior rights of the Exchange Contractors.

J.A. 42.

Therefore, we conclude that San Joaquin River water may be used by Reclamation as "substitute water" when such water is required by the Exchange Contract to be used as "substitute water," such as when the government cannot otherwise meet its obligations to the Exchange Contractors. Here, it is undisputed that during 2014, Reclamation was only able to deliver approximately 331,000 acre-feet of non-San Joaquin River water to the Exchange Contractors, thereby requiring the remaining substitute water to be sourced from the San Joaquin River to fulfill its obligations under Article 8 of the Exchange Contract. J.A. 33-34.

B

The Friant Contractors object that our conclusion as just described cannot be squared with Article 4 of the Exchange Contract. More particularly, they contend that the Court of Federal Claims' interpretation of Article 4(a) improperly renders Articles 4(b) and 4(c) of the Exchange Contract nullities – because those are the only sections that *require* Reclamation to provide the Exchange Contractors with San Joaquin River water. We are not persuaded.

Article 4(a), entitled "Conditional Permanent Substitution of Water Supply," provides that the government may

> store, divert, dispose of and otherwise use, within and without the watershed of the aforementioned San Joaquin River, the aforesaid reserved waters of said river for beneficial use by others than [the Exchange Contractors] *so long as, and only so long as*, the United States does deliver to [the Exchange Contractors] by means of the Project or otherwise substitute water in conformity with this contract.

J.A. 315-16 (emphasis added). In this way, Article 4(a) makes the government's ability to provide San Joaquin River water to "others," including the Friant Contractors, dependent on the government's simultaneous ability ("so long as, and only so long as") to provide substitute water to the Exchange Contractors.

***9** Article 4(b), "Temporary Interruption of Delivery," then provides:

> Whenever the United States is temporarily unable for any reason or for any cause to deliver to the [Exchange Contractors] substitute water from [the Sacramento River through] the Delta-Mendota Canal or other sources, *water will be delivered from the San Joaquin River*.

J.A. 316 (emphasis added). The San Joaquin River water to be provided during such a temporary interruption in the government's ability to deliver non-San Joaquin River substitute water to the Exchange Contractors must be (1) in the same quantities as required under Article 8 for the first seven days, and (2) for the rest of the temporary interruption, "in quantities and rates as reserved in the Purchase Contract," which (as we discuss further below) are quantities significantly *less* than the quantities owed to the Exchange Contractors under Article 8. J.A. 316. Article 4(c) goes on to address "Permanent Failure of Delivery," providing that "[w]henever the United States is permanently unable for any reason or for any cause to deliver" the Exchange Contractors the required substitute water, the Exchange Contractors "shall receive the said reserved waters *of the San Joaquin River* as specified in said Purchase Contract." J.A. 316-17 (emphasis added).

Nothing about our interpretation of the Exchange Contract, including Article 4(a), renders Articles 4(b) or 4(c) meaningless. The Friant Contractors' contrary view rests on their incorrect assumption that Articles 4(b) and 4(c) set out the sole circumstances under which San Joaquin River water is required to be delivered to the Exchange Contractors. To adopt the Friant Parties' reading – that Articles 4(b) and 4(c) are triggered on each occasion Reclamation is unable (temporarily or permanently) to meet even a small portion of its substitute water obligations to the Exchange Contractors from non-San Joaquin River sources – would materially reduce the rights the Exchange Contractors bargained for in their contract.

Reclamation may, for instance, be unable to deliver substitute water to the Exchange Contractors from the Sacramento River through the Delta-Mendota Canal because certain facilities necessary to do so may, at some point, be inoperative or under repair. Consistent with these foreseeable possibilities, the Friant Contract references "errors in physical operations of the Project, drought, [and] other physical causes beyond the control of the Contracting Officer," J.A. 394, which likewise could result in the government – temporarily or permanently – being unable to supply the Exchange Contractors with *any* non-San Joaquin River-sourced substitute water. Articles 4(b) and 4(c) address these specific circumstances. They do not more generally govern in all circumstances under which the government is able to provide some non-San Joaquin River water to the Exchange Contractors, but is not able to provide all of the required water from non-San Joaquin River sources.

Our conclusion is consistent with a common-sense understanding of the parties' intent in entering into the Exchange Contract. The amount of water to which the Exchange Contractors are entitled under Article 8 of the Exchange Contract is 840,000 acre-feet in non-critical years and 650,000 in critical years. This significantly exceeds the amounts to which they are entitled when Articles 4(b) and 4(c) are triggered. For instance, during a temporary interruption in

the government's ability to supply any substitute water from non-San Joaquin River sources, the Exchange Contractors are entitled to the amounts "as specified in Article 8" *only* "for the first 7 consecutive days." J.A. 316. Thereafter, the quantities they are entitled to are reduced to "quantities and rates as reserved in the Purchase Contract." *Id.*

***10** Appellants' position, then, that Article 4(b) applies whenever Reclamation is unable to deliver *the full amount* of substitute water (from non-San Joaquin River sources) to which the Exchange Contractors are entitled under Article 8, would, as the Exchange Contractors write in their brief, "convert a shortfall of even a single acre-foot into the Exchange Contractors' loss of entitlement to the remaining 649,999 acre-feet of water" in a critical year, "senselessly punish[ing] [them] for the government's inability to meet its obligations." Intervenors' Br. at 17. Nothing in the contractual language warrants such a result, which would contradict the history and intent of the Exchange Contract: to provide the Exchange Contractors' reserved water rights in the San Joaquin River to the government to use in the CVP but *conditioned upon* the government's obligation to deliver the Exchange Contractors the specified amounts of substitute water, preferably from non-San Joaquin River sources but, if necessary, from the San Joaquin River.

Importantly, when the government acts pursuant to Article 4(b), instead of Article 8, it is relieved of other obligations as well. In addition to being permitted to deliver lesser amounts of substitute water (after the first seven days) to the Exchange Contractors, invoking Article 4(b) also eliminates the government's responsibility to ensure the quality of substitute water (Article 9(f)), waives limits on the methods by which substitute water is to be delivered (Article 10), and changes the location where the substitute water is delivered (Article 5). There is no indication in the Exchange Contract that the Exchange Contractors would have absolved the government of all of these duties in circumstances in which the government was still able to deliver a substantial proportion of substitute water from non-San Joaquin River water – as opposed to the narrow circumstances in which, temporarily or permanently, the government is unable to deliver *any* water from non-San Joaquin River sources.

In short, Article 4(b) addresses specific circumstances in which the government is wholly unable to provide the Exchange Contractors with substitute water from anywhere other than the San Joaquin River. It is undisputed that in 2014 this never occurred. While the drought limited how much non-San Joaquin River water the government delivered to the Exchange Contractors, the government was able to – and did – deliver non-San Joaquin River water to the Exchange Contractors throughout that year; eventually, more than 300,000 acre-feet of such water. J.A. 2114 (Appellants' expert acknowledging "there was never a day [in 2014] in which Reclamation was unable to deliver water from the Delta-Mendota Canal to the Exchange Contractors"). Accordingly, the situation here was *not* governed by Article 4(b) of the Exchange Contract. Instead, as the government has repeatedly maintained, it acted in 2014 pursuant to its authority – and obligation – under Article 8 of that contract. Hence, again, we agree with the Court of Federal Claims that the government was entitled to summary judgment on the Friant Contractors' breach of contract claims.

C

The Friant Contractors argue that even if we determine, as we have, that San Joaquin River water may be "substitute water," and that Article 4(a) – and, therefore, the quantities of Article 8, rather than the lower quantities of Article 4(b) – applied in 2014, as we have also concluded, the government nonetheless breached the Friant Contract due to specific features of the deliveries it made that year. We again disagree.

First, the Friant Contractors contend that during certain months in 2014 the government "over-delivered" San Joaquin River water to the Exchange Contractors, thereby breaching the government's duty under the Friant Contract not to supply any more water to the Exchange Contractors than was prescribed by the Exchange Contract. The Friant Contractors did not make this argument in their opening brief and, as such, it is forfeited. *See United States v. Ford Motor Co.*, 463 F.3d 1267, 1276 (Fed. Cir. 2006). ("Arguments raised for the first time in a reply brief are not properly before this court."). Even if the argument had been preserved, it lacks merit. As the Court of Federal Claims explained, the "maximum monthly entitlements" of the Exchange Contract are non-binding guidelines, so long as Reclamation does not exceed the "*annual* substitute water supply" limit of that same contract. J.A. 38-39 (emphasis added). It is undisputed that the government delivered only approximately 540,000 acre-

feet of water to the Exchange Contractors over the whole of 2014. Thus, regardless of how much water the government delivered the Exchange Contractors during any particular month that year, it did not exceed the binding annual cap – so it did not deliver more water than was required under the Exchange Contract and, hence, did not breach duties owed to the Friant Contractors under the Friant Contract.

***11** Second, the government also did not breach the Friant Contract by including among the substitute water it provided to the Exchange Contractors water it had stored in Millerton Lake. The Friant Contractors argue that "over 100,000 acre-feet of water delivered to the Exchange Contractors (largely from storage in Millerton Lake [and originating in the San Joaquin River]) ... should have been delivered to the Friant Contractors." Reply Br. at 1. As we explained above, *see supra* III.A, including this water among what it delivered to the Exchange Contractors was entirely consistent with the Exchange Contract. To the extent the Friant Contractors are also contending that Reclamation committed a breach by storing San Joaquin River water at Millerton Lake in anticipation of needing it to supply to the Exchange Contractors, they fail to point to any specific duty in the Friant or Exchange Contract that the government violated. At most, the Friant Contractors contend that because Article 4(b) doesn't require the use of water from Millerton Lake, the Friant Contract does not permit it. But they fail to identify any section of the Friant Contract prohibiting the use of water from Millerton Lake. Even if no provision of the Exchange Contract explicitly authorizes this action, neither does any provision in it (or in the Friant Contract) prohibit it.

Again, then, there was no breach of contract.

D

Even if the Friant Contractors could, contrary to our analysis above, demonstrate that delivery of San Joaquin River-sourced water to the Exchange Contractors in 2014 was not *required* by the Exchange Contract and, therefore, such delivery constituted a breach of the government's obligations to the Friant Contractors, we would still affirm the Court of Federal Claims on the alternative grounds of the government's contractual immunity from liability. As the Ninth Circuit has recognized, operation of the CVP assigns to Reclamation "an extremely difficult task: to operate the country's largest federal water management project in a manner so as to meet the Bureau's many obligations." *Cent. Delta Water Agency v. Bureau of Reclamation*, 452 F.3d 1021, 1027 (9th Cir. 2006). Unsurprisingly, then, when the government undertook these obligations it did so while also obtaining a measure of immunity from liability.

Specifically, Article 13(b) of the Friant Contract provides:

> If there is a Condition of Shortage because of ... drought ... or actions taken by the Contracting Officer to meet legal obligations ... then, except as provided in subdivision (a) of Article 19 of this Contract, no liability shall accrue against the United States ... for any damage, direct or indirect, arising therefrom.

J.A. 394. Article 19(a), in turn, states:

> Where the terms of this Contract provide for actions to be based upon the opinion or determination of either party to this Contract, said terms shall not be construed as permitting such action to be predicated upon arbitrary, capricious, or unreasonable opinions or determinations.

J.A. 402. We agree with the government that "[r]ead together, Articles 13 and 19 prevent liability from accruing against the United States during periods of drought so long as the contracting officer does not take actions that are predicated upon arbitrary, capricious, or unreasonable opinions or determinations." Gov't Br. at 13 (internal quotation marks omitted).

Taking the evidence in the light most favorable to the Friant Contractors, no reasonable factfinder could find that the Contracting Officer's actions here were of this nature. During

the "critical year" of 2014, Reclamation, confronted with insufficient water from non-San Joaquin River sources to meet its full contractual obligation to supply "substitute water" to the Exchange Contractors, determined that it was required under the Exchange Contract to supply San Joaquin River water to the Exchange Contractors. The record is devoid of evidence that the government's actions were anything other than a good faith, reasonable effort to address a challenging circumstance in a manner that officials believed was compliant with the government's contractual obligations.

Accordingly, the Court of Federal Claims was right to grant summary judgment to the government on the Friant Contractors' breach of contract claim, as the government could not be found liable based on its actions, which cannot reasonably be found to be arbitrary, capricious, or unreasonable.

E

***12** Finally, we address Appellants' takings claims. [11] Appellants allege that the 2014 actions of Reclamation constituted a taking of their property without justification, in violation of the Fifth Amendment. Here, again, we reach the same conclusion as the Court of Federal Claims, which dismissed these claims based on the lack of a protected property interest.

While the Court of Federal Claims based its dismissal decision on the Friant Parties' lack of standing, pursuant to Rule 12(b)(1) of the Rules of the Court of Federal Claims ("RCFC"), J.A. 19, we have determined that the issue before us is instead whether Appellants stated a takings claim upon which relief may be granted, an inquiry governed by RCFC 12(b)(6). [12] The Friant Parties adequately alleged they were injured by Reclamation's water allocation decisions and that the Court of Federal Claims could redress their injuries. Hence, they established standing and that the Court of Federal Claims had subject matter jurisdiction. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) ("[T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.") (alterations in original; internal citations, quotation marks, and footnotes omitted). Because Appellants' allegation of a protected property interest is not "wholly insubstantial and frivolous," nor "patently without merit," they have standing and the trial court had jurisdiction to determine whether they stated a claim. *Bell v. Hood*, 327 U.S. 678, 682-83, 66 S.Ct. 773, 90 L.Ed. 939 (1946).

We turn, then, to whether Appellants stated a takings claim upon which relief may be granted. *See Columbus Reg'l Hosp. v. United States*, 990 F.3d 1330, 1342 (Fed. Cir. 2021) ("If we conclude that [the plaintiff 's] allegations fail to state a cognizable claim, we can convert the [Court of Federal Claims'] Rule 12(b)(1) dismissal into a Rule 12(b)(6) dismissal."). They did not.

***13** In the context of water rights, state law, not federal law, "define[s] the dimensions of the requisite property rights for purposes of establishing a cognizable taking." *Klamath Irr. Dist. v. United States*, 635 F.3d 505, 511 (Fed. Cir. 2011) (internal quotation marks omitted); *see also id.* at 512-17 (applying Oregon law). As the Supreme Court has stated on several occasions, "the [Reclamation] Act clearly provided that state water law would control in the appropriation and later distribution of the water." *Nevada v. United States*, 463 U.S. 110, 122, 103 S.Ct. 2906, 77 L.Ed.2d 509 (1983) (internal emphasis omitted); *see also California v. United States*, 438 U.S. 645, 664, 98 S.Ct. 2985, 57 L.Ed.2d 1018 (1978) (same).

Thus, we must assess whether the Friant Contractors or the Friant Growers possess property rights under California law. J.A. 199-215 (complaint alleging 18 times that Appellants have property rights "under California law"). They do not.

Appellants argue they have "appurtenant" rights to CVP water because it is delivered to their customers or to their lands. Open. Br. at 48 ("[T]he Government's allocation of water acquired for the Reclamation Act project is constrained by the appurtenant right of the landowners within that project who

beneficially use the [P]roject's water to irrigate their crops."). Like the trial court, we understand their argument to be that California law gives them "appropriative" rights, i.e., a right that " 'confers upon one who actually diverts and uses water the right to do so provided that water is used for reasonable and beneficial uses and is surplus to that used by **riparians** or earlier appropriators.' " J.A. 16 (quoting *United States v. State Water Res. Control Bd.*, 182 Cal.App.3d 82, 227 Cal. Rptr. 161, 168 (1986)). Appellants are wrong.

First, Appellants do not have any water rights under California law because, instead, as the California State Water Resource Control Board ("SWRCB") has held, it is *Reclamation* that "has appropriative water rights in the Central Valley Project." *Cnty. of San Joaquin v. State Water Res. Control Bd.*, 54 Cal.App.4th 1144, 63 Cal. Rptr. 2d 277, 285 n.12 (1997); *see also* J.A. 2399-2403 (SWRCB Decision D-1641 (Mar. 15, 2000) ("Title to the water rights under the permits is held by [Reclamation]."), *aff'd sub nom. State Water Res. Control Bd. Cases*, 136 Cal.App.4th 674, 39 Cal. Rptr. 3d 189 (2006)); J.A. 221 (complaint acknowledging "[t]he United States holds legal title to such water and water rights").

Second, as the government points out, "[t]he purpose of the appropriation doctrine is to reward initiative that allows water that would have otherwise sat worthless to be put to beneficial use, thus contributing to the state's development." Gov't Br. at 56 (citing *Irwin v. Phillips*, 5 Cal. 140, 146 (Cal. 1855)). This is exactly the type of action that Reclamation undertook pursuant to the Reclamation Act, 43 U.S.C. § 372. While Appellants put the water provided to them by Reclamation to beneficial use, that supply of water would not exist without the creation and operation of the Project, i.e., the efforts of Reclamation. In this context, California law does not assign property rights in water based on the uses put to it by end users. *See Ivanhoe Irr. Dist. v. All Parties and Persons*, 53 Cal.2d 692, 3 Cal.Rptr. 317, 350 P.2d 69, 75 (1960) (holding that Project water "belongs to or by appropriate action may be secured by the United States" and "[i]n a very real sense it is or will become the property of the United States"), *abrogated on other grounds by California v. United States*, 438 U.S. 645, 672, 98 S.Ct. 2985, 57 L.Ed.2d 1018 (1978).

***14** Appellants point to no California precedent persuasively supporting the proposition that the water delivered by Reclamation creates in the Friant Growers, or in the end users whose interests the Friant Contractors seek to represent, appropriative property rights. Appellants cite to a decision of the SWRCB, Cal. SWRCB Decision No. D-935. This SWRCB decision, in the course of granting permits to the United States to control certain water rights, discussed the rights of recipients of such water. J.A. 975-1086. It observed: "[u]nder our permit and license system the right to the use of water by appropriation does not vest by virtue of application, permit or license, [but] by application of the water to beneficial use upon the land." J.A. 1074. This statement does not constitute a holding that putting received Project water to "beneficial use upon the land" is sufficient to create a property right in receipt of that water. Other California authorities, including those we have already cited above, further clarify this point. *See* J.A. 2402 (SWRCB Decision D-1641) (rejecting argument that water users have property rights in Project water and stating "[the] argument that the end users of water are the water right holders would mean that instead of having a relatively few water purveyors subject to statewide regulatory authority of the SWRCB, there would be millions of water right holders"); *Israel v. Morton*, 549 F.2d 128, 132 (9th Cir. 1977) (holding that appurtenance doctrine does not apply to water delivered by Reclamation).

Because Appellants have failed to establish that they possess any property rights in water delivery from the government, they cannot maintain a takings claim. *See Fishermen's Finest*, 59 F.4th at 1275 (explaining that only "if the court concludes that a cognizable property interest exists" do we determine whether that property interest was "taken"). Therefore, we affirm the Court of Federal Claims' dismissal of these claims.

IV

We have considered Appellants' remaining arguments and find them unpersuasive. For the reasons stated, we affirm the judgment of the Court of Federal Claims.

AFFIRMED

COSTS

No costs.

All Citations

--- F.4th ----, 2024 WL 5131747

Footnotes

1 For simplicity, and because it does not impact the analysis, we use "water district" throughout the remainder of this opinion to refer to both water districts and irrigation districts.

2 *See* Friant Water Authority Amicus Curiae Br., ECF No. 52 at 2 (further annotations added by court).

3 We use "Exchange Contractors" to refer to, collectively, the parties that intervened in this litigation to join the government's defense: San Luis & Delta-Mendota Water Authority, Westlands Water District, Santa Clara Valley Water District, San Luis Water District, Grassland Water District, James Irrigation District, Byron Bethany Irrigation District, Del Puerto Water District, San Joaquin River Exchange Contractors Water Authority, Central California Irrigation District, Firebaugh Canal Water District, San Luis Canal Company, and Columbia Canal Company.

4 The Exchange Contract has been amended several times. The version in effect at the pertinent time, 2014, is the 1968 version. J.A. 25, 309-44. All references to the "Exchange Contract" are to this 1968 version.

5 We use "Friant Contractors" to refer to, collectively: City of Fresno, Arvin-Edison Water Storage District, Chowchilla Water District, Delano-Earlimart Irrigation District, Exeter Irrigation District, Ivanhoe Irrigation District, Lindmore Irrigation District, Lindsay-Strathmore Irrigation District, Lower Tule River Irrigation District, Orange Cove Irrigation District, Porterville Irrigation District, Saucelito Irrigation District, Shafter-Wasco Irrigation District, Southern San Joaquin Municipal Utility District, Stone Corral Irrigation District, Tea Pot Dome Water District, Terra Bella Irrigation District, and Tulare Irrigation District. We use "Friant Growers" to refer to, collectively: Loren Booth LLC, Matthew J. Fisher, Julia K. Fisher, Hronis Inc., Clifford R. Loeffler, Maureen Loeffler, Douglas Phillips, and Caralee Phillips.

6 All citations to the "Friant Contract" are to the 2010 version, which was in effect in 2014. The parties are in agreement that this version is representative of the governing agreements between the Friant Contractors and the United States.

7 On January 8, 2021, the Friant Parties filed a substantially identical case challenging the Bureau's 2015 water allocations. *See City of Fresno v. United States*, No. 21-375 (Fed. Cl. Jan. 8, 2021). That matter is currently stayed. *See id.*, ECF No. 9. (Feb. 11, 2021).

8 This aspect of the trial court's ruling is not on appeal.

9 It is undisputed that in 2014 "Reclamation delivered San Joaquin River-sourced water to the Exchange Contractors at Mendota Pool." Gov't Br. at 26.

10 The Fresno Slough is "at times a tributary of" the San Joaquin River. J.A. 234.

11 The takings claim was brought by the Friant Contractors (on behalf of non-party individuals to whom they deliver water), the Friant Growers, and Fresno. J.A. 222-23 (Complaint); *see also* J.A. 15. The Court of

Federal Claims dismissed as to each of these Appellants, as none had shown it had a property right to water, and the Friant Growers additionally lacked any contractual rights whatsoever. On appeal, the Friant Parties challenge only the dismissals as to the Friant Contractors (in their representative capacity) and as to the Friant Growers. Because, as a matter of law, none of the Appellants has a protected property interest in the water supplied to them by Reclamation, we need not make distinctions among them in our analysis.

12 Appellees moved to dismiss the takings claims based on both RCFC 12(b)(1) and 12(b)(6). *See City of Fresno v. United States*, No. 16-1276C (Fed. Cl. May 15, 2019), ECF No. 136 at 3, 22-23; ECF No. 137 at 15-19, 26, 34-36; ECF No. 138 at 6-7, 9.

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Only the Westlaw citation is currently available.
United States District Court, W.D. Pennsylvania.

FRANK FRANCI and RANDY BUMBAUGH, on behalf of themselves and all others similarly situated, Plaintiffs,

v.

CHAMBERS DEVELOPMENT COMPANY, INC., Defendant.

Civil Action No. 2:24-cv-800
|
Filed 12/16/2024

MEMORANDUM OPINION

WILLIAM S. STICKMAN IV UNITED STATES DISTRICT JUDGE

***1** Plaintiffs, Frank Franci ("Franci") and Randy Bumbaugh ("Bumbaugh") (collectively "Plaintiffs"), on behalf of themselves and others similarly situated ("Class Members"), brought this action against Defendant Chambers Development Company, Inc. ("Chambers") in the Court of Common Pleas of Allegheny County, Pennsylvania. (ECF No. 1-3). Chambers removed the action to this Court. (*Id.*). Plaintiffs allege at Count I that Chambers intentionally, knowingly, recklessly, and/or negligently created a private nuisance that substantially and unreasonably interfered with Plaintiffs' property. (*Id.* ¶¶ 56-65). At Count II, Plaintiffs allege that Chambers' substantial and unreasonable interference with Plaintiffs' use and enjoyment of their property "arises from a public nuisance, from which the Plaintiffs have uniquely suffered." (*Id.* ¶¶ 66-81). At Count III, Plaintiffs allege that Chambers negligently allowed conditions to exist which caused noxious odors to physically invade Plaintiffs' properties. (*Id.* ¶¶ 82-88). Chambers filed a motion to dismiss (ECF No. 5) and supporting brief (ECF No. 6) arguing that Plaintiffs' complaint must be dismissed for failure to state a claim upon which relief may be granted. (ECF No. 5, p. 1). In the alternative, Chambers moves to dismiss Plaintiffs' claims for punitive damages and strike Plaintiffs' class allegations. (*Id.*). Plaintiffs filed a brief opposing Chambers' motion to dismiss and strike. (ECF No. 19). Chambers filed a reply brief, (ECF No. 20), and notice of supplemental authority, (ECF No. 21). For the reasons set forth below, the Court will deny Chambers' motion in all respects.

I. FACTUAL BACKGROUND

Chambers is a Delaware corporation which owns and operates a solid waste landfill ("Landfill") located at 600 Thomas Street, Monroeville, Pennsylvania. (ECF No. 1-3, ¶ 5). Plaintiffs are individuals who own and reside on property in Monroeville, Pennsylvania. (*Id.* ¶ 3-4). They brought this action individually and on behalf of "[a]ll owners/occupants and renters of residential property within one (1) mile of the Landfill property boundary." (*Id.* ¶ 44). There are around 2,700 residences within the class area. (*Id.* ¶ 46). Chambers is a Delaware corporation which owns and operates the Landfill. (*Id.* ¶ 5).

The Landfill accepts, processes, and stores substantial quantities of waste materials including, but not limited to: biosolids, municipal solid waste, construction and demolition debris, auto shredder fluff, and sandblast media. (*Id.* ¶ 15). Plaintiffs allege that the materials deposited into the Landfill decompose and generate byproducts, including leachate and landfill gas. (*Id.* ¶ 16). These byproducts can be particularly odorous and offensive when not managed properly, giving off a "rotten egg" smell. (*Id.*). Plaintiffs contend that landfills do not inherently emit noxious odors perceptible in the surrounding community. (*Id.* ¶ 17). Rather, "[a] properly designed, operated, and maintained landfill will adequately capture, process, and remove leachate and landfill gas to prevent odors from escaping into the ambient air as fugitive emissions." (*Id.*).

***2** Plaintiffs allege that Chambers failed to use adequate odor mitigation processes and technologies to control emissions from the Landfill. (*Id.* ¶ 26). As a result, noxious odors invaded Plaintiffs' and Class Members' properties. (*Id.*). Plaintiffs allege that Chambers' failure to prevent off-site emissions include, but are not limited to:

a) Failing to install, maintain, and operate an adequate landfill gas collection system;

b) Insufficient monitoring of the Landfill;

c) Using inadequate cover and cover practices;

d) Inadequate collection, management, and disposal of leachate;

e) Failing to purchase, possess, and maintain appropriate equipment;

f) Improper and/or excessive processing of construction and demolition waste;

g) Engaging in excavation without adequate erosion or sedimentation controls; and

h) [Failing] to use other odor mitigation and control techniques that are available.

(*Id.* ¶ 27). As a result, Plaintiffs allege that "Plaintiffs' property[,] including Plaintiffs' neighborhoods, residences[,] and yards have been and continue to be physically invaded by noxious odors, pollutants, and air contaminants." (*Id.* ¶ 12).

Plaintiffs allege that citizens in the nearby residential area have frequently complained about noxious odors emanating from the Landfill. (*Id.* ¶ 28). Specifically, Plaintiffs allege that numerous residents have filed complaints with the Pennsylvania Department of Environmental Protection ("PDEP") concerning the odors. (*Id.* ¶ 34). The Pitcairn Fire Department has been called to the area several times due to gas-like odors emitted by the Landfill into the community. (*Id.*). Betsy Stevick, the mayor of the Borough of Pitcairn, issued a formal letter to Pennsylvania Governor Joshua Shapiro requesting an investigation into the Landfill and its odor emissions. (*Id.*). Further, Franci stated that "he often experiences a lack of sleep from being continuously woken up by the odors emanating from [the] Landfill." (*Id.* ¶ 31). Bumbaugh reported that the "odor is so bad it makes the inside of your house smell." (*Id.* ¶ 32). Plaintiffs' complaint includes several allegations made by Class Members regarding the odor. (*Id.* ¶ 33).

Plaintiffs also contend that the noxious odors from the Landfill are offensive to them and Class Members and would be offensive to reasonable people of ordinary health and sensibilities. (*Id.* ¶ 36). The odors have "caused property damage" and "substantially interfered with the abilities of [Plaintiffs] and [Class Members] to reasonably use and enjoy their homes and properties." (*Id.* ¶ 37). Further, the invasion of Plaintiffs' and Class Members' properties by the noxious odors has reduced the value of those properties. (*Id.* ¶ 38). Members of the public were also allegedly harmed by the noxious odors that emitted from the Landfill into public areas. (*Id.* ¶ 40).

II. STANDARD OF REVIEW

A motion to dismiss filed under Federal Rule of Civil Procedure ("Rule") 12(b)(6) tests the legal sufficiency of the complaint. *Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993). A plaintiff must allege sufficient facts that, if accepted as true, state a claim for relief plausible on its face. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A court must accept all well-pleaded factual allegations as true and view them in the light most favorable to a plaintiff. *See Doe v. Princeton Univ.*, 30 F.4th 335, 340 (3d Cir. 2022); *see also Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009). Although a court must accept the allegations in the complaint as true, it is "not compelled to accept unsupported conclusions and unwarranted inferences, or a legal conclusion couched as a factual allegation." *Baraka v. McGreevey*, 481 F.3d 187, 195 (3d Cir. 2007) (citations omitted).

***3** The "plausibility" standard required for a complaint to survive a motion to dismiss is not akin to a "probability" requirement but asks for more than sheer "possibility." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). In other words, the complaint's factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations are true even if doubtful in fact. *Twombly*, 550 U.S. at 555. Facial plausibility is present when a plaintiff pleads factual content that allows the court to draw the reasonable inference that a defendant is liable for the misconduct alleged. *Iqbal*, 556 U.S. at 678. Even if the complaint's well-pleaded facts lead to a plausible inference, that inference alone will not entitle a plaintiff to relief. *Id.* at 682. The complaint must support the inference with facts to plausibly justify that inferential leap. *Id.*

III. ANALYSIS

A. Sufficiency of Plaintiffs' Pleadings

i Private Nuisance

Chambers argues that Plaintiffs' private nuisance claim (Count I) fails because Plaintiffs failed to plead that (1) Chambers' invasion caused significant harm, (2) Chambers' actions were either intentional and unreasonable or negligent and reckless as required, and (3) their property interests were encroached upon against their will. (ECF No. 6, pp. 7-8). Plaintiffs counter by arguing that (1) whether they suffered significant harm is a question for the jury – not the Court, (2) they plausibly plead that Chambers acted with the requisite state of mind, and (3) they adequately alleged encroachment of Plaintiffs' property interests. (ECF No. 19, pp. 12-14). Chambers responds that Plaintiffs improperly relied on outdated case law to support their contention that significant interference is a question for the jury, and Plaintiffs did not plead significant harm or tangible damage to their properties. (ECF No. 20, pp. 3-4). The Court holds that Plaintiffs adequately alleged the elements of a private nuisance claim under Pennsylvania law. [1]

Pennsylvania follows the Restatement (Second) of Torts approach for determining whether a defendant's conduct constitutes a private nuisance. *Diess v. Pennsylvania Dep't of Transp.*, 935 A.2d 895, 905 (Pa. Commw. Ct. 2007). Under this approach, private nuisances are "nontrespassory invasion[s] of another's interest in the private use and enjoyment of land." *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 821D (AM. L. INST. 1977)). "A private nuisance exists when a person's conduct invades 'another's interest in the private use and enjoyment of land,' and that invasion is either intentional and unreasonable or unintentional but negligent." *Baptiste v. Bethlehem Landfill Co.*, 965 F.3d 214, 222-23 (3d Cir. 2020) (quoting *Youst v. Keck's Food Serv., Inc.*, 94 A.3d 1057, 1072 (Pa. Super. Ct. 2014)). An invasion is actionable under the doctrine of nuisance only if it causes "significant harm, of a kind that would be suffered by a normal person in the community or by property in normal condition and used for a normal purpose." *Karpiak v. Russo*, 676 A.2d 270, 272 (Pa. Super. Ct. 1996) (citing RESTATEMENT (SECOND) OF TORTS § 821F (AM. L. INST. 1977)). A significant harm must involve more than "slight inconvenience or petty annoyance." *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 821F cmt. c (AM. L. INST. 1977)). It must constitute a "real and appreciable interference with the plaintiff's use or enjoyment of his land." *Id.* The standard for determining whether an alleged invasion is significant is the "standard of normal persons or property in the particular locality. If normal persons living in the community would regard the invasion in question as definitely offensive, seriously annoying or intolerable, then the invasion is significant." *Tiongco v. Sw. Energy Prod. Co.*, 214 F. Supp. 3d 279, 284 (M.D. Pa. 2016) (internal citations omitted). "It is for the trier of fact to determine whether there was a significant invasion of [a party's] enjoyment of their property, and, if such an invasion existed, whether the invasion was unreasonable." *Kembel v. Schlegel*, 478 A.2d 11, 15 (Pa. Super. Ct. 1984). A defendant's actions need not be injurious to health to be a nuisance. *Id.* (citing *Smith v. Alderson*, 396 A.2d 808, 810 (Pa. Super. Ct. 1979) (stating that a nuisance may be found where there is an "unreasonable, unwarrantable, or unlawful use by a person of his own property which causes injury, damage, hurt, *inconvenience, annoyance or discomfort* to one in the legitimate enjoyment of his reasonable rights of person or properly") (emphasis added)).

***4** Plaintiffs pled that noxious odors emanating from the Landfill substantially and unreasonably interfered with their enjoyment of life and property by:

> a) Forcing the Plaintiffs and Class Members to remain inside their homes and forego the use of their yards, porches, and other spaces, and to generally refrain from outdoor activities;
>
> b) Causing the Plaintiffs and Class Members to keep their doors and windows closed when they would otherwise have them open;
>
> c) Depriving the Plaintiffs and Class Members of the value of their homes and properties; [and]
>
> d) Causing the Plaintiffs and Class Members embarrassment, inconvenience, and discomfort including, but not limiting to, creating a reluctance to invite guests in their homes and preventing Plaintiffs and Class Members from utilizing the outdoor areas of their respective properties.

(ECF No. 1-3, ¶ 59). Chambers contends that Plaintiffs' "conclusory allegations more aptly describe a slight inconvenience and petty annoyance than significant and unreasonable interference." (ECF No. 6, p. 7). Chambers

further argues that Plaintiffs pled "no noncompliance or violations by Chambers with the PDEP." (*Id.*).

A private nuisance may flow from the consequences of an otherwise lawful act. *Tiongco*, 214 F. Supp. 3d at 286 (citing *Liberty Place Retail Assocs., L.P. v. Israelite Sch. of Universal Prac. Knowledge*, 102 A.3d 501, 508–09 (Pa. Super. Ct. 2014)). Thus, whether Chambers complied with PDEP requirements is not dispositive of whether Chambers' activities constituted a significant invasion giving rise to a private nuisance. The private nuisance inquiry is not limited to whether Chambers' conduct violated a regulation, ordinance, or other requirement. The question is whether Chambers' conduct constituted a significant and unreasonable invasion of Plaintiffs' use and enjoyment of their property.

Further, the Court disagrees with Chambers' contention that Plaintiffs' allegations are conclusory and threadbare. Plaintiffs did not merely recite the elements of private nuisance. Instead, Plaintiffs alleged specific interference with the use of their property – e.g., they were forced to keep the windows of their residence closed and they felt reluctant to invite guests to their property. (*See* ECF No. 1-3, ¶ 59). Accepting Plaintiffs' allegations as true and viewing them in the light most favorable to Plaintiffs, the Court holds that Plaintiffs plausibly alleged that odors from the Landfill caused significant harm to Plaintiffs' use and enjoyment of their property.

Chambers next argues that Plaintiffs failed to allege that Chambers' actions were either intentional and unreasonable or negligent and reckless as is required for liability to attach. (ECF No. 6, pp. 7-8). Plaintiffs counter that their complaint contains factual allegations adequately pleading that Chambers acted unreasonably and/or negligently. (ECF No. 19, p. 13). Plaintiffs also contend that Chambers acted intentionally because it continued to operate the Landfill with knowledge of its negative impact on the community. (*Id.*). The Court holds that Plaintiffs plausibly alleged that Chambers acted intentionally (in the context of private nuisance claims) when Plaintiffs alleged that Chambers had notice of the invasion of the community's land and continued to intentionally operate the Landfill.

***5** As discussed above, private nuisance plaintiffs must demonstrate that the invasion was brought about by either intentional and unreasonable conduct, or unintentional conduct that is otherwise actionable under the rules controlling liability for negligence or recklessness, or for abnormally dangerous conditions or activities. *Tiongco*, 214 F. Supp. 3d at 284 (citing *Karpiak*, 676 A.2d at 272). A party commits an intentional invasion when he either "act[s] for the purpose of causing it or know[s] that it is resulting or is substantially certain to result from his conduct." RESTATEMENT (SECOND) OF TORTS § 825 cmt. c (AM. L. INST. 1977); *see also McQuilken v. A&R Dev. Corp.*, 576 F. Supp. 1023, 1030 (E.D. Pa. 1983) (citing *Burr v. Adam Eidemiller, Inc.*, 126 A.2d 403, 422 (Pa. 1956)). A party generally possesses the requisite level of intent if he knows or is substantially certain "that the condition or activity is causing harm to another's interest in the use and enjoyment of land." *Tiongco*, 214 F. Supp. 3d at 284. When a defendant begins a course of conduct without knowing that his conduct is invading another's use and enjoyment of land but is later put on notice that such an invasion is resulting and does not abate his activities, further invasions may be considered "intentional." RESTATEMENT (SECOND) OF TORTS § 825 cmt. d (AM. L. INST. 1977) (explaining that in cases involving continuing or recurrent invasions, the "first invasion resulting from the actor's conduct may be either intentional or unintentional; but when the conduct is continued after the actor knows that the invasion is resulting from it, further invasions are intentional").

Plaintiffs pled that "[b]y constructing and then failing to reasonably repair, maintain, and operate the Landfill, thereby causing noxious odors to physically invade the Plaintiffs' and Class [Members'] properties, [Chambers] intentionally, knowingly, recklessly, and/or negligently created a nuisance that substantially and unreasonably interferes with the Plaintiffs' and Class [Members'] properties." (ECF No. 1-3, ¶ 61). Plaintiffs also alleged that Chambers "failed to use adequate mitigation strategies, processes, technologies, and equipment to control noxious odor emissions from the Landfill and prevent those odors from invading the homes and properties of [ ] Plaintiffs and [Class Members]." (*Id.* ¶ 26). Finally, Plaintiffs allege that Chambers "knew about its substantial noxious odor emissions through numerous complaints, warnings, and significant media attention throughout the Borough of Pitcairn." (*Id.* ¶ 41). Given the allegations discussed above, Plaintiffs plausibly pled that Chambers knew or had substantial certainty that their conduct was invading Plaintiffs' use and enjoyment of their land. Thus, the Court holds that Plaintiffs plausibly alleged that

Chambers acted intentionally in the context of their private nuisance claim. Since the Court holds that Plaintiffs plausibly pled that Chambers acted intentionally, the Court does not discuss whether Plaintiffs plausibly alleged that Chambers acted negligently or recklessly. *See Pryor v. Nat'l Collegiate Athletic Ass'n.*, 288 F.3d 548, 565 (3d Cir. 2002) (stating that "issues involving state of mind (*e.g.,* intent) are often unsuitable for a Rule 12(b)(6) motion to dismiss").

Finally, Chambers argues that Plaintiffs failed to allege that their property interests were "encroached by something that has come onto the property against their will." (ECF No. 6, p. 8). In other words, Chambers argues that Plaintiffs' allegations did not relate to a property interest. (*Id.*). Plaintiffs counter that "[b]oth Plaintiffs clearly allege odor experiences specifically impacting their private property interests." (ECF No. 19, p. 14). The Court holds that Plaintiffs plausibly alleged an invasion of their property interests.

Chambers correctly notes that private nuisance plaintiffs must plead that their "property interests have been encroached by something that has come onto the property against the plaintiff[s'] will." *Cavanagh v. Electrolux Home Prod.*, 904 F. Supp. 2d 426, 435 (E.D. Pa. 2012). Franci alleged that he "experiences a lack of sleep" because of the odors emitted from the Landfill. (ECF No. 1-3, ¶ 31). Bumbaugh alleged that the "odor is so bad it makes the inside of your house smell." (*Id.* ¶ 32). Chambers alleges that these allegations do not relate specifically to any property interest. Viewing the complaint in the light most favorable to Plaintiffs, the Court holds that these statements allege an encroachment of Plaintiffs' residences. Thus, Plaintiffs alleged that their properties have been encroached upon by odors that have come onto their property against Plaintiffs' will.

ii. Public Nuisance

***6** Chambers contends that Plaintiffs have not pled interference with a public right, requiring dismissal of their public nuisance claim (Count II). (ECF No. 6, pp. 9-11). Plaintiffs counter that they plausibly alleged interference of the public's right to unpolluted and uncontaminated air. (ECF No. 19, p. 14). The Court holds that Plaintiffs plausibly alleged interference with the right to fresh air in public spaces.

A public nuisance is an unreasonable interference with a right common to the public. *Atl. Richfield Co. v. Cnty. of Montgomery*, 294 A.3d 1274, 1283 (Pa. Commw. Ct. 2023) (citing RESTATEMENT (SECOND) OF TORTS § 821B).[2] Unlike reasonableness, which is a factual inquiry, whether a right is public is a question of law. *Id.* at 1284 (citing *Machipongo Land & Coal Co. v. Com.*, 799 A.2d 751, 773 (Pa. 2002)). In the context of public nuisance claims, a public right is necessarily collective. *Id.*; *see also Greyhound Lines, Inc. v. Peter Pan Bus Lines, Inc.*, 845 F. Supp. 295, 302 (E.D. Pa. 1994) (explaining that, under Pennsylvania tort law, "the law of public nuisance comprehends threats to the public at large, not specific persons"). The Second Restatement gives the hypothetical example of pollution in a stream, which, if it "deprives fifty or a hundred lower **riparian** owners of the use of the water for purposes connected with their land," is not a public nuisance. RESTATEMENT (SECOND) OF TORTS § 821B cmt. g (AM. L. INST. 1977). "If, however, the pollution prevents the use of a public bathing beach or kills the fish in a navigable stream and so deprives all members of the community of the right to fish, it becomes a public nuisance." *Id.*

Baptiste v. Bethlehem Landfill Co., 965 F.3d 214 (3d Cir. 2020) is instructive in determining whether Plaintiffs plausibly alleged interference with a public right. In *Baptiste*, property owners sued a landfill owner, on behalf of themselves and a putative class of persons, asserting causes of action for, in part, public nuisance. The United States Court of Appeals for the Third Circuit noted that there is a public right to "fresh air in public spaces." *Baptiste*, 965 F.3d at 220. Moreover, the Third Circuit found that the plaintiffs properly alleged a public nuisance claim when they pled that odors emanating from a landfill caused significant discomfort and inconvenience when the odors invaded their community. *Id.*

Plaintiffs allege that Chambers' "noxious odors have interfered with the public's right to unpolluted and uncontaminated air" and that "[m]any members of the general public are impacted by the odors when they work, study, commute, shop, or engage in recreation in the Class Area." (ECF No. 1-3, ¶¶ 70, 75). Plaintiffs also allege that "[m]embers of the public, including, but not limited to, businesses, employees, commuters, tourists, visitors, minors, customers, clients, students, and patients have been harmed by the fugitive noxious odors emitted from the Landfill into public spaces." (*Id.* ¶ 40). Like in *Baptiste*, Plaintiffs alleged significant discomfort and inconvenience caused by offensive

odors emitting from the Landfill into the surrounding area. Plaintiffs alleged that the odors interfered with the activities of the general public in the area. Given these allegations, the Court holds that Plaintiffs plausibly pled that Chambers significantly interfered with the public right to clean and uncontaminated air.

***7** Chambers argues that the public right to clean air flows between the Commonwealth of Pennsylvania and its citizens. (ECF No. 20, pp. 4-5). Thus, it argues that Plaintiffs cannot rely on this right to establish a public nuisance claim. (*Id.*). Under *Baptiste*, private citizens may sue under a theory of public nuisance to vindicate their right to fresh air in public spaces. *Baptiste*, 965 F.3d at 220. Chambers is correct that "[b]ecause these rights are held in common by the public at large and no one owns them to the exclusion of others, the remedy for their infringement ordinarily lies 'in the hands of the state.' " *Id.* (quoting *Philadelphia Elec. Co. v. Hercules*, Inc., 762 F.2d 303, 315 (3d Cir. 1985)). However, "[w]hen a public nuisance interferes with an individual's personal rights, such as the right to use and enjoy private land, the aggrieved person has a private cause of action to remedy the infringement of his personal rights." *Id.* Stated differently, to sustain a private claim on a public nuisance theory, "a plaintiff must have suffered a harm of greater magnitude and of a different kind than that which the general public suffered." *Id.*; *see also Pennsylvania Soc. for Prevention of Cruelty to Animals v. Bravo Enterprises, Inc.*, 237 A.2d 342, 360 (Pa. 1968) ("[A] public nuisance may be enjoined at the behest of a private citizen or group of citizens, if ... their property or civil rights[ ] are specifically injured by the public nuisance over and above the injury suffered by the public generally."). Chambers' argument that Plaintiffs cannot bring a claim for public nuisance to enforce the public right to clean air fails. [3]

B. The Economic Loss Doctrine

The Court holds that Plaintiffs plausibly alleged physical injury sufficient for their negligence and private nuisance claims to survive Chambers' motion to dismiss. The viability of Plaintiffs' claims depends on whether the invasion of noxious odors onto an individual's property is a cognizable physical injury. Chambers argues that the Court must dismiss Plaintiffs' negligence and private nuisance claims under the economic loss doctrine because Plaintiffs have not pled any physical injury or properly damage. (ECF No. 6, p. 12). [4]

The Court need not, at this early stage of the proceedings, make a final determination as to whether the facts in this case bring Plaintiffs' claims within the orbit of the economic loss doctrine. It leaves for another day the question of whether the odor from the Landfill can be viewed as causing damage to or a physical invasion of Plaintiffs' property. The parties may revisit this issue at summary judgment with a more fulsome record on the nature of the alleged odor, its genesis and composition, and any other issue that might be relevant to the traditional economic loss doctrine analysis. As explained below, the Court leans toward predicting that the Pennsylvania Supreme Court would hold that the economic loss doctrine would not bar tort recovery in negligence and private nuisance cases arising from the type of circumstances this case presents. [5]

The economic loss doctrine provides that "no cause of action exists for negligence that results solely in economic damages unaccompanied by physical injury or property damage." *Am. Stores Properties, Inc. v. Spotts, Stevens & McCoy, Inc.*, 678 F. Supp. 2d 328, 333 (E.D. Pa. 2009); *see also Spivack v. Berks Ridge Corp. Inc.*, 586 A.2d 402, 405 (Pa. Super. Ct. 1990). Economic loss has been defined as "damage for inadequate value, costs of repair and replacement of defective product, [and] consequential loss of property, without any claim of personal injury or damage to other property." *Palco Linings, Inc. v. Pavex, Inc.*, 755 F. Supp. 1269, 1276 (M.D. Pa. 1990). Moreover, the scope of the economic loss doctrine is not restricted to negligence actions; instead, this doctrine extends to tort liability more generally. *Diehl v. CSX Transp., Inc.*, 349 F. Supp. 3d 487, 506 (W.D. Pa. 2018); *Duquesne Light v. Pa. Am. Water Co.*, 850 A.2d 701, 705 (Pa. Super. Ct. 2004) (discussing Pennsylvania's "strong, oft-stated public policy of barring recovery for economic losses sustained as a result of another's tortious conduct" including liability for private nuisance); *Moore v. Pavex, Inc.*, 514 A.2d 137, 139 (Pa. Super. Ct. 1986) (rejecting the contention that plaintiffs could recover under the law of private nuisance for purely economic harm). The economic loss doctrine applies to Plaintiffs' claims of negligence and private nuisance. [6]

***8** In *Baptiste*, the Third Circuit expressly declined to consider whether "noxious odors, pollutants, and air contaminants" invading an individual's properly constitutes physical injury sufficient to avoid the application of the

economic loss doctrine. *Baptiste*, 965 F.3d at 228. The Court noted:

> Conceptually, it is not difficult to conceive how the presence of hazardous particulates in the air could constitute physical property damage if these pollutants infiltrate physical structures, as is the case when hazardous chemicals seep into private wells through contamination in groundwater. *See Ayers v. Jackson Twp.*, 525 A.2d 287, 294 (N.J. 1987); *see also Gates v. Rohm & Haas Co.*, No. CIV.A. 06-1743, 2008 WL 2977867, at *3 (E.D. Pa. July 31, 2008) ("[T]he physical presence of vinyl chloride [a hazardous substance] in the air, even if undetectable, constitutes a physical injury to the property for purposes of common law property damage claims."). Drawing all reasonable inferences in favor of the [plaintiffs], as required at the pleadings stage, the allegations in the complaint— namely that "landfill gas" and other hazardous contaminants have physically invaded the plaintiffs' property and "permeate[d] the walls"— may be enough to satisfy that requirement.

Id. at 229 n. 12. Absent controlling circuit precedent, district courts within the Third Circuit have reached different conclusions. Chambers relies mainly on the decision of the United States District Court for the Eastern District of Pennsylvania in *Lloyd v. Covanta Plymouth Renewable Energy, LLC*, 517 F. Supp. 3d 328 (E.D. Pa. 2021) for the contention that the invasion of noxious odors cannot by itself satisfy the economic loss doctrine. In *Lloyd*, the plaintiff brought claims for private nuisance, public nuisance, and negligence. *Id.* at 330. These claims arose from the defendant's operation of a waste-to-energy processing facility which plaintiffs alleged emitted noxious odors that invaded her and other residents' properties. *Id.* The plaintiff pled that the odors harmed her property due to the loss of its use and enjoyment, that noxious odors prevented her and her neighbors from engaging in outdoor activities, and that the odors forced her to keep her windows closed on certain days. *Id.* at 333. The plaintiff's claims in *Lloyd* are much like Plaintiffs' allegations here. The court cited to the Third Circuit's footnote in *Baptiste* to support its conclusion that the plaintiff failed to plead sufficient facts alleging physical injury or property damage to support her claim for negligence. *Id.* at 332.

On the other hand, in denying a defendant's motion to dismiss a plaintiff's negligence claim, a fellow judge of this Court "respectfully decline[d] to adopt the reasoning in *Lloyd*" which, in the court's view, read "too much into the [Third Circuit's] footnote" in *Baptiste*. *Childs v. Westmoreland Sanitary Landfill LLC*, No. CV 21-1100, 2022 WL 2073022, at *1 (W.D. Pa. June 9, 2022).

In *Flynn v. Shell Chem. Appalachia, LLC*, No. 2:24-CV-00193-MJH, 2024 WL 4664830 (W.D. Pa. Nov. 4, 2024), another fellow judge of this Court dismissed the plaintiff's negligence claim because the complaint did not sufficiently allege "the infiltration into Plaintiff's physical structure which has caused physical damage under a negligence theory." *Flynn*, 2024 WL 4664830, at * 3. The court looked to the Third Circuit's reference in the *Baptiste* footnote as an indication that, "in the industrial context," physical damage requires air pollutants to infiltrate physical structures. *Id.* The court noted that one putative class member asserted that they had to perform "extra dusting" inside the house" since the plant at issue opened. *Id.* The court held that this allegation was not sufficient to establish physical infiltration because Plaintiffs did not aver any "precise connection" between the alleged extra dusting within the residence and damages for diminution of property value. *Id.*

***9** The Court agrees with its colleague in *Childs* that the *Baptiste* footnote should not be read to require the physical infiltration or permeation of Plaintiffs' property by chemicals or noxious gases. The Court views it as significant that in *Baptiste* the Third Circuit favorably cited to *Gates v. Rohm & Haas Co.*, No. CIV.A. 06-1743, 2008 WL 2977867 (E.D. Pa. July 31, 2008). In *Gates*, the court held that "[w]here the invading substance is a hazardous chemical, to demonstrate interference with use and enjoyment of the property, a plaintiff must show either a physical invasion or an invasion by something otherwise perceptible to the senses, but not necessarily physical, like noise or vibrations." *Id.* at *3. The court "conclude[d] 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." *Id.* (stating that "there is sufficient evidence in the record to establish that vinyl chloride is a carcinogen and thus a hazardous chemical, the Plaintiffs need only show that vinyl chloride was and continues to be physically present on their properties"). Chambers argues that *Gates* is distinguishable from the instant case because *Gates*

involved a hazardous carcinogen. Here, Plaintiffs did not allege the presence of a hazardous carcinogen but "noxious odors" and "fugitive emissions." (*See e.g.*, ECF No. 1-3, ¶¶ 14, 17, 20, 26). Plaintiffs repeatedly alleged that Chambers "caused a physical invasion of the Plaintiffs' and putative Class [Members'] properties by noxious odors on frequent, intermittent, and reoccurring occasions too numerous to list individually." (*Id.* ¶¶ 42, 43, 84).

Even if the physical invasion of noxious odors cannot be construed as inflicting physical injury to Plaintiffs' property, the Court has doubts as to whether Pennsylvania's economic loss doctrine is applicable to Plaintiffs' claims. The well-established policy behind the economic loss doctrine is preventing open-ended tort liability. Because the economic consequences of many types of negligent conduct are far-reaching, a defendant who could be held liable for every economic effect of its tortious conduct would face virtually uninsurable risks, far out of proportion to its culpability. Thus, in a classic economic loss case, the doctrine is meant to prevent highly attenuated theories of proximate causation. By way of illustration, imagine a plaintiff who owns a restaurant in a resort area that generates most of its business from customers returning from the beach. An oil spill shuts down the beach. The restaurant's business drastically decreases. The restaurant owner sues the defendant who spilled the oil for negligence. This is a classic case where the economic loss rule bars recovery. The plaintiff suffered no actual personal injury or property damage. The business's losses were actually caused by the lack of customers. In this hypothetical, the oil spill was further upstream in the chain of ultimate causation than our law countenances. Whereas here, the harm complained of by Plaintiffs *is* directly caused by the noxious odors. One might say that the harm is the odor itself. Thus, Plaintiffs are alleging a direct harm to enjoyment of day-to-day life on their land. The harm is not caused by some distant event.

The Pennsylvania Supreme Court has recently exhibited a willingness to reconsider the extent of the economic loss doctrine. The Court permitted negligence claims to proceed even where the plaintiffs did not allege any personal injury or property damage. In *Dittman v. UPMC*, 196 A.3d 1036 (Pa. 2018), employees sued their employer for, in part, negligence, after a data breach wherein the names, birth dates, social security numbers, tax information, addresses, salaries, and bank information of the employees were accessed and stolen from the employer's computer systems. *Id.* at 499-501. The employer argued that the economic loss doctrine prevented the plaintiffs' recovery because they did not allege any physical injury or property damage. *Id.* at 502. The Pennsylvania Supreme Court held that the economic loss doctrine does not preclude all negligence claims seeking solely economic damages. *Id.* at 525. The Court permitted the plaintiffs to pursue damages in tort, despite the economic loss doctrine, even though the data breach did not cause any property damage or physical injury. *Dittman* is notable because it demonstrates that the Pennsylvania Supreme Court has taken a major step away from a strict application of the economic loss doctrine and permitted tort claims to proceed in cases where nothing approximating physical damage or personal injury occurred. Here, the alleged harm from the odor is arguably more direct, and physical, than the harm that might accrue to the *Dittman* plaintiffs due to the data breach.

***10** Other courts have acknowledged the possible incongruity between the classic application of the economic loss doctrine and circumstances like those presented by this case. For example, in *Paulus v. Citicorp N. Am., Inc.*, No. 2:12-CV-856, 2013 WL 5487053 (S.D. Ohio Sept. 30, 2013), the plaintiffs sued a company that operated a data center near the plaintiffs' property. *Paulus*, 2013 WL 5487053, at *1. The plaintiffs alleged that the defendant's generators "produce[d] a loud, annoying noise that" they could hear "both inside and outside of their home" during all hours of the day. *Id.* They also alleged that the noise caused their windows to vibrate, forced them to close their windows "instead of enjoying the natural ventilation from the outside air," woke them up between the hours of 10:00 p.m. and 5:00 a.m., caused them sleep deprivation, which hurt their performance at work, and prevented them from "the quiet enjoyment of their home and yard during their leisure time." *Id.* The defendant alleged that Ohio law, which has an economic loss doctrine that is substantively identical to Pennsylvania, prevented the plaintiffs from recovering purely economic losses. *Id.* at *8. The court held that the plaintiffs' alleged damages did not qualify as indirect economic loss, but rather *direct* economic losses which were not prevented by the economic loss doctrine. The court held:

> [T]o the extent the [plaintiffs] assert purely economic damages, the damages are direct – they allege, for example, the lost value of their house as a result of conduct they see as tortious. This is not akin to consequential damages

> or lost profit, rather more in alignment with "the loss attributable to the decreased value of [a] product." Because these qualify as direct economic damages, the economic loss doctrine does not bar the claims at issue.

Id. (internal citations omitted). In the alternative, the court noted that even if the plaintiffs' alleged damages were indirect, they arose "from tangible physical injury to persons or from tangible property" damage because "a diminished quality of life, sleep deprivation, and diminished performance at work" amount to harms that are "tangible, redressable, nuisance-related injuries." *Id.* at *9; *see also Little Hocking Water Ass'n, Inc. v. E.I. du Pont Nemours & Co.*, 91 F. Supp. 3d 940, 988 (S.D. Ohio 2015) (noting that the economic loss doctrine does not prevent recovery for economic losses which are "more akin to the decreased value of the product than to loss of profits or time"); *Avery v. GRI Fox Run, LLC*, 160 N.E.3d 155, 175 (Ill. App. Ct. 2020) (stating, in the context of a private nuisance claim, that "inconvenience, health issues, annoyance, discomfort, and the inability to fully use and enjoy" the plaintiffs' property cannot be characterized as economic losses or injury because the alleged damages are a form of personal injury).

Here, Plaintiffs have alleged damages for interference with the use and enjoyment of private property, loss of property values, and interference with Plaintiffs' activities in the area surrounding the Landfill. (*See e.g.*, ECF No. 1-3, ¶¶ 29, 31-32, 36-37). The parties dispute whether these damages are "purely economic loss" barring Plaintiffs from recovering under negligence and private nuisance theories of liability. The parties further dispute whether Plaintiffs plausibly pled physical injury sufficient to sustain a negligence claim. As discussed above, binding case law does not resolve whether invasion by noxious odors resulting in loss of enjoyment and use of property constitutes non-economic physical injury. However, the Third Circuit in *Baptiste* indicated that loss of real property value and interference with the use and enjoyment of property are not purely economic losses. *Baptiste*, 965 F.3d at 222 n.4 ("The [plaintiffs] are not seeking economic losses, only real property damages, *i.e.*, loss of real property value and interference with the use and enjoyment of their homes and private land."). Further, even if Plaintiffs' losses are solely economic, it is unclear whether the Supreme Court of Pennsylvania would hold that the economic loss doctrine prevents their recovery. In light of the uncertainty in binding case law, the Court cannot now conclude, drawing inferences in Plaintiffs' favor, that loss of use of real property is a purely economic loss such that it is appropriate to dismiss Plaintiffs' negligence and private nuisance claims on the pleadings as a matter of law. Nor can the Court conclude, at this time, that Plaintiffs' claims fall within the ambit of the economic loss doctrine. Viewing all inferences in the light most favorable to Plaintiffs, the Court holds that Plaintiffs' plausibly alleged injuries or damages are sufficient for their negligence and private nuisance claims to survive Chambers' motion to dismiss.

C. Punitive Damages

***11** Chambers next argues that Plaintiffs' allegations do not support an award of punitive damages. (ECF No. 6, p. 15). Chambers contends that "the pleadings do not demonstrate that Chambers had the requisite state of mind or that the conduct at issue is so outrageous as to call for the imposition of punitive damages." (*Id.* at 16). Plaintiffs counter that it is premature to strike Plaintiffs' claim for punitive damages. (ECF No. 19, p. 19). They argue that "the Court should reserve any decision on entitlement to punitive damages until the summary judgment stage, based on a complete record." (*Id.*). The Court will deny Chambers' motion because striking Plaintiffs' punitive damages claim at the motion to dismiss stage would be premature.

In Pennsylvania, "punitive damages are awarded for outrageous conduct, that is, for acts done with a bad motive or with a reckless indifference to the interests of others." *Judge Technical Servs., Inc., v. Clancy*, 813 A.2d 879, 889 (Pa. 2002) (emphasis and internal quotation marks omitted). "[P]unitive damages are penal in nature and are proper only in cases where the defendant's actions are so outrageous as to demonstrate willful, wanton[,] or reckless conduct." *Hutchison v. Luddy*, 870 A.2d 766, 770 (Pa. 2005). "The state of mind of the actor is vital. The act, or the failure to act, must be intentional, reckless or malicious." *Id.*

The Pennsylvania Supreme Court discussed punitive damages at length in *Phillips v. Cricket Lighters*, 883 A.2d 439 (Pa. 2005):

> Our case law makes it clear that punitive damages are an "extreme remedy" available in only the most exceptional matters. Punitive damages may be appropriately awarded only when the plaintiff has established that the defendant

> has acted in an outrageous fashion due to either "the defendant's evil motive or his reckless indifference to the rights of others. A defendant acts recklessly when "his conduct creates an unreasonable risk of physical harm to another [and] such risk is substantially greater than that which is necessary to make his conduct negligent."

Phillips, 883 A.2d at 445-46 (stating that punitive damages exist to "heap an additional punishment on a defendant who is found to have acted in a fashion that is particularly egregious") (internal citations omitted). The question of punitive damages is usually determined by the trier of fact and the Court may decide the issue only when no reasonable inference from the facts alleged supports a punitive award. [7] *Diehl*, 349 F. Supp. 3d at 509 (internal citations omitted).

Plaintiffs' request for punitive damages may proceed. Plaintiffs pled that Chambers "knowingly, recklessly, and with a conscious disregard for the rights of the Plaintiffs and Class [Members] allowed conditions to exist and perpetuate, which caused noxious odors to physically invade the Plaintiffs' and Class [Members'] properties." (ECF No. 1-3, ¶ 87). Plaintiffs also alleged that Chambers' "negligence was committed with a conscious indifference to the harm caused to the Plaintiffs' and Class [Members'] properties, which entitles the Plaintiffs and Class [Members] to an award for ... punitive relief." (*Id.* ¶ 88). Moreover, Plaintiffs alleged throughout their complaint that Chambers acted "intentionally, knowingly, willfully, recklessly, and/or negligently" when it failed to properly "construct, maintain, and/or operate the Landfill" and when it "knew about its substantial noxious odor emissions through numerous complaints, warnings, and significant media attention ...." (*Id.* ¶¶ 41-42). The Court finds that Plaintiffs have adequately alleged that Chambers was aware of the Landfill's impact on the community and acted in conscious disregard of those impacts. If Plaintiffs' allegations are proven, punitive damages may be appropriate. Whether the facts ultimately support a request for punitive damages is a question for another day.

D. Class Allegations

***12** Chambers argues that the Court should strike Plaintiffs' class allegations because the complaint demonstrates that individual issues will predominate, rendering class treatment inappropriate. (ECF No. 6, p. 16). Plaintiffs counter that (1) motions to strike class allegations at the motion to dismiss stage are "disfavored" and granted in rare cases; (2) striking class allegations based on predominance is "suspect"; and (3) Plaintiffs can prove that common issues predominate. (ECF No. 19, p. 20). Chambers responds that striking class allegations at the motion to dismiss stage is rare but appropriate in the instant case where "the factfinder would have to go property-by-property throughout the entire class to make these individualized causation determinations." (ECF No. 20, p. 13). At this stage of the proceedings, the Court will deny Chambers' motion because this is not the "rare case" where striking class allegations is appropriate.

The Court, either on its own or on motion made by a party, may strike from a pleading "an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." FED. R. CIV. P. 12(f). When considering class allegations, the Court may "require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly." FED. R. CIV. P. 23(d)(1)(D). In defending against a motion to strike class allegations, "[t]he plaintiff bears the burden of advancing a *prima facie* showing that the class action requirements of Rule 23 are satisfied or that discovery is likely to produce substantiation of the class allegations." *Salyers v. A.J. Blosenski, Inc.*, No. CV 23-4802, 2024 WL 1773368, at *2 (E.D. Pa. Apr. 24, 2024) (internal citations omitted).

"[A] motion to strike class allegations pursuant to Rule 23(d)(1)(D) seems, for all practical purposes, identical to an opposition to a motion for class certification, and the rule provides the procedural mechanism for striking class allegations ... once the Court determines that maintenance of the action as a class is inappropriate." *Almond v. Janssen Pharms., Inc.*, 337 F.R.D. 90, 99 (E.D. Pa. 2020) (internal citations and quotation marks omitted). However, here, unlike in the typical class certification motion, the parties have not begun much less completed discovery. Because "[c]lass determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action, and discovery is therefore integral," only in "rare cases where the complaint itself demonstrates that the requirements for maintaining a class action cannot be met" should a court strike the class allegations at the motion to dismiss stage. *Salyers*, 2024 WL 1773368, at *2 (internal citations omitted); *Landsman & Funk PC v. Skinder-Strauss Assoc.*, 640 F.3d 72, 93, 93 n.30 (3d Cir. 2011) (stating that,

in relation to striking class allegations, "[i]n most cases, some level of discovery is essential).

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (internal quotation marks omitted). In order to become certified, a class must satisfy the four requirements of Rule 23(a): (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. FED. R. CIV. P. 23(a). In addition, Rule 23 mandates that parties seeking class certification satisfy the requirements of one of the three subsections in Rule 23(b). *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614–15 (1997). To satisfy Rule 23(b)(3), which applies here, a party seeking certification must meet two requirements. *Id.* First, common questions must "predominate over any questions affecting only individual members." *Id.* Second, class resolution must be "superior to other available methods for the fair and efficient adjudication of the controversy." *Id.*

***13** Here, as discussed above, Plaintiffs seek to bring this action on behalf of "[a]ll owners/occupants and renters of residential property within one (1) mile of the Landfill property boundary." (ECF No. 1-3, p. 12). Chambers argues that Plaintiffs' class allegations should be struck under Rules 12(f) and 23(b)(3) because the complaint does not demonstrate that individual issues will predominate. (ECF No. 6, p. 16). Plaintiffs counter that numerous common issues will predominate including (1) whether and how Chambers emitted off-site nuisance odors; (2) the geographic extent to which those odors invaded the surrounding residential community; (3) whether Chambers acted negligently or unreasonably in emitting off-site odors; and (4) the degree of harm suffered by Plaintiffs and the Class Members. (ECF No. 19, p. 21).

The predominance requirement "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation, a standard far more demanding than the commonality requirement of Rule 23(a)." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 310-11 (3d Cir. 2008) (internal citations omitted). However, predominance does not require absolute identity of the underlying claims. *See Harnish v. Widener Univ. Sch. of Law*, 833 F.3d 298, 304 (3d Cir. 2016). "[I]f the court decides that the central, predominant issues in the case are common, then Rule 23(b)(3) is met despite the possibility that some subsidiary issues will require individualized evidence." *Id.* Thus, the need for an individualized damage determination is not necessarily fatal to Rule 23(b)(3) certification. *Brockman v. Barton Brands, Ltd.*, No. 3:06CV-332-H, 2007 WL 4162920, at *9 (W.D. Ky. Nov. 21, 2007). Further, motions to strike class allegations based on predominance are specifically disfavored at the motion to dismiss stage. *Landsman*, 640 F.3d at 93 ("Particularly when a court considers predominance, it may have to venture into the territory of a claim's merits and evaluate the nature of the evidence.... [A]llowing time for limited discovery supporting certification motions may ... be necessary for sound judicial administration.") (internal citations omitted). "To determine if the requirements of Rule 23 have been satisfied, a district court must conduct a rigorous analysis." *Id.* (internal citations and quotation marks omitted).

Plaintiffs argue that "[c]ommon issues predominate in air pollution cases when the paramount issue concerns whether a plant's emissions are substantially interfering with the local residents' use and enjoyment of their real and personal property." (ECF No. 19, p. 20) (citing *Stanley v. U.S. Steel Co.*, No. 04-74654, 2006 WL 724569, at *7 (E.D. Mich. Mar. 17, 2006). Chambers responds that "nuisance claims inherently raise individualized issues due, in part, to the fundamental maxim that each parcel of land is unique." (ECF No. 6, p. 18) (citing *Navarro v. ExxonMobil Corp.*, No. CV 17-2477 DSF (SKX), 2022 WL 22248790, at *12 (C.D. Cal. July 5, 2022)). Plaintiffs pled that the following issues are common questions of law and fact that predominate over any individual questions affecting Class Members:

a) Whether and how [Chambers] wrongfully, intentionally, knowingly, recklessly, and/or negligently failed to maintain and operate the Landfill, causing noxious odors to invade their properties;

b) Whether [Chambers] owed any duties to the Class Members;

c) Which duties [Chambers] owed to the Class Members;

d) Which steps [Chambers] has and has not taken in order to control the emission of noxious odors through the maintenance and operation of the Landfill;

e) Whether and to what extent the Landfill's noxious odors were dispersed over the Class Area;

f) Whether it was reasonably foreseeable that [Chambers'] failure to properly maintain and operate the Landfill would result in an invasion of the Class Members' property interests;

***14** g) Whether the degree of harm suffered by the Class Members constitutes a substantial annoyance or interference with their use and enjoyment of their properties; and

h) The proper measure of damages incurred by the Class Members.

(ECF No. 1-3, ¶ 48).

At this early stage, Plaintiffs have met their burden of advancing a *prima facie* showing of predominance. Reading the complaint in the light most favorable to Plaintiffs, the above allegations adequately plead that Plaintiffs' claims are sufficiently cohesive so as to warrant adjudication by representation. The parties may revisit this issue at the class certification stage. A more fulsome record is necessary for the Court to conduct the rigorous analysis it is tasked with to determine predominance. It needs more than speculation and supposition to determine whether issues common to the putative class will predominate in this litigation.

Chambers also advances an argument for striking the class allegations that goes to the class definition. It argues that Plaintiffs' class allegations should be struck because Plaintiffs failed to plead facts showing why the one-mile geographical boundary is proper. (ECF No. 6, p. 20 n. 11). Issues regarding class definition are best decided at the class certification stage, not on a motion to strike. *Webb v. Circle K Stores Inc.*, No. CV-22-00716-PHX-ROS, 2022 WL 16649821, at *3 (D. Ariz. Nov. 3, 2022) ("The proper stage for fine-tuning the class definition is certification, not pleading."); *Corbett v. Pharmacare U.S., Inc.*, 544 F. Supp. 3d 996, 1013 (S.D. Cal. 2021) (denying a defendant's motion to strike class allegations based on the argument that the class was overbroad because "[p]laintiffs should be given an opportunity through discovery to demonstrate that a ... class is viable at the class certification stage"). The Court recognizes that it may reject the proposed class if Plaintiffs failed to identify a logical reason for the one-mile geographic boundary. However, the Court notes that a geographic boundary transforms the class from being one whose outer limits were determined by long-term transient movements of the wind and odors (which is obviously not ascertainable), to being a proposed class whose outer limits are definite. The one-mile geographic boundary, *at this early stage*, is sufficient. After reviewing evidence as the record develops, the Court will be in a better position to decide whether Plaintiffs' proposed class definition succeeds or fails. Since it is not facially apparent that Plaintiffs' proposed class is not ascertainable, the Court will deny Chambers' motion to strike on that ground.

Finally, Chambers takes issue with Plaintiffs' class allegations because Plaintiffs do not include a relevant time period. (ECF No. 6, p. 20 n. 11). According to Chambers, "[i]t is unclear whether the proposed class includes residents going back five months or fifty years." (*Id.*). Plaintiffs did not include any class period limiting Chambers' alleged liability to a certain time period anywhere in their complaint. (ECF No. 1). At a later stage, the failure to propose an appropriate time limitation in defining the class period will usually result in a finding that the class is impermissibly overbroad and not ascertainable. *See Royal Park Invs. SA/NV v. Deutsche Bank Nat'l Tr. Co.*, No. 14-CV-4394 (AJN), 2017 WL 1331288, at *5 (S.D.N.Y. Apr. 4, 2017) (denying a class certification motion because the proposed class lacked "an expressly defined class period, and, indeed, any meaningful temporal limitation at all"); *In re Sears, Roebuck & Co. Tools Mktg. & Sales Pracs. Litig.*, No. 05 C 2623, 2007 WL 4287511, at *4 (N.D. Ill. Dec. 4, 2007) (denying a plaintiff's motion for class certification in part because the proposed class "contain[ed] no time limitation or indication of what the class period would be"). The Court notes that both of these cases pertain to denial of class certification motions, not motions to strike class allegations. Given the hesitancy of courts in the Third Circuit to strike class allegations before a class certification motion is filed, and because this is not the "rare case" where no amount of discovery will allow Plaintiffs to resolve deficiencies in class definitions under Rule 23, the Court will not strike Plaintiffs' class allegations prior to learning more about the nature of the claims at issue. *See Samuel v. Centene Corp.*, No. CV 23-1134-JLH-SRF, 2024 WL 3552869, at *14 (D. Del. July 26, 2024) (The ascertainability inquiry, which requires Plaintiffs to identify objective, reliable criteria for identifying class members, is [ ] more appropriately addressed after fact discovery.").

IV. CONCLUSION

***15** For the forgoing reasons, the Court will deny Chambers' motion. An Order of Court will follow.

All Citations

Slip Copy, 2024 WL 5119389

Footnotes

1 The parties do not dispute that Pennsylvania law substantively governs Plaintiffs' claims.

2 In public nuisance actions, Pennsylvania courts rely on the Restatement (Second) of Torts § 821B. *Atl. Richfield Co. v. Cnty. of Lehigh*, 299 A.3d 181 (Pa. Commw. Ct. 2023).

3 Chambers did not argue that Plaintiffs did not suffer a harm of greater magnitude and of a different kind than what the general public suffered. Thus, the Court does not address this issue.

4 Chambers separately argues that Plaintiffs' negligence claim fails because Plaintiffs have not alleged physical injury or damage to their properties. (ECF No. 6, p. 11). Because both arguments hinge on whether odor invasion constitutes a physical injury, the Court will address them in one analysis under the umbrella of the economic loss doctrine.

5 In the absence of a controlling opinion from the Pennsylvania Supreme Court on an issue involving Pennsylvania law, federal courts must predict how that court would decide the issue. *Pac. Emps. Ins. Co. v. Glob. Reinsurance Corp. of Am.*, 693 F.3d 417, 433 (3d Cir. 2012). Since the Pennsylvania Supreme Court has not decided whether the economic loss doctrine bars recovery in negligence and private nuisance cases dealing with noxious odors, air pollutants, and the like, this Court has approached the analysis as it believes the Pennsylvania Supreme Court would if presented with identical issues.

6 The Court rejects Plaintiffs' argument that the economic loss doctrine is limited to products liability actions. *See Lower Lake Dock Co. v. Messinger Bearing Corp.*, 577 A.2d 631, 634 (Pa. Super. Ct. 1990) (stating that the economic loss doctrine "is not limited to products liability" actions).

7 Plaintiffs contend that Chambers' motion to dismiss Plaintiffs' punitive damages claim "is not properly brought under Rule 12(b)(6) and instead can only be considered in the context of a Motion to Strike under Rule 12(f)." (ECF No. 19, p. 19). The Court will analyze Chambers' motion under Rule 12(b)(6). A Rule 12(f) motion to strike has "no application to a request for punitive damages, in that it does not constitute redundant, immaterial, impertinent, or scandalous matter." *Castelli-Velez v. Moroney*, No. 3:20-CV-00976, 2021 WL 978814, at *4 (M.D. Pa. Mar. 16, 2021) (internal citations omitted); *see also Jordan v. Wilkes-Barre Gen. Hosp.*, No. 07-CV-390, 2008 WL 3981460, at *4 (M.D. Pa. Aug. 22, 2008) (stating that courts should not use Rule 12(f) to dismiss requests for punitive damages).