IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Master Case No. 5:15-CV-00013-BR

IN RE: NC SWINE FARM)
NUISANCE LITIGATION)
)

THIS DOCUMENT RELATES TO:

***Anderson v. Murphy-Brown LLC,* No. 7:14-cv-00183-BR**
***Artis v. Murphy-Brown LLC,* No. 7:14-cv-00237-BR**
***Gillis v. Murphy-Brown LLC,* No. 7:14-cv-00185-BR**
***McGowan v. Murphy-Brown LLC,* No. 7:14-cv-00182-BR**
***McKiver v. Murphy-Brown LLC,* No. 7:14-cv-00180-BR**

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT "CONCERNING PLAINTIFFS WITH INSUFFICIENT PROPERTY INTERESTS"

Plaintiffs file their brief opposing the motion for summary judgment filed by the Defendant Murphy-Brown, LLC d/b/a Smithfield's Hog Production Division ("Smithfield") at Doc. 315.

1. **Introduction.**

The Plaintiffs are neighbors whose families had their homes and lands ***before*** the hogs came. After these families and their ancestors were already living on this land they owned, the companies that Smithfield later bought made a decision to put thousands of hogs near their homes. These families had their lands first – the hogs came later. These Plaintiffs who are suing are North Carolina property owners and proud residents of our State, and their spouses and children.

The company now argues that even if the property owner in the family can sue, if he has a wife or a child, they cannot sue because their name is not on the deed to the land. But the law has long held that any family member with a right of ***possession*** or ***occupancy*** has equal ability to sue. Therefore, Defendant's argument must be rejected.

The law provides families using land for their residence special protections, because the concept of home is important. The national majority view of the Restatement of Torts, which North Carolina follows, holds that a family can bring a nuisance claim, even if they only rent, possess, or occupy the land instead of owning it. Also, a family in occupancy can sue for physical discomfort, annoyance, and loss of use and enjoyment, related to the nuisance. The rights go together. And this policy of allowing the family members to sue is especially sensible here, given the facts now known. Specifically, these homes ***have tested positive for the DNA fingerprint of pig intestinal bacteria on their surfaces – they literally have pig feces on their walls.***[1] Which means that what the families have been saying for so many years, is true – they have been assaulted by the particles of a foul, disgusting and germ-ridden odor. Which the multinational company refuses to correct even as it receives the economic benefits of record exports and profits.

2. <u>Background: The Law of Private Nuisance.</u>

Defendant's argument is premised on the idea that to sustain a claim for nuisance, a plaintiff must show proof of ownership and legal title to the land as if in a "quiet title" dispute. But Defendant has no claim to the land of Plaintiffs. Rather, Defendant through its conduct has causes recurrent foul odors and other nuisances to go onto that land.

Recognizing that context, the law allows an individual to proceed on a claim so long as they show a possessory or occupancy interest. This is the national majority view and the view of the Restatement (Second) of Torts. It is also the view under the common law in North Carolina,

[1] See expert report of Dr. Shane Rogers, attached. At pages 66 to 72 he discusses the samples collected from sides of homes that revealed the presence of the special DNA fingerprint for pig waste particles in the air – a microbial source tracker called Pig-2-Bac. The report has been redacted because the company has refused to allow public disclosure of the results of our sampling from inside the hog operations. But the results from the clients' homes are public, and included.

whose courts have cited the Restatement for guidance in nuisance cases.[2] The nuisance law in this respect seeks to protect our basic right to use and enjoy our home, regardless of whether we own, rent, occupy or possess.[3]

a. The Restatement Approach.

Defendant cites Restatement (Second) of Torts § 821E. (Def. Br. 6).[4] However, it supports the Plaintiffs. Specifically, Section 821E, comment d states that "occupancy is a sufficient interest in itself to permit recovery for invasions of the interest in the use and enjoyment of the land."[5] (Ex. 1 (Emphasis added)). Here, each of the Plaintiffs has at least an "occupancy" interest. Each lives in the homes on their properties. (*See* Statement of Facts).

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[2] *BSK Enters., Inc. v. Beroth Oil Co.*, 783 S.E.2d 236 (N.C. Ct. App. 2016) (nuisance case, citing Restatement (Second) of Torts § 929); *Mayes v. Tabor*, 77 N.C. App. 197, 334 S.E.2d 489 (1985) (hog nuisance case, citing Restatement (Second) of Torts § 822); *Morgan v. High Penn Oil Co.*, 238 N.C. 185, 77 S.E.2d 682, 689-90 (1953) (nuisance, citing § 825); *Pendergrast v. Aiken*, 293 N.C. 201, 236 S.E.2d 787, 796-97 (1977) (nuisance, citing §§ 822, 826-29); *Watts v. Pama Mfg. Co.*, 256 N.C. 611, 618, 124 S.E.2d 809, 814-15 (1962) (§§ 822, 826); *Kaplan v. Prolife Action League of Greensboro*, 111 N.C. App. 1, 431 S.E.2d 828, 838 (1993) (§ 822); *Galloway v. Pace Oil Co., Inc.*, 62 N.C. App. 213, 219, 302 S.E.2d 472, 476 (1983) (trespass, § 930); *Smith v. Pate*, 246 N.C. 63, 97 S.E.2d 457 (1957) (trespass, § 166); *Graham v. Deutsche Bank National Trust Co.*, 768 S.E.2d 614 (N.C. Ct. App. 2015) (trespass, § 161).

[3] *Carey v. Brown*, 447 U.S. 455, 471 (1980) ("Preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value.... The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society").

[4] Copy attached as Exhibit 1 to brief. It is remarkable that the Defendant would cite the Restatement to support its position, when elsewhere they argue against it. Specifically, the Restatement also states that plaintiffs who are residents and claim interference by the nuisance with their home life can recover damages reflecting their discomfort, annoyance, irritation and inconvenience. Restatement (Second) of Torts § 929 (Exhibit 2 to brief). This Restatement section was discussed in Plaintiffs' past briefs on the damages issues filed in 2014 in *Gillis* at Doc. 26, and filed in 2015 in the master case at Doc. 19. Defendant opposed the Restatement in its briefs, yet now changes course and embraces it.

[5] Courts have cited this Restatement section for guidance as to who has a sufficient interest in property to sue for nuisance. *See Graham Oil Co. v. BP Oil Co*., 885 F.Supp. 716 (W.D. Pa. 1994); *Peters v. ContiGroup*, 292 S.W.3d 380, 390 (Mo. Ct. App. 2009) (nuisance case, citing § 821E cmt. d for proposition that "occupancy is a sufficient interest in itself to permit recovery for invasions of the interest in the use and enjoyment of the land").

The Restatement defines private nuisance as "a nontrespassory invasion of another's interest in the private use and enjoyment of land." Restatement (Second) of Torts § 821D. (Exhibit 3, emphasis added)). The phrase "interest in the private use and enjoyment of land" includes any disturbance of the enjoyment of property, and is not limited to the rights of individuals who hold title to the property. The claim does not require proof of ownership of land, but rather of an interest in the land – a far more lenient standard, as befits the fact that the nuisance defendant does not have a claim to the land.

The reason why someone with occupancy can sue is related to the fact that the nuisance claim is not simply about injury to the property. It is also about injury to the ***use and enjoyment of*** that property by the person who lives there.[6]

The comments for Section 821D reflect how the interest protected relates not just to the harm to the land itself, but also, the harm to the use and enjoyment by the person:

> The phrase 'interest in the use and enjoyment of land' is used in this Restatement in a broad sense.... 'Interest in use and enjoyment' also comprehends the pleasure, comfort and enjoyment that a person normally derives from the occupancy of land. Freedom from discomfort and annoyance while using land is often as important to a person as freedom from physical interruption with his use or freedom from detrimental change in the physical condition of the land itself.

Restatement (Second) of Torts § 821D, comment b, p. 101 (Ex. 3, emphasis added).[7]

[6] "Any person who suffers injury, either to his person or to his property, is entitled to relief against a party who injures him by the maintenance of a nuisance, and he may sue that person in law to recover damages or in equity to have the nuisance abated." 2-16 Webster's Real Estate Law in North Carolina § 16.21 (2016) (Ex. 4).

[7] The Restatement view also accords with Prosser on Torts. According to Prosser, "any interest sufficient to be dignified as a property right" will support an action for private nuisance. *Oscar v. University Students Co-op. Ass'n*, 939 F.2d 808 (9th Cir. 1991) (citing Prosser and Keeton on the Law of Torts § 87 (any interest sufficient to be dignified as a property right--including a tenancy for a term or a week-to-week tenancy--will support action for interference with its enjoyment)). North Carolina courts cite Prosser for guidance on nuisance and trespass claims. *E.g., Whiteside Estates, Inc. v. Highlands Cove, L.L.C.*, 146 N.C. App. 449, 456, 553 S.E.2d 431, 437 (2001)

The range of fact situations covered by nuisance law is vast. It can range from a claim by an absentee investor who can have no physical discomfort because he is never there; to a claim by a tenant who uses the property while not owning it; to a claim by a family who lives in a home they own. Under the Restatement, it is individuals who use the property for residential purposes and live there, who are able to claim for discomfort and annoyance. Restatement Section 929(c) allows damages for "discomfort and annoyance to him as an occupant" – it does not require ownership, only occupancy.[8] (Ex. 2).

"The references to the 'occupant' and to the 'members of the household' suggest residency, as does the express exclusion of nonresident owners from the class of persons entitled to recover for annoyance and discomfort." *Kelly v. CB&I Constr.*, 179 Cal.App.4th 442, 457-58 (Cal. Ct. App. 2009). Discomfort damages are limited to plaintiffs who have an occupancy or possessory interest in a home where they live.[9] This is because

(nuisance claim, citing Prosser); *Graham v. Deutsche Bank National Trust Co.,* 768 S.E.2d 614 (N.C. Ct. App. 2015) (trespass, citing Prosser).

[8] "Discomfort and annoyance to an occupant of the land and to the members of the household are distinct grounds of compensation for which in ordinary cases the person in possession is allowed to recover in addition to the harm to his proprietary interests…. The owner of land who is not an occupant is not entitled to recover for these harms except as they may have affected the rental value of his land." Rest.2d Torts § 929, comment e (Ex. 2 (emphasis added)).

[9] *E.g., Kelly*, 179 Cal.App.4th at 458 ("Appellate courts in other jurisdictions also have permitted the recovery of annoyance and discomfort damages. All of the cases of which we are aware involved a plaintiff who was in immediate personal possession of the property." (Citing cases)). *See also Felton Oil Co., LLC v. Gee*, 182 S.W.3d 72, 76 (Ark. 2004); *Gallagher v. Grant-Lafayette Elec. Co-op*., 637 N.W.2d 80, 90-91 (Wis. Ct. App. 2001); *Lanier v. Burnette*, 538 S.E.2d 476, 480 (Ga. Ct. App. 2000) (damages for annoyance and discomfort are proper upon proof of "wrongful interference with the comfortable enjoyment of property by a person in possession"); *Hawkins v. Scituate Oil Co.,* 723 A.2d 771, 772-773 (R.I. 1999); *Ayers v. Jackson Tp*., 525 A.2d 287, 294 (N.J. 1987); *Webster v. Boone*, 992 P.2d 1183, 1185 (Colo. Ct. App.1999); *Banford v. Aldrich Chem. Co*., 904 N.E.2d 582, 592-601 (Ohio Ct. App. 2008); *Weld County Bd. of County Com'rs v. Slovek*, 723 P.2d 1309, 1314-1316 (Colo. 1986); *French v. Ralph E. Moore, Inc*., 661 P.2d 844, 845-48 (Mont. 1983); *Edwards v. Talent Irrigation Dist.*, 570 P.2d 1169, 1169-1170 (Or. 1977); *Pollard v. Land West, Inc*., 526 P.2d 1110, 1112-15 (Idaho 1974); *City of New Cordell v. Lowe*, 389 P.2d 103, 104-07 (Okla. 1963); *Riblet v. Spokane-Portland Cement Company*, 274

> the nature of the injury compensated by annoyance and discomfort damages involves some personal effect that arises from the plaintiff's personal, physical presence on the premises…. The term "occupant" has "historically been used in legal writing to denote 'one who takes possession of property.'"[10]

b. North Carolina Follows the Restatement.

A plaintiff need only show an "interest" in the property. *Watts v. Pama Mfg. Co*., 256 N.C. 611, 617, 124 S.E.2d 809, 813 (1962) (stating that "for liability to exist there must be a substantial non-trespassory invasion of another's interest in the private use and enjoyment of property"). Possession suffices. *Whiteside Estates, Inc. v. Highlands Cove, L.L.C.*, 146 N.C. App. 449, 456, 553 S.E.2d 431, 437 (2001) ("The ownership or rightful possession of land necessarily involves the right not only to the unimpaired condition of the property itself, but also to some reasonable comfort and convenience in its occupation." (Emphasis added, quoting Prosser § 87). As the Webster's treatise states:

> A private nuisance affects … use or enjoyment of some private right or interest. Where one uses his land unreasonably in such a manner as to annoy and disturb another in the possession of his property, so as to render its ordinary use or occupation physically uncomfortable, or so as injuriously to affect the peace or menace the health and safety of an adjoining landowner, there is a private nuisance for which the law provides the injured persons redress…. The nature of the protectable interest would seem to be immaterial. For instance, a fee owner, a life tenant, tenant for years, tenant from period to period, or even an adverse possessor should be entitled to maintain an action to have a private nuisance enjoined which affected his interest.

2-16 Webster's Real Estate Law in North Carolina § 16.18 & n. 221 (2016) (Exhibit 5 (emphasis added)). *See also King v. Ward*, 207 N.C. 782, 783, 178 S.E. 577 (1934) (approving jury charge which instructed that if cotton gin operation was "emitting odors which impaired the comfortable

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P.2d 574, 578 (Wash. 1954) (all accord); *Nichols v. City of Evansdale*, 687 N.W.2d 562, 573 (Iowa 2004) (court denied annoyance and discomfort damages to non-occupant owner).

[1010] 179 Cal.App.4th at 459. "Accordingly… a nonresident property owner who merely stores personal property on the premises is not entitled to recover annoyance and discomfort damages from a trespass." *Id.* All of the Plaintiffs here go far beyond merely storing items.

occupancy of the plaintiff's home, then that would constitute a nuisance" (Emphasis added)); *Jones v. Queen City Speedways, Inc.,* 276 N.C. 231, 172 S.E.2d 42, 1970 N.C. LEXIS 668, *3 (1970) (apartment residents alleged a race track was a nuisance -- "plaintiffs are residents of apartments owned by [others] … which were constructed prior to the construction of defendant's race track"). In the latter case, the Court noted that "the defendant owns and has been operating a dirt surface motor vehicle race track immediately across West Boulevard from the apartments in which the plaintiffs reside…." *Id.* at *3 (emphasis added).

> The plaintiffs alleged and the jury by its verdict found that the noise of the racing vehicles on defendant's track was so loud as to cause the plaintiffs discomfort and annoyance, to cause them to lose sleep at night, and to impair the plaintiffs' use and enjoyment of their homes….

Id. at *24-25 (emphasis added). The families lived in these residences, were trying to use and enjoy their property, and had this right impaired. It did not matter they only rented. *See also BNT Co. v. Baker Precythe Dev. Co.,* 151 N.C. App. 52, 54, 564 S.E.2d 891 (2002) (nuisance case, some of the plaintiffs were lessees: "plaintiff Mark Gilson was the lessee of the premises at 340 Hidden Valley Road and plaintiffs Zion and Dorit Kapach were the lessees of the premises located at 400 Hidden Valley Road.").

Many other courts follow the majority rule. In addition to the cases cited above, *see Bowers v. Westvaco Corp*., 244 Va. 139, 148-49, 419 S.E.2d 661, 665 (1992):

> The defendants also argue that David and Justin Bowers are not entitled to recover damages for the nuisance because they have no ownership interest in the property owned by their parents. We disagree.
>
> We have repeatedly held that an owner or occupant of land has a right to recover against the operator of a private nuisance…. Accordingly, we hold that the Bowers' children, as lawful occupants of the land, are entitled to recover damages for injuries they incurred as a result of the defendants' maintenance of the private nuisance. This holding is consistent with the Restatement (Second) of Torts, Sec. 821E comment d….

See also Hoffman v. United Iron & Metal Co., 671 A.2d 55, 63-64 (Md. Ct. App. 1996):

> A nuisance action may be brought by a landowner, *see Smith v. Shiebeck*, 180 Md. 412, 421, 24 A.2d 795 (1942), but ownership is not necessary. Lawful possession is sufficient. *See Green v. T.A. Shoemaker Co*., 111 Md. 69, 76, 73 A. 688 (1909) (holding that lawful occupant of premises may maintain an action in nuisance). *Accord Vicksburg Chemical Co. v. Thornell*, 355 So.2d 299, 301 (Miss. 1978) (stating that a person who has property interest may bring nuisance suit on behalf of himself and all members of his family); *Bowers v. Westvaco Corp*., 244 Va. 139, 419 S.E.2d 661, 668 (1992) (finding that children, as lawful occupants of land, may recover in nuisance); RESTATEMENT 2d OF TORTS § 821E cmt. d (1977) ….

(Emphasis added).[11]

c. Defendant Cites Law that Supports the Plaintiffs.

· Defendant cites *Hanes v. Continental Grain* Co., 58 S.W.3d 1, 5 (Mo. Ct. App. 2001) (Def. Br. 9). In fact, the courts in Missouri allow possessors, occupants and family members to sue.[12] *See Peters v. ContiGroup*, 292 S.W.3d 380, 388 (Mo. Ct. App. 2009), noting that "all that is required to bring a temporary nuisance claim is to be an 'occupier' of the property" and "one who 'occupies' a home 'may be compensated for any actual inconvenience and physical discomfort which materially affected the comfortable and healthful enjoyment and occupancy of his home, as well as for any actual injury to his health or property caused by the nuisance.'" *Id.* (citing treatise).

> In *Hane*s … the defendants claimed that certain plaintiffs failed to make a submissible case of nuisance because "they did not have any ownership or possessory rights in any property affected by the nuisance." 58 S.W.3d at 4. The plaintiffs at issue were adult children who lived in separate dwellings on the properties owned by their parents. *Id.* Relying upon *McCracken*, the *Hanes* court held that an occupier of property can recover for loss of enjoyment and use of property even if he holds no possessory interest in the property: "We find that a person who rightfully occupies but does not own a home may sue for injuries caused by a temporary nuisance. In a temporary nuisance action, the damages are for personal injuries inflicted upon the person occupying the property…."

[11] *See also Bollant Farms, Inc. v. Scenic Rivers Energy Coop.,* 805 N.W.2d 734 (Wisc. Ct. App. 2011) ("The question of whether an individual is a possessor of land is not necessarily a question of ownership." Citing Restatement (Second) of Torts).

[12] It is remarkable that Defendant would cite this Missouri case law, given as discomfort and annoyances damages were specifically allowed – including in *Hanes*.

292 S.W.3d at 389 (emphasis added). Many of the subject Plaintiffs fall into the underlined category -- adult children on family land. The court went on to say:

> [T]he cause of action for a temporary nuisance can be maintained by an occupier of the property with no ownership interest…. Although a householder has brought his own cause of action for damages, including damages related to his distress caused by observing the discomfort and injuries suffered by members of his family, those family members are not barred by *res judicata* from bringing their own claims. Thus, Rachel, as an occupant of the Peters's residence, possessed her own separate cause of action for temporary nuisance based on the direct personal injuries she sustained prior to May 17, 1999.

292 S.W.3d at 389 (emphasis added).

3. The Facts for the Plaintiffs Reflect an Adequate Interest for a Claim.

Plaintiffs file herewith a Responsive Statement of Facts showing that each of the Plaintiffs falls within the "occupancy" standard. Below, we review the facts.

A. *Plaintiffs Who Are Adult Siblings of Property Owners.*

Defendant puts into this category: (1) Allen T. Johnson (*Gillis*); (2) Gertie Jacobs (*Artis*); (3) Gwendolyn Pickett (*Gillis*); (4) John Taylor (*Artis*); and (5) Fred Lloyd (*McKiver*). Defendant concedes that most or all "resided" on the property. For example, as to Allen T. Johnson: "When Mr. Allen T. Johnson **resided** at the Subject Property it was owned by his sisters, Alvera Johnson Pierce and Annjeanette Gillis." (Def. Statement of Material Facts, Doc. 317 at ¶ 2; *see also* ¶¶ 6, 14, 19). In the case of Plaintiff Fred Lloyd, he began permanently residing on the property in 1994. (Fred Lloyd Dep. 22:16-18; 15:23-16:3, Def. App. Ex. 7). Additional facts include:

Allen T. Johnson (*Gillis*): Mr. Johnson passed away on December 31, 2015. His estate has maintained his nuisance claim concerning the property located at 541 Moon Johnson Road, Rose Hill. (Allen T. Johnson's Second Supplemental Fact Sheet ("SSFS") ¶¶ 6-7, Def. App. Ex.

8). He resided on the property all of his life with Annjeanette Gillis' permission -- his sister and the owner. (Annjeanette Gillis Dec. at ¶ 9, App. Ex. 9).

Neighbors knew the home as Mr. Johnson's. (Annjeanette Gillis Dep. 11:7-10, App. Ex. 10; Gwendolyn Pickett Dep. 58:10-22, June 15, 2016, App. Ex. 11; Annie Johnson Dep. 8:1-15, 13:3-7, App. Ex. 12; Allen A. Johnson Dep. 21:6-19, App. Ex. 13). He raised his family there. After he married Annie, the couple raised their son on the property from 1992 to 2006. (Annie Johnson Dep. 7:24-8:21, App. Ex. 12). In 2006, Annie moved away but he still stayed. (*Id*.). It is a big choice to decide where to raise a family and Mr. Johnson chose to do it on his family land. (*Id*. at 53:3-13). And, he controlled the land and its use. He rebuilt a porch, built an additional porch, and the maintained the exterior. (Allen A. Johnson Dep. 21:20, 23:15-24:20, App. Ex. 13). In addition to his labors, all of the utilities associated with the property were in his name, which he paid for until his death. (Declaration of Annjeanette Gillis ¶¶ 11, 13, App. Ex. 9).

Gertie Jacobs (*Artis*): Gertie Jacobs has brought a nuisance claim concerning the property located at 8038 Piney Woods Road, Willard. (Gertie Jacobs's SSFS ¶¶ 6-7, App. Ex. 14). She lives there with her sister, Edna Allison, the owner. (Gertie Jacobs Dep. 23:5-10, App. Ex. 15). With Edna's permission, Ms. Jacobs moved into her sister's home in 1999. (Edna Allison Dec. ¶ 5, App. Ex. 16). Ms. Jacobs' residency was confirmed by her other sister, Leola Jacobs. (Leola Jacobs Dep. 116:3-21, App. Ex. 17 *see also* Edna Allison Dep. 54:15-20, App. Ex. 18). The property was previously owned by Ms. Jacobs' father and is family land. (Gertie Jacobs Dep. 4:25-5:18, App. Ex. 15). Despite the changes of ownership, Ms. Jacobs has always considered the property her home and primary address. (*Id*.; Edna Allison Dec. ¶ 6, App. Ex. 16). Ms. Jacobs pays $250 a month to Edna Allison for rent and pays half of the utilities and bills. (Edna Allison Dec. at ¶ 7, App. Ex. 16). She also does yardwork, laundry, and cleaning. (*Id*. at ¶ 8).

Gwendolyn Pickett (*Gillis*): Ms. Pickett brought a private nuisance claim concerning the property located at 541 Moon Johnson Road, Rose Hill. (Gwendolyn G. Pickett's SSFS ¶¶ 6-7, App. Ex. 19). It has been in her family for over 50 years and now owned by Annjeanette Gillis. (Gwendolyn Pickett Dep. 6:19-22, 52:8-11, June 15, 2016, App. Ex.11). Ms. Pickett lived until her recent death on this family land. (*Id*. at 6:17-18).

From 1999 until her death, Ms. Pickett lived in a singlewide trailer that she put on the land. (*Id*. at 19:6-12, 22:15-19).[13] While residing there, she was responsible for the upkeep and maintenance associated with her occupancy, until she became disabled. (Annjeanette Gillis Dec. ¶ 15, App. Ex. 9). After becoming disabled, she relied on the Annjeanette and her relative Daqwan Robinson to help her maintain her home. (*Id*. at ¶ 16). In addition to her labors, Ms. Pickett paid for the utilities and bills associated with her residency. (*Id*. at 18).

John Taylor (*Artis*): Mr. Taylor has brought a private nuisance claim concerning the property located at 8061 Piney Woods Road, Watha. (John Taylor's SSFS ¶¶ 6-7, App. Ex. 21). It is currently owned by the estate of his sister, Pearlene Shellman. (John Taylor Dep. 103:21-23, App. Ex. 22). Mr. Taylor has continuously resided on the property since 1969, through various changes in ownership within his family. (SSFS ¶¶ 6-7, App. Ex. 21). When asked about ownership of the property, he stated it was "heir property." (John Taylor Dep. 84:5-17, App. Ex. 22). Mr. Taylor has lived on the property for nearly five decades. (John Taylor Dec. ¶ 4, App. Ex. 23). He has made substantial improvements to the property. (John Taylor Dep. 105:17-108:1, App. Ex. 22). In addition, he pays his share of the utilities and bills associated with his occupancy. (John

[13] At the time Ms. Pickett affixed her home to the Subject Property in 1999, the Subject Property was owned by her grandmother, Maggie Pickett Johnson. (*Id*. at 52:12-16). The Subject Property is now owned by her aunt, Annjeanette Gillis. (Pl. [Annjeanette Gills]'s SSFS ¶ 10, App. Ex. 20).

Taylor Dec. ¶ 6, App. Ex. 23). He also pays the property taxes associated with the property and pays for his nephew to maintain the yard and do chores. (*Id*.).

Fred Lloyd (*McKiver*): Fred Lloyd before his death in December 2016 brought a nuisance claim concerning the property located at 90 Pearl Lloyd Road, White Oak. (Pl. [Fred Lloyd]'s SSFS ¶¶ 6-7, App. Ex. 24). The property has been in Mr. Lloyd's family since the late 1960s and has been passed down through the generations. (Fred Lloyd Dep. 6:12-22, 20:6-21:1, App. Ex. 7). Mr. Lloyd's family considers the property to be "heirs land," and let Mr. Lloyd reside there. (*Id*. at 6:8-10). Since the beginning of his occupancy, Mr. Lloyd paid for the property taxes, electric bill and water bill. (*Id*. at 20:6-10:1). When asking questions, even Defense Counsel referred to it as "**your** home." (*Id.* at 18:25-19:5:1). Mr. Lloyd stated his favorite thing to do is to sit out on his front porch. (*Id.* at 19:18-25). Mr. Lloyd during his lifetime enjoyed and used the property with the permission of its owner – and suffered the same discomfort, annoyance and loss of use and enjoyment that he would have it he held formal title.

B. *Plaintiffs Who Are Adult Children, Grandchildren or Nephews.*

Defendant stipulates that the following Plaintiffs resided at their properties: (1) James Al Davis, Jr.; (2) Daqwan Robinson; (3) Allen A. Johnson; (4) Eddie Nicholson, Jr.; (5) Tammy Lloyd; (6) Tanechia Lloyd; (7) Karen McKiver; (8) Brionna McKiver; (9) Edward Owens; (10) Dominique Woodard; and (11) Nicholas Woodard, Jr. (Doc. 317 at ¶¶ 30, 36, 44, 55, 61, 68, 74, 81, 88, 95, and 103). Despite this admission, Defendant contends their occupancy is insufficient:

James Al Davis, Jr. (*McGowan*): James Al Davis, Jr. brought a nuisance claim concerning the property located at 108 Howards Farm Road, Beulaville. (James Al Davis, Jr.'s SSFS ¶¶ 6-7, App. Ex. 25). The property has been in Mr. Davis' family since the 1970s, when his father purchased it. (James Al Davis, Jr. Dep. 5:24-6:8, App. Ex. 26). Since his birth, in 1990, Mr.

Davis has lived on the property with his father's permission. (*Id*.; James Al Davis, Sr. Dec. ¶ 4, App. Ex 27). He has always considered the property his primary address, even while attending college and graduate school. (*Id*. at ¶ 7). His parents claimed him as a dependent on their tax returns while he was in school. (*Id*. at ¶ 5). Mr. Davis maintained a bedroom in the house where he kept many of his belongings. (*Id*. at ¶ 6). Regularly living in the home, he has helped towards the betterment of the property by doing yardwork and helping pay the household bills. (*Id*. at ¶¶ 9, 10; James Al Davis, Jr. Dep. 50:10-52:6, App. Ex. 26).

Daqwan Robinson (*Gillis*): Daqwan Robinson has brought a nuisance claim concerning the property located at 357 Moon Johnson Road, Rose Hill. (Daqwan Robinson's SSFS ¶¶ 6-7, App. Ex. 28). It is owned by his grandparents, Annjeanette and Woody Gillis. (Annjeanette Gillis's SSFS ¶¶ 8, 9, App. Ex. 20). He has resided there his entire life. (Daqwan Robinson Dep. 5:21-24, 52:13-18, App. Ex. 29; Annjeanette Gillis Dec. at ¶ 4, App. Ex. 9). The treat him as a son. He houses his dog, dirt bike, and other possessions there. (*Id*. at 53:19-54:12). Mr. Robinson has contributed to its betterment. He does yardwork, helps with the dishes, takes out the trash, cooks for the others, and helped take care of his neighbor, Gwen Pickett, when she was ill. (Annjeanette Gillis Dec. at ¶¶ 5, 6, 7, App. Ex. 9). Mr. Robinson is a lawful occupant. (Daqwan M. Robinson's SSFS ¶¶ 6-7, App. Ex. 28).

Allen A. Johnson (*Gillis*): Allen A. Johnson brought a private nuisance claim concerning the property located at 541 Moon Johnson Road, Rose Hill. (Allen A. Johnson's SSFS ¶¶ 6-7, App. Ex. 30). It is owned by his aunt, Annjeanette Gillis, who gave him and his father permission to reside on her land. (Annjeanette Gillis Dec. ¶¶ 9, 12, App. Ex. 9). He resided on the property from the date of his birth, in 1994, until the death of his father. (Allen A. Johnson Dep. 6:4-12, 53:3-20, App. Ex. 13). During that time, he occupied the home. (*Id*. at 23:5-6).

The land where Allen A. and his father Allen T. resided has been in the family for nearly 50 years. (Gwendolyn Pickett Dep. 9:15-25, Dec. 23, 2016, App. Ex. 31). Due to the close familial ties to the land, and to each other, he had permission to use the property as his own. (Allen A. Johnson Dep. 23:2-4, App. Ex. 13; Annjeanette Gillis Dec. ¶ 12, App. Ex. 9). He helped renovate the front porch and built an additional porch. (*Id*. at 24:3-20). Allen A. Johnson was a lawful occupant of the property and was in lawful possession throughout his occupancy. (Allen A. Johnson's SSFS ¶¶6-7, App. Ex. 30).

Eddie Nicholson, Jr. (*Artis*): Mr. Nicholson has brought a claim concerning the property at 8162 Piney Woods Road, Willard. (Eddie Nicholson, Jr.'s SSFS ¶¶ 6-7, App. Ex. 32). He has resided there with the owner's permission since 1985. (Eddie Nicholson, Jr. Dep. 5:10-15, 43:1-10, App. Ex. 33; Lenora Nicholson Dec. ¶ 6, App. Ex. 34).

Since 1985, Mr. Nicholson has made monthly rental payments to his mother in exchange for his use and occupancy. (Eddie Nicholson, Jr. Dep. 50:7-20, 90:1-5, App. Ex. 33; Lenora Nicholson Dec. at ¶ 8, App. Ex. 34). He takes great pride in maintaining the property because that "show[s] you care about where you live at." (*Id*. at 60:7-13). Mr. Nicholson additionally pays the property taxes associated with the property. (Lenora Nicholson Dec. ¶ 9, App. Ex. 34).[14]

Tammy Lloyd (*McKiver*): Tammy Lloyd has brought a claim concerning her use and enjoyment of the property located at 248 Wright Lloyd Road, White Oak. (Tammy Lloyd's SSFS ¶¶ 6-7, App. Ex. 35). Tammy began living on the property in 1989 with her father, the owner. (Tammy Lloyd Dep. 5:21-6:5, 6:24-7:4, App. Ex. 36). After she decided to move out of her

[14] Mr. Nicholson's family owns additional properties on Piney Woods Road. (*Id*. at ¶¶ 9, 10). Mr. Nicholson resides at the 8162 address, not the 9902 address. (*Id*. at ¶ 12). Regarding the property located at 9902 Piney Woods Road, Mr. Nicholson stated that no one lives there and it is only used as a business address. (Eddie Nicholson, Jr. Dep. 43:25-44:3, 138:1-25, App. Ex. 33).

parent's home (*Id*. at 21:3-7), with her own money, she bought a trailer and placed it on the land with her father's permission. (*Id*. 17:2-14; Archie Wright, Jr. Dec. ¶¶ 8, 9, 10, 11, App. Ex. 37). She never considered locating her trailer anywhere else because "that's family-owned land and we had the land there, so I didn't want to spend no money on no more land." (Tammy Lloyd Dep. 21:8-14, App. Ex. 36).

Since moving into her own home on the property in 2003, Tammy enjoys spending time in her own bedroom. (*Id*. at 17:15-17). She has exercised control over the property by making improvements such as installing: (1) flooring; (2) vinyl siding; (3) windows; and (4) sheetrock. (*Id*. 42:17-43:2, 43:18-20). Tammy also pays for all of the utilities associated with her possession of the property. (Archie Wright, Jr. Dec. ¶ 12, App. Ex. 37).

Tanechia Lloyd (*McKiver*): Tanechia Lloyd has brought a nuisance claim concerning the property located at 280 Wright Lloyd Road, White Oak. (Tanechia Lloyd's SSFS at ¶¶ 6-7, App. Ex. 38). Tanechia Lloyd began living on the property with her father, the owner, in 1989. (Tanechia Lloyd Dep. 5:24-6:1, App. Ex. 39). From 1989 through the present, she has resided on the property with the permission of her father as the owner. (Archie Wright, Jr. Dec. ¶ 16, App. Ex. 37). When she moved out of her parent's house in 1997, Tanechia bought her own home and placed it on the family land with t permission. (Tanechia Lloyd Dep. 24:8-21, App. Ex. 39; Archie Wright, Jr. Dec. ¶ 15, App. Ex. 37). Since moving into her own home, she has made improvements by: (1) installing a new barn; (2) building a porch; (3) installing a new roof; and (4) building an addition. (*Id*. at 22:22-26:15, 27:25-29:13, 28:1-9 32:5-24). Her ability to use these additions is no different from if she held formal legal title. In addition, Tanechia pays for the utilities associated with the property. (Archie Wright, Jr. Dec. ¶¶ 17, 18, App. Ex. 37).

Karen McKiver (*McKiver*): Karen McKiver has brought a nuisance claim concerning the property located at 6948 NC Highway 53 West, White Oak. (Karen McKiver's SSFS ¶¶ 6-7, App. Ex. 40). It is owned by her mother, Annette. (Karen McKiver Dep. 5:21-23, 7:1-3, 26:22-25, App. Ex. 41). Since the 1970s, Karen has lived on the property with her mother's permission. (*Id*.) Until 2001, Karen lived with her mother in her home. (*Id*. at 26:1-5). In 2001, Karen purchased her own home and placed it a few yards away from where she lived with her mother before. (*Id*.) Karen's mother gave her express permission to place her new home on the land and to reside there. (Annette McKiver Dec. ¶ 5, App. Ex. 42).

Karen has raised two children on the property. (Karen McKiver Dep. 5:12-6:7, 23:13-24:3, 24:25-25:16, App. Ex. 41). She has worked hard to support her family and enjoys living close to her mother on the property. (Annette McKiver Dec. ¶ 7, App. Ex. 42). Karen pays for the utilities and bills associated with her occupancy. (*Id*. at ¶ 9). Currently, Karen continues to pay monthly mortgage payments on her home located on the property. (Karen McKiver Dep. 25:23-25, App. Ex. 41). Karen has also made improvements to her home. They include installing a brick underpinning and having a porch built off the front of the home. (*Id*. at 27:20-28:7; Annette McKiver Dec. ¶ 10, App. Ex.42).

Brionna McKiver (*McKiver*): Brionna McKiver has brought a private nuisance claim concerning the property located at 6948 NC Highway 53 West, White Oak. (Brionna McKiver's SSFS ¶¶ 6-7, App. Ex. 43). Brionna has lived on the property her entire life. (Brionna McKiver Dep. 5:20-25, App. Ex. 44). Currently, she lives with her mother, Karen McKiver, and her brother, Edward Owens. The property was initially purchased by Brionna's grandmother in the 1970s. (Karen McKiver Dep. 5:21-23, 7:1-3, 26:22-25, App. Ex. 41). The McKivers take pride in being a close family and help their grandmother keep up the property. While Brionna's mother was in

college her grandmother helped raise her. (*Id*. at 6:6-10). In 2001, Brionna's mother, Karen, purchased a separate home on the property. (*Id*. at 25:3-11, 26:1-5). Since 2001, Brionna has resided with her mother at her home. (*Id*.) Brionna helps with chores and contributes to the upkeep. (Karen McKiver Dec. ¶ 5, App. Ex. 45). Additionally, Brionna helps pay bills. (*Id*. at ¶ 6).

Edward Owens (*McKiver*): Edward Owens has brought a claim concerning the property located at 6948 NC Highway 53 West, White Oak. (Edward Owens's Supp. Fact Sheet ¶¶ 6-7, App. Ex. 46). Mr. Owens has resided on the property since he was born. (Karen McKiver Dep. 6:8-25, App. Ex. 41). From 1996, when he was born, until 2001, he resided with his grandmother, the property owner, at her home on the property. (*Id*. at 26:1-5). Since 2001, Mr. Owens has resided with his mother in her home which is located on the property. (*Id*. at 5:12-6:7, 23:13-24:3, 24:25-25:16). He contributes to the betterment of the property. He mows the lawn. (Edward Owens Dep. 101:16-102:17, App. Ex. 47). In addition, Mr. Owens does household chores; cleans the home; and helps pay the bills. (Karen McKiver Dec. ¶ 10-13, App. Ex. 45).

Dominique Woodard (*Anderson*): Mr. Dominique Woodard has brought a private nuisance claim concerning the property at 6061 Highway 11, Willard. (Dominique J. Woodard's SSFS ¶¶ 6-7, App. Ex. 48). The property is owned by his father, Nicholas Woodard, Sr. (Dominique Woodard Dep. 6:25-7:4, 148:4-23, App. Ex. 49). He has resided on the property since his birth in 1994. (*Id.* at 6:5-13; Nicholas Woodard, Sr. Dec. ¶ 5, App. Ex. 50; Dominique Woodard Dep. 194:5-12, App. Ex. 49). He provides his parents with labor, and money from his job, to help contribute towards the upkeep of the property. (*Id*. at 107:17-25). Especially since his father's heart attack, Dominique's assistance is meaningful. (Nicholas Woodard, Sr. Dec. ¶¶ 6- 8, App. Ex. 50). He helps pay household bills. (*Id*. ¶ 7).

Nicholas Woodard, Jr. (*Anderson*): Nicholas Woodard, Jr. has brought a claim concerning the property located at 6061 Highway 11, Willard. (Nicholas Woodard, Jr.'s SSFS ¶¶ 6-7, App. Ex. 51). He was born in 1989 and has since resided on the property. (Nicholas Woodard, Jr. Dep. 5:5-19,160:2-4, App. Ex. 52). His parents, who own the property, have allowed him to live there throughout his life. (*Id*. at 92:15-23; Nicholas Woodard, Sr. Dec. ¶ 5, App. Ex. 50; Nicholas Woodard, Sr. Dep. 74:21-25, App. Ex. 53). He helps with household chores; he does painting; and helps with cleaning. He helps pay the bills, and buys groceries. (Nicholas Woodard Sr. Dec. ¶ 11, App. Ex. 50).

C. *Plaintiff Spouses Who Reside at the Subject Properties.*

Defendant contends the following are "guests" in spouses' homes: (1) Anthony Carlton; (2) Vonnie Williams; and (3) Dianne Artis. (Doc. 317, p. 19). Defendant concedes each resides at their properties: "In 1984, Mr. Carlton began **residing** with Mrs. Carlton at the Subject Property." (Def. Statement of Facts, Doc. 317, ¶¶ 113, 118, 124).

Anthony Carlton (*McGowan*): Mr. Carlton has brought a claim concerning the property located at 967 Hallsville Road, Beulaville. (Anthony Carlton's Second Supplemental Fact Sheet ¶¶ 6, 7, App. Ex. 54). It is owned by his wife, Elaine Carlton. (Anthony Carlton Dep. 16:11-14, App. Ex. 55). Since their marriage in 1984, Mr. Carlton has resided on the property with the express permission and consent of his wife and in no way considered a "squatter." (Elaine Carlton Dec. ¶ 4, App. Ex. 56). Since moving there permanently, Mr. Carlton has treated the home as his own. He and his wife are "one." (Anthony Carlton Dep. 384:20-385:8, App. Ex. 55). Over the course of his residency, Mr. Carlton has contributed significantly by: (1) paying bills with his wife; (2) buying and installing new appliances; (3) putting new windows on their home; (4) installing new window-mounted air conditioning units; (5) mowing the lawn; (6) buying a new septic tank;

not to mention (7) otherwise maintaining the home. (Elaine Carlton Dec. ¶¶ 5, 6, App. Ex. 56; Elaine Carlton Dep. 147:25-148:12, 161:1-22, App. Ex. 57).

Vonnie Williams (*McGowan*): Vonnie Williams has brought a claim concerning the property at 928 Hallsville Road, Beulaville. (Vonnie Williams's SSFS ¶¶ 6, 7, App. Ex. 58). The property is owned by her husband, Elvis. (Vonnie Williams Dep. 161:4-6, App. Ex. 59). Since 2007, she has resided on the property with the consent of her husband, Elvis, who does not consider his wife a "squatter." (Elvis Williams Dec. at ¶ 4, App. Ex. 60). Over course of her residency in her home, Mrs. Williams has enjoyed sitting on the porch with her husband after a long day at work. (*Id.* at ¶¶ 7, 9). Her job is demanding; her home is a refuge. The money she earns goes to her own account. (*Id*. at ¶ 5). These funds are used to pay for costs associated with living on the property. (*Id*. at ¶¶ 5, 6, 8). Mrs. Williams also contributes significant amounts of labor towards the betterment of the property such as helping with the care and upkeep of their home; and planting and maintaining the flower beds. (*Id.* at ¶ 6; Vonnie Williams Dep. 125:5-126:11, App. Ex. 59).

Dianne Artis (*Artis*): Mrs. Artis has brought a nuisance claim concerning the property located at 7350 Piney Woods Road, Willard. (Dianne Artis's SSFS ¶¶ 6, 7, App. Ex. 61). The property is owned by her husband, Ben. (*Id*.) After their marriage in 2009, she resided on the property. (Ben Artis Dec. ¶ 3, App. Ex. 63; Dianne Artis Dep. 66:7-11, App. Ex. 62). Since 2009, Mrs. Artis has continuously resided with her husband. (Dianne Artis Dep. 5:14-22, App. Ex. 62). They are proud of their home and often entertain their grandchildren at the property. (*Id*. at 45:25-46:6). As a result of her occupancy, Mr. and Mrs. Artis do many things together in order to upkeep and maintain the property. (Ben Artis Dec. ¶¶ 4, 5, 6, App. Ex. 63).

4. <u>Other Facts and Considerations.</u>

As shown above, all of these family members have an interest in their homes which is more than sufficient to allow their claim. Furthermore, as demonstrated, many of these individuals, even if not formally owning the land, do own the home, house trailer or home improvement they built and installed on that land with their hard-earned funds.

Recently uncovered evidence in the case shows that all of these family members are being harmed by a severe nuisance. It is now known from the scientific work that has been done in the case that ***these homes are covered with particles of pig feces.***

Specifically, during the discovery and investigation process, a representative number of homes were tested for presence of "Pig2Bac."[15] Pig2Bac is a component particle of pig feces. It is a DNA marker to track the presence of hog waste. Pig2Bac was detected on the walls of the homes of several of the Plaintiffs listed by the instant motion:

- Gwendolyn Pickett (*Gillis*),
- Daqwan M. Robinson (*Gillis*),
- James Al Davis, Jr. (*McGowan*),
- Tammy Tarrell Lloyd (*McKiver*), and
- Dianne F. Artis (*Artis*).

The presence of pig feces on the homes is important to weigh in considering the possessory interests of these Plaintiffs. Specifically, as detailed above and in the Statement of Facts, some of these Plaintiffs while not formally holding title to the land, certainly owned, bought and kept up

[15] For general background on pig2bac, also sometimes spelled as pig-2-bac, *see* United States Department of the Interior, U.S. Geologic Survey, USGS website, "Fate and transport of pathogens and nutrients from land-applied animal manures," describing study in North Carolina participated in by Dr. Shane Rogers, our environmental engineering expert. The objectives of this official government study were to "measure the survival of bacterial indicator organisms and pathogens and the persistence of host-specific molecular biomarkers in soils receiving applications of swine waste materials," and among other things, the scientific team tested for "PCR Biomarkers" including Pig-2-Bac. Available at https://nc.water.usgs.gov/projects/transport/overview.html.

and improved their ***homes*** on that land. Gwen Pickett put her singlewide trailer on the land. Tammy Lloyd did the same. Tammy also installed new flooring, siding, windows and sheetrock. Now it is known she has pig fecal particles on the walls of her home including the very siding she put on. Her use and enjoyment is impaired. Pig feces are on the siding she took pride in installing.

According to Plaintiffs' environmental engineer Shane Rogers, the detection of the Pig2Bac fingerprint means that in fact ***larger*** quantities of other pig fecal material are on the homes. Under the law of nuisance, in addition to discomfort and loss-of-use damages, a Plaintiff like Tammy is entitled to recover ***damages reflecting the cost to repair, replace and restore the damaged property***.[16] It is reasonable to conclude based on the representative sampling done so far, that all of the other Plaintiffs' properties also have quantities of pig fecal particles on them. They would also be entitled to such damages.

Knowing the presence of pig feces, does it need to be disclosed to a buyer, if a home goes up for sale? Should Plaintiffs like Tammy Lloyd be entitled to recover the full cost to repair, restore and remediate her home such that all of the Pig2Bac waste is removed? Under Restatement (Second) of Torts § 929, now accepted by the Court of Appeals as providing guidance for nuisance damages per the 2016 *BSK* decision,[17] a Plaintiff suing for nuisance affecting a family home may be allowed to recover repair and restore damages ***even if they exceed the total value of the home***, due to a home's special value as the place of family life and cherished emotions. The same Restatement provision, Section 929, ***also*** provides that homeowners or occupants can recover

[16] The news of the widespread Pig2Bac presence was learned in recent months. Plaintiffs were unable to originally allege the claim because unaware of it at the time. The discovery of Pig2Bac and pig feces on (and likely in) the homes may support new damages claims under nuisance, a trespass claim given the proof of physical particles, and a negligence claim. Plaintiffs are still evaluating the import of this discovery.

[17] *See BSK, supra*, 783 S.E.2d 236 (N.C. Ct. App. 2016) (citing Restatement § 929).

damages for lost use and enjoyment and for discomfort and annoyance. Is Tammy Lloyd to be blamed if now she feels uncomfortable opening the contaminated window, touching the contaminated doorknob, serving her two children dinner on the contaminated table? The discovery of pig feces on her home can only make her discomfort far worse.

The dates of the Pig2Bac samples were as follows:

Date	Residence	Address	Case	Results
10/23/16	**Tammy Lloyd**	**248 Wright Lloyd Rd**	**McKiver**	**Present**
11/16/16	**Gwen Pickett**	**541 Moon Johnson Rd**	**Gillis**	**Present**
11/16/16	**Dianne Artis**	**7350 Piney Woods Rd**	**Artis**	**Present**
11/16/16	**Daqwan Robinson**	**357 Moon Johnson Rd**	**Gillis**	**Present**
11/23/16	**Dianne Artis**	**7350 Piney Woods Rd**	**Artis**	**Present**
11/23/16	**Dianne Artis**	**7350 Piney Woods Rd**	**Artis**	**Present**
12/28/16	**James Al Davis Jr.**	**108 Howards Farm Rd**	**McGowan**	**Present**
12/29/16	**James Al Davis Jr.**	**108 Howards Farm Rd**	**McGowan**	**Present**
12/30/16	**James Al Davis Jr.**	**108 Howards Farm Rd**	**McGowan**	**Present**

(See Dr. Rogers expert report, Table 9, Ex. 6 to this brief). Dr. Rogers explains:

> Pig2bac is an established DNA marker for identifying the presence pig feces. It has been used in many scientific studies to allocate sources of fecal pollution in environmental samples and in human exposure studies. For example, researchers from Johns Hopkins University and the University of North Carolina at Chapel Hill were able to demonstrate pig2bac as a reliable marker for occupational exposure of industrial hog operation workers to *Staphylococcus aureus* originating in swine feces that were subsequently found in the nasal passages of the workers.
>
> The pig2bac marker is conservative for the presence of pig feces. This means that pig feces has to be in relatively high concentrations to facilitate its detection….
>
> Bacteria of the phylum *Bacteroidetes* and order *Bacteriodales* represent approximately 40% of the total bacteria present in pig feces. *Bacteroidales* that harbor DNA specific to the pig2bac marker comprise only about 2.5% of the total *Bacteroidales* in pig feces. Considering these factors together, only about 1% of the bacteria in pig feces harbor DNA that can be detected by the pig2bac marker. Bacteria in pig feces likely constitutes only half or less of the total solid matter in pig feces based on measurements of bacteria as a fraction of human fecal matter.

(Rogers report pp. 67-68 (emphasis added)).

> Considering the above, the detection of pig2bac in a sample drawn from a location or the environment in aerosols or following aerosol transport and deposition implies the presence of a **much greater mass of fecal material and other fecal bacteria, which may include pathogenic microorganisms**. It also strongly implies transport of fecal material further downwind from the areas where it was detected because it can be expected to diminish to undetectable levels faster than other manure particles.

(Rogers report p. 69 (emphasis added)).

> During the course of my investigations, I collected air samples and physical samples from the exterior of houses of neighbors of the subject CAFO sites for DNA testing. I also trained personnel in the appropriate sterile techniques to collect additional samples for DNA testing. The purpose of this DNA testing was to determine whether there was evidence to demonstrate an undue nuisance at the neighbors' homes as evidenced by exposure to pig feces by either its impaction onto their houses, or presence in the air where it could be breathed in. It is well known that particulates from swine CAFOs are of the most important contributors of odors experienced from these facilities because they absorb and concentrate odorous compounds at the facility and they deposit in the olfactory mucosa when breathed in where their sensory effects are intensified. As described below, the DNA we tested for is present only in a bacterium in pig feces, and a bacterium and DNA are both particulates. Therefore, presence of this DNA reasonably serves as a surrogate for particulate transport and deposition of particulates (and associated odor) from the subject CAFO facilities. **It is a direct measure of fecal particles**.

(Rogers report p. 66 (emphasis added)). "DNA swab samples were collected from either 1-inch square or 12-inch square areas of the exterior walls of neighbor homes at least four feet in elevation from the ground surface." (*Id.*, p. 69).

> Thirty-one samples collected from surfaces of the homes of the clients were submitted for DNA testing…. In total, 14 of 17 homes tested positive, indicating a recent history of impaction of hog feces onto their homes. Further, all six dust samples collected from the air using vacuum filtration devices at the yards of four clients as far as 0.47 miles from the CAFO properties contained tens of thousands to hundreds of thousands of hog feces DNA particles, demonstrating exposure to hog feces bioaerosols for clients who breathe in the air at their homes. **Considering the facts, it is far more likely than not that hog feces also gets inside the clients[']homes where they live and where they eat….**
>
> **[T]he ability to detect the DNA signature of the hog feces at these distances and in such high concentrations from the hog CAFOs was surprising. In my own experience, this DNA does not persist well in the environment relative to pathogens or other biological particles of concern. Because we detected this**

> **DNA in such high concentrations, it is clear that we were still well within the plume of fecal material extending from these facilities. Within sound scientific reason, it is reasonable to say that these conditions are likely experienced by all of the clients fairly evenly, the furthest of which lives only 0.72 miles from one of the subject swine CAFOs, and provided sampling on the right day, we would identify it[.]**

(Rogers report, p. 70). All of these clients suffer the nuisance injury, including the Pig2Bac now found on their homes. And if it is on the outside of the homes, then it is also likely on the inside as well -- on the food they eat, on the toys their children play with.

CONCLUSION

Plaintiffs' social sciences expert Dr. Thu observed:

> Their homes and properties are central for their quality of life which revolves around core cultural principles of family, faith, friends, and health. The odor, flies, trucks and buzzards not only interfere with individual events isolated to particular time and days, but also envelop and significantly undermine entire lifestyles and cultural norms that are the basis of plaintiffs' quality of life.

(Dr. Thu report, p. 27, App. Ex. 65).

This injury to this way of life is the same regardless of whether the Plaintiff lives on land from her father, as with Tammy, or lives in a home with adults who are parents to him, as with Daqwan, or simply lives with her loving spouse, as with Vonnie as she sits on the porch with Elvis, attempting to enjoy the rural evening.

Accordingly, Defendant's motion should be denied.

Respectfully submitted this 5th day of May, 2017.

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CERTIFICATE OF SERVICE

I do hereby certify that on the 5th day of May, 2017, I served a true and correct copy of the above and foregoing document by ECF filing which will ensure service electronically on counsel for the Defendant.

This the 5th day of May, 2017.

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Exhibits to Brief

1. Restatement (Second) of Torts § 821E
2. Restatement (Second) of Torts § 929
3. Restatement (Second) of Torts § 821D
4. 2-16 Webster's Real Estate Law in North Carolina § 16.21
5. 2-16 Webster's Real Estate Law in North Carolina § 16.18
6. Dr. Shane Rogers Report (redacted)