IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HOLLY LLOYD, on behalf of herself and all others similarly situated,	)
Plaintiff,	)
vs.	) Case No. 2:20-cv-4330-HB
COVANTA PLYMOUTH RENEWABLE ENERGY, LLC,	)
Defendant.	) JUDGE HARVEY BARTLE III

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S PARTIAL MOTION TO DISMISS AND STRIKE

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INTRODUCTION

Holly Lloyd (hereinafter, "Plaintiff") brings this class action against Covanta Plymouth Renewable Energy, LLC (hereinafter, "Defendant") because of widespread noxious odors that the company repeatedly emits from its industrial waste incinerators into the surrounding residential community in Conshohocken, Pennsylvania. [Plaintiff's Complaint, Doc. 1, ¶¶1-3, 23-28].

Defendant's motion is a recycled, meritless motion that has already been rejected by this Court in a different case involving the same counsel. In *Baptiste v. Bethlehem Landfill* Co., 965 F.3d 214 (3d. Cir. 2020), the Third Circuit published a precedential opinion that wholly reversed and remanded a district court order granting a landfill operator's motion to dismiss similar claims for nuisance and negligence. While the Third Circuit has unequivocally spoken, Defendant's counsel ostensibly seeks to capitalize on a perceived loophole in the opinion. For the first time on appeal, the defendant in *Baptiste* attempted to make the legally unsupported argument that negligence claims require allegations of "physical" property damages to survive a motion on the pleadings. Because the defendant's argument was "drastically different from the issue presented to and addressed by the District Court," the Third Circuit decided that it would "not venture into the weeds of this issue in the first instance." *Id.* at 229. Now, Defendant, through the same counsel, seeks to raise the issue here.

What Defendant failed to tell the Court is that Judge Kenney has already considered, and rejected, its counsel's meritless argument through a virtually identical motion. *See Baptiste v. Bethlehem Landfill Co.*, Case No. 5:18-cv-2691-CFK (E.D. Pa., September 11, 2020) [Doc. No. 46-1]. Just five days after the *Baptiste* motion was filed, the vast majority of which could have been copy-pasted into the present motion, Judge Kenney *sua sponte* denied it in its entirety, without even requiring a response from the plaintiffs. *See Baptiste v. Bethlehem Landfill Co.*, Case No. 5:18-cv-2691-CFK (E.D. Pa., September 11, 2020) [Doc. No. 48]. Judge Kenney's order

stated that "upon consideration of Defendant's Motion to Dismiss (ECF No. 46) it is hereby ORDERED and DECREED Defendant's Motion to Dismiss (ECF No. 46) is DENIED. Defendant must file an answer to Plaintiffs' allegations related to Plaintiffs' negligence claim and request for punitive damages on or before September 22, 2020."

For the following reasons, this Court should follow Judge Kenney's lead, deny Defendant's meritless motion in its entirety, and order Defendant to answer the complaint.

FACTUAL BACKGROUND

Defendant owns and operates a commercial municipal waste incinerator facility located at 1155 Conshohocken Road in the borough of Conshohocken, Pennsylvania (hereinafter, the "Facility"). [¶1, 9]. The Facility's business operations involve receiving and storing substantial quantities of household waste which is then processed into refuse-derived fuel. [¶11]. The Facility includes a municipal waste storage pit, an auxiliary fuel storage tank, two Municipal Waste Incinerators ("MWI's"), two auxiliary burners, and certain emission control equipment. [¶12]. The Facility processes approximately 1,216 tons of municipal solid waste per day, which it then converts into energy and sells for a profit. [¶9].

At Defendant's Facility, there are two emission stacks, one for each MWI, through which Defendant releases its incinerators' waste byproducts into the ambient air. [¶15]. Defendant is under a duty to maintain its combustion chamber temperature at or greater than 1800°F in order to ensure proper combustion and control damaging emissions. [¶13]. Defendant relies on certain emission control processes, including a Selective Non-Catalytic Reduction (SNCR) system designed to reduce nitrous oxide (NOx) emissions, acid gas scrubbers to control acid gases, a PAC injection carbon absorption process to control emission of toxic pollutants, and a baghouse to control particulate matter emissions. [¶14].

On frequent, recurrent, and continuing occasions too numerous to list individually, Plaintiff's property, neighborhood, residence, and outdoor spaces have been persistently invaded by noxious odors from the Facility. [¶20]. The raw materials and chemicals utilized by Defendant are noxious and highly odiferous, and its processing operations create a foreseeable risk that noxious odor emissions could be emitted into surrounding residential communities if reasonable steps are not taken to mitigate and control them. [¶16]. Defendant's emission control processes are inadequate and improperly maintained and operated and fail to prevent noxious offsite odors from invading nearby private, residential properties. [¶18]. Defendant has failed to properly construct, operate, and maintain its facility to prevent causing offensive offsite odor impacts, despite knowledge that their facility has repeatedly emitted noxious fugitive emissions into the ambient air. [¶19].

Importantly, the emission of off-site noxious odors is not inherent to the operation of a facility such as Defendant's. Rather, a properly operated, maintained, and/or constructed municipal waste incinerator will not emit noxious odors into the surrounding residential areas. [¶17]. Defendant has a duty, and has failed in its duty to control its odorous emissions, including in the following ways:

a) Defendant has failed to reasonably install, maintain, and operate its waste management systems including its incinerators, boilers, and turbine-generator;

b) Defendant has failed to adequately install, maintain, and operate odor and pollution prevention/control systems, including its flue gas scrubbers, individual selective non-catalytic reduction ("SNCR") systems, PAC injection equipment, continuous emissions monitoring systems, and other odor prevention and control systems which were available to Defendant;

c) Defendant has failed to adequately install, maintain, and operate systems to ensure proper and complete combustion of refuse to prevent numerous instances of untreated off-site emissions, including by failing to fully clear incinerator grates while its combustion chambers are dormant or in a reheating phase;

d) Defendant has failed to establish, maintain, and implement operational plans to prevent, or mitigate the effects of, repeated electrical malfunctions at its facility, which have caused massive quantities of untreated noxious emissions to invade surrounding public and private properties;

e) Defendant has failed to take reasonable steps to address the noxious odors that are the direct and proximate result of the negligent operation of its waste management systems;

f) Defendant has failed to consistently maintain its combustion chambers at a temperature at or greater than 1800°F in order to ensure proper combustion and control damaging emissions;

g) Defendant has failed to utilize adequate odor reduction and treatment practices in the receipt, processing, and/or covering of odiferous raw waste materials; and

h) Defendant has failed to utilize adequate operational practices and procedures to minimize and/or treat odors generated at its facility;

i) Defendant has failed to utilize other odor prevention, elimination, mitigation and control strategies and technologies available to Defendant. [¶83].

The Facility and its odorous emissions have been the subject of frequent complaints from residents in the nearby residential area. [¶22]. Dozens of residents have contacted Plaintiff's counsel documenting the noxious odors they attributed to Defendant's Facility. [¶23]. Members of the putative class consistently describe strong and offensive stenches that affect their ability "breathe, open windows, or go outside," "enjoy the front porch or back patio," and prevent them from enjoying their outdoor areas with family members or guests due to the odors because it "just… isn't possible." [¶25(a-f)].

The unreasonable malodors released into public spaces and the neighboring residential area have prompted numerous residents to complain to governmental entities, including the Borough of Conshohocken, Plymouth Township, and the Pennsylvania Department of Environmental Protection ("DEP"). [¶26]. As just one example, on December 30, 2018, the DEP and emergency personnel for Plymouth Township, among others, were alerted of substantial amounts of steam and noise coming from the facility. [¶26(a)]. The DEP's report noted that neighboring residents

reported "a burning plastic smell[.]" [*Id.*]. It was reported to the DEP that "the building [was] 'smoked out.'" [*Id.*]. Similar complaints of a "terrible burning plastic smell in the entire area" and other pervasive odors were received on January 3, 2019, June 11, 2019, and October 15, 2019. [¶26(b)-(d)].

Additionally, on June 15, 2020 at approximately 7:30 a.m., Defendant's facility experienced a power failure that caused both incinerator units and all of its air pollution control devices to become non-operational, and uncontrolled air pollution and fugitive emissions were spewed into surrounding residential neighborhoods. [¶26(e)]. At 9:35 a.m. on the same day, Defendant again experienced an electrical failure that shut down the facility and all its air pollution control devices. [*Id.*]. Numerous local residents complained to the DEC regarding noxious odors invading their properties. [*Id.*]. The DEP verified numerous violations resulting from Defendant's malfunction, which constituted "unlawful conduct and a public nuisance." [*Id.*]. Between June 10, 2019 and January 4, 2020, the DEC received at least 163 citizen complaints regarding Defendant's facility. [¶26(f)]. The complaints overwhelmingly relate to noxious odors. [*Id.*]. Additional odor complaints have been made to the DEC throughout 2020, which the DEC characterized as "ongoing issues" relating to Defendant's facility. [¶26(g)].

Defendant has a well-documented pattern of failing to control its emission of noxious odor emissions, demonstrated by Numerous Notices of Violations ("NOV") issued by the DEC, media reports, and substantial community activism focused on concerns regarding Defendant's noxious emissions. On October 17, 2019, October 24, 2019, December 23, 2019, and June 24, 2020, after confirming unlawful offsite odor emissions, the DEC cited Defendant's Facility with Notices of Violation for regulatory infractions relating to odor emissions. [¶27(a)]. Additionally, there have been numerous media reports regarding Defendant's "burning plastic" and other foul odors.

[¶27(b)]. Members of the community, concerned about Defendant's unlawful emissions, have created a Facebook group demanding action, and have also demanded the DEC cease Defendant's operations or deny their application for permit renewal. [¶27(c)-(d)].

The odors invading Plaintiff's and the putative class's property are indecent and/or offensive to the senses and obstruct the free use of their property so as to interfere with the comfortable enjoyment of life and/or property. [¶51]. The odors are substantial and unreasonable, as they cause Plaintiff and members of the putative class to remain inside their homes, keep doors and windows closed, and suffer from physical discomfort, embarrassment, and reluctance to invite guests to their homes. [¶69].

The odors caused by the incinerator have been and continue to be dispersed across all public and private land in the class area. [¶36]. The Facility's odors have substantially and unreasonably interfered with Plaintiff's and the putative class' use and enjoyment of property. [¶30]. Furthermore, the invasion of Plaintiff's property and that of the Class by noxious odors has reduced the value of those properties. [¶31].

STANDARD OF REVIEW

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 571, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). In reviewing the motion courts must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008). Though a complaint need not contain detailed factual allegations, it requires more than

"[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Ashcroft*, 556 U.S. at 678 (citations omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (quoting *Bell Atlantic Corp.*, 550 U.S. at 571).

"The standard for striking a complaint or a portion of it is strict, and 'only allegations that are so unrelated to the plaintiffs' claims as to be unworthy of any consideration should be stricken.'" *Steak Umm Co., LLC v. Steak'Em Up, Inc.*, No. Civ.A.09-2857, 2009 U.S. Dist. LEXIS 101357, 2009 WL 3540786, at *2 (E.D. Pa. Oct. 29, 2009) (citing *Johnson v. Anhorn*, 334 F. Supp. 2d 802, 809 (E.D. Pa. 2004)). "The purpose of a motion to strike is to clean up the pleadings, streamline litigation, and avoid unnecessary forays into immaterial matters." *McInerney v. Moyer Lumber and Hardware, Inc.*, 244 F. Supp. 2d 393, 402 (E.D. Pa. 2002). Although "[a] court possesses considerable discretion in disposing of a motion to strike under Rule 12(f)," such motions are "not favored and usually will be denied unless the allegations have no possible relation to the controversy and may cause prejudice to one of the parties, or if the allegations confuse the issues in the case." *River Road Dev. Corp. v. Carlson Corp.*, No. Civ.A.89-7037, 1990 U.S. Dist. LEXIS 6201, 1990 WL 69085, at *3 (E.D. Pa. May 23, 1990). "Thus, striking a pleading or a portion of a pleading 'is a drastic remedy to be resorted to only when required for the purposes of justice.'" *Lee v. Dubose Nat'l Energy Servs.*, 2019 U.S. Dist. LEXIS 71309, *9-10, 2019 WL 1897164 (E.D. Pa. April 24, 2019) (quoting *DeLa Cruz v. Piccari Press*, 521 F. Supp. 2d 424, 428 (E.D. Pa. 2007) (citations omitted).

ARGUMENT

I. Defendant Has a Well-Established Duty to Plaintiff to Operate Its Industrial Incinerator with Due Care to Prevent Foreseeable Property Damage to Its Residential

Neighbors, and Plaintiff Has Alleged Cognizable Property Damages to Sustain a Negligence Claim.

"In Pennsylvania, a plaintiff complaining of negligence must establish that (i) the defendant has a legal duty to conform to a certain standard of care to prevent unreasonable risks to the plaintiff, (ii) the defendant's conduct breached that duty, (iii) the breach caused an injury to the plaintiff, and (iv) the injury resulted in actual losses or damages." *Baptiste v. Bethlehem Landfill* Co., 965 F.3d 214, 227 (3d. Cir. 2020) (quoting *Nw. Mut. Life Ins. Co. v. Babayan*, 430 F.3d 121, 139 (3d Cir. 2005); *R.W. v. Manzek*, 585 Pa. 335, 888 A.2d 740, 746 (Pa. 2005)).

Through its partial motion to dismiss, Defendant presents two arguments that Plaintiff's negligence claim should be dismissed on the pleadings.[1] First, Defendant argues that industrial air polluters owe no duty of care to private residential property holders to prevent overwhelming, noxious odors caused by their operations to repeatedly spew off-site and invade their private properties. Second, Defendant argues that, even if it did owe Plaintiff the same well-established common law duty of care applicable to everyone engaged in risk-creating activity in our society, Plaintiff's alleged damages are somehow not cognizable under a negligence theory because such damages are not "physical." Defendant is mistaken on both points.

At the outset, it is remarkable that Defendant relegates any reference to the recent, precedential Third Circuit opinion in *Baptiste* to a footnote in the middle of a paragraph near the conclusion of its duty argument. (Doc. 11-1, pg. 21 n.5). In *Baptiste*, the defendant landfill operator was represented by the same legal counsel that represents Covanta Plymouth here. *See Baptiste v. Bethlehem Landfill* Co., 965 F.3d 214 (3d. Cir. 2020). Yet, Defendant recycles the same meritless negligence argument that, because of its lack of merit, was not even disputed in *Baptiste*. There,

[1] *Baptiste* roundly forecloses any challenge to the nuisance claims at issue in this case.

the Third Circuit noted that "[Defendant] concedes that it owes the plaintiffs a common-law duty to undertake its landfilling operations with reasonable care but disputes the content of that duty." *Baptiste*, 965 F.3d at 228.

Yet, despite being represented by the same counsel, Defendant now denies that well-recognized common law duty here.[2] Such a reversal illustrates the obvious error of Defendant's position. Ostensibly, its counsel seeks to capitalize on a perceived loophole in the Third Circuit holding in *Baptiste* to create a foothold that it can use to undermine the property rights of private residential property owners in other cases across the country whose properties are harmed by irresponsible and negligent industrial operators. What Defendant fails to disclose to the Court is that, on remand in *Baptiste*, Defendant's counsel submitted a virtually identical motion and brief that was roundly and immediately rejected. *See Baptiste v. Bethlehem Landfill Co.*, Case No. 5:18-cv-2691-CFK (E.D. Pa., September 11, 2020) [Doc. No. 46-1]. Judge Kenney *sua sponte* denied Defendant's motion in its entirety just four days after the filing, without even requiring a response from the plaintiffs. *See Baptiste v. Bethlehem Landfill Co.*, Case No. 5:18-cv-2691-CFK (E.D. Pa., September 11, 2020) [Doc. No. 48]. Judge Kenney's order stated that "upon consideration of Defendant's Motion to Dismiss (ECF No. 46) it is hereby ORDERED and DECREED Defendant's Motion to Dismiss (ECF No. 46) is DENIED. Defendant must file an answer to Plaintiffs'

[2] Defendant notably mischaracterizes the reason why its meritless negligence arguments were not addressed by the Third Circuit. While Defendant claims that the Third Circuit "reserved opinion on whether … odor nuisance conditions could ever yield the requisite physical harm needed to state a claim for negligence," [R. 11-1, pg. 21 n. 5], the real reason for "reserving" decision is that the defendant's argument on appeal was "drastically different from the issue presented to and addressed by the District Court." *Baptiste*, 965 F.3d at 228. Because Defendant failed to preserve the argument for appeal, the Third Circuit decided that it would "not venture into the weeds of this issue in the first instance." *Id.* at 229.

allegations related to Plaintiffs' negligence claim and request for punitive damages on or before September 22, 2020."

Undeterred by the unequivocal rejection of its argument, Defendant's counsel pulls the same meritless motion out of the file and requests that the same court yield a different result. Plaintiff is confident that this Court will see through this attorney-driven effort and deny Defendant's baseless motion.

A. Longstanding, Well-Established Common Law Principles Demonstrate that Defendant Owes a Duty to Exercise the Care of a Reasonable Man to Protect Neighbors from Unreasonable Harms that Result from Defendant's Affirmative Conduct.

Defendant plainly owes a duty to its residential neighbors to operate its industrial incinerator with due care to prevent property damage to its neighbors. The traditional common law standard for determining legal duty in negligence claims was recently reaffirmed by the Supreme Court of Pennsylvania in *Dittman v. UPMC*, 196 A.3d 1036, 1046-47 (Pa. 2018).

> This Court has observed that '[i]n scenarios involving an actor's affirmative conduct, he is generally 'under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act.' The *Seebold* Court explained that '[t]his duty appropriately undergirds the vast expanse of tort claims in which a defendant's affirmative, risk-causing conduct is in issue.' Indeed, this Court noted that 'many judicial opinions on the subject of negligence do not specifically address the duty element,' not because they 'fail to see duty as an element of negligence, but because they presume the existence of a duty where the defendant's conduct created a risk.'

Dittman, 196 A.3d at 1046-47 (quoting *Seebold v. Prison Health Servs.*, 618 Pa. 632, 654-655, 57 A.3d 1232, 1246 (Pa. 2012)). In other words, Defendant, affirmatively engaging in industrial operations, like operating an incinerator, is under a duty to Plaintiff to exercise the care of a reasonable man to protect against an unreasonable risk of harm foreseeably arising out of the act. Defendant's "affirmative, risk-causing conduct is in issue" here. *See Id.* It is axiomatic that there

is generally a duty where it is the defendant's conduct that created a risk.[3] "Common-law duties stated in general terms are framed in such fashion for the very reason that they have broad-scale application." *Id.* (quoting *Alderwoods (Pennsylvania), Inc. v. Duquesne Light Co.*, 106 A.3d 27, 40 (Pa. 2014)). "Like any other cause of action at common law, negligence evolves through either directly applicable decisional law or by analogy, meaning that a defendant is not categorically exempt from liability simply because appellate decisional law has not specifically addressed a theory of liability in a particular context." *Id.* (quoting *Scampone v. Highland Park Care Center, LLC*, 618 Pa. 363, 57 A.3d 582, 599 (Pa. 2012)).

The same or similar duty has been found in the context of power plants, brass smelters, natural gas extraction, road construction, and more. *See Noerr v. Lewistown Smelting & Ref., Inc.*, 60 Pa. D. & C.2d 406, 453 (C.P. 1973) (negligence included failing to install and properly operate adequate pollution controls); *Kamuck v. Shell Energy Holdings GP, LLC*, No. 4:11-CV-1425, 2012 U.S. Dist. LEXIS 59113, at *32-33 (M.D. Pa. Mar. 19, 2012) ("[the] complaint outlines a duty of care owed by the Defendants arising out of their drilling and natural gas extraction activities); *Hartle v. FirstEnergy Generation Corp.*, Civil Action No. 08-1019, 2014 U.S. Dist. LEXIS 36509, at *2 (W.D. Pa. Mar. 20, 2014); *Butts v. Sw. Energy Prod. Co.*, No. 3:12-CV-1330, 2014 U.S. Dist. LEXIS 111637, at *22 (M.D. Pa. Aug. 12, 2014). Pennsylvania courts have long held that when it comes to the emission of offensive gasses from industrial operations, whether liability will attach depends on whether (as here) there is negligence, recklessness, or ultrahazardous conduct. *See Waschak v. Moffat*, 379 Pa. 441, 455, 109 A.2d 310, 317-18 (1954).

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[3] "A basic principle of negligence law is that ordinarily everyone has a duty to refrain from affirmative acts that unreasonably expose others to a risk of harm." *Widdoss v. Huffman*, 62 Pa. D. & C.4th 251, 255 (C.P. 2003). "[W]here an injury is sustained to real property as a result of the negligence of another, the property owner is entitled to damages…" *Clark v. Fritz*, 151 A.3d 1139 n.22 (Pa. Super. Ct. 2016).

There is no novel duty at issue here. Plaintiff's Complaint alleges that "a properly operated, maintained, and/or constructed municipal waste incinerator, will not emit noxious odors into the surrounding residential areas" and that "Defendant's emission control processes are inadequate and improperly maintained and operated and fail to prevent noxious offsite odors from invading nearby private, residential properties." [Doc. 1, pg. 4 ¶17-18]. Defendant's duty is not to prevent all odors from reaching Plaintiff's property, but to operate its incinerator with due care to prevent harm to its neighbors. "Of course, it is not to be questioned that the defendant had the right to do its work…but all this could be done contemporaneously with the use of due care in protecting the property of the plaintiffs and, to the extent that the defendant failed in doing this, it is liable in damages." *Dussell v. Kaufman Constr. Co.*, 398 Pa. 369, 377, 157 A.2d 740, 744 (1960).

Defendant relies heavily on a single, out-of-context quote from *Gilbert v. Synagro Central*—a case dismissed primarily because of Pennsylvania's inapplicable Right to Farm Act—to support its position. However, *Gilbert* does not support Defendant's position and is readily distinguishable. There, the court noted that "at no point in the Complaint, Plaintiffs' Response In Opposition, or the support brief do Plaintiffs clarify what legal duty Defendants, as transporters, haulers, spreaders, marketers or users, owed to Plaintiffs to protect Plaintiffs against the alleged unreasonable risks and injuries." *Gilbert v. Synagro Cent., LLC*, No. 2008-SU-3249-01, 2012 Pa. Dist. & Cnty. Dec. LEXIS 323, at *37 (C.P. Dec. 28, 2012). *Gilbert* involved only the question of whether the plaintiffs in that case had put forth any duty that a "transporter, hauler, spreader, marketer, or user" of organic fertilizer, in general, owes his neighbors with respect to the spread of odors, particulates, and flies. *Id.*

Gilbert does not stand for the proposition that the spread of emissions of odor or particulate can never be violative of a legal duty. The court merely observed that the "Plaintiffs failed to

allege a legally recognized duty and this Court cannot determine any duty or obligation recognized by the law requiring Defendants to conform to a certain standard of conduct for the protection of Plaintiffs against unreasonable risks." *Id.* at 39. In contrast, Defendant's duties to Plaintiff arises from specific affirmative acts, as specified above. Defendant conducts is a major industrial operation whose affirmative acts create its emissions as well as its duties to its neighbors. Pennsylvania law has always imposed a duty of care in such situations, and *Gilbert* does not change that.

Further, the nuisance claims in *Gilbert* were correctly dismissed because they were barred by the Pennsylvania Right to Farm Act's general prohibition on nuisance claims. *See* 3 P.S. § 954. This undoubtedly weighed heavily in the *Gilbert* Court's evaluation of the negligence claim that was at issue. Defendant does not argue, nor could it, that the Right to Farm Act prohibition on nuisance claims is applicable to Plaintiff's claims here, against a negligent incinerator operator. This distinction is significant because repackaging a nuisance claim against a party otherwise protected by the Right to Farm Act, could threaten the statutory purpose for which that nuisance prohibition was created—a factor which is not present here. Thus, it makes sense that the *Gilbert* court was unwilling to permit a negligence claim to proceed where "the facts to support Plaintiffs' negligence claim mirror their nuisance claim, which we found is barred by operation of 3 P.S. § 954(a)." *Id.* at 39. The purported *Gilbert* rule, which was based primarily on protecting the Right to Farm Act, is simply not applicable to this case against a private incinerator operator.

"Our case law affords great protection to property owners who suffer damage at the hands of a tortfeasor." *Welsh v. City of Phila.*, 16 Phila. 130, 143 (1987). Pennsylvania courts have long recognized the duty of care owed by industrial operators, like Defendant, to nearby residents. It is true that this duty has not often been analyzed in judicial opinions, "because," as noted in *Dittman*,

"[courts] presume the existence of a duty where the defendant's conduct created a risk." *Dittman*, 196 A.3d at 1047 (quoting *Seebold v. Prison Health Services, Inc.*, 618 Pa. 632, 57 A.3d 1241 n.21 (Pa. 2012)). Here, Plaintiff has clearly alleged violations of Defendant's duty to adhere to the waste incinerator industry's standards of care. Plaintiff has also not only alleged, but materially substantiated, that Defendant has repeatedly breached its standard of care. [See Doc. 1, pg. 6-7, ¶26-27] (citing numerous notices of violation and complaints caused by Defendant's unlawful emission of odor emissions).

Further, even if Pennsylvania had not recognized similar or identical common law and statutory duties for decades, there would be ample basis for imposing such a duty on Defendant here. "To assist us in identifying a previously unrecognized duty, we rely upon five factors: '(1) the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution.'" *Walters v. UPMC Presbyterian Shadyside*, 187 A.3d 214, 222 (Pa. 2018) (quoting *Althaus v. Cohen*, 562 Pa. 547, 553, 756 A.2d 1166, 1169 (2000)). Plaintiff and the Class are residents of the community in which Defendant has undertaken to operate. While waste incineration and disposal obviously have social utility, there is much less social utility in doing it negligently and harming neighboring property holders. The nature of the risk is the depravation of public property rights, and it is plainly foreseeable in that the consequences of poor waste incineration operations are well known. The consequences of imposing this duty are to hold incinerator operators to the appropriate industry standard and improve conditions for those residing near waste incinerators. There is very clearly an overwhelming public interest in imposing such a duty, consistent with Pennsylvania public policy:

> [i]mplicit … is the right to protect one's property from harm, whether it be in the form of decreased valuation, insufficient water supply, excessive dust, noise, pollution, or some other cause. . . When the property at issue is someone's home, the owner's right to protect the viability of his property is even more personal. The purchase of a home is often considered to be one of, if not the, most significant investments an individual can make during his lifetime. **To deny an individual the right to protect his interest in the property he calls home would violate public policy.**

Markwest Liberty Midstream & Res., LLC v. Cecil Twp. Zoning Hearing Bd., 183 A.3d 516 (Pa. Commw. Ct. 2018).

Plaintiff's claims do not raise a novel issue of duty. Defendant receives and burns massive quantities of waste at its incinerator and undertakes incinerator management activities and processes that are supposed to prevent odorous emissions from escaping off-site. Affirmative acts like these have always been held to create duties in the Commonwealth. Defendant's duty argument should be rejected.

B. Plaintiff's Negligence Claim Relies on Factual Allegations and Legal Standards Beyond and In Addition to Plaintiff's Nuisance Claims, and Plaintiff has Adequately Pled Negligent Conduct by Defendant that Caused Cognizable, Physical Injuries to Property.

Relying on *Horne v. Haladay*, 728 A.2d 954 (Pa. Super. 1999) and *Gilbert v. Synagro Cent., LLC*, 2014 PA Super 77, 90 A.3d 37 (Pa. Super. Ct. 2014), Defendant argues that Plaintiff's negligence claim must be dismissed as a matter of law because it is purportedly duplicative of Plaintiff's nuisance claims. However, Defendant is incorrect, and its arguments have been squarely rejected by the Third Circuit. In *Baptiste* the Third Circuit was presented with an identical argument from the same legal counsel and stated as follows:

> Bethlehem cites *Gilbert v. Synagro Cent., LLC*, 2014 PA Super 77, 90 A.3d 37 (Pa. Super. Ct. 2014), and *Horne v. Haladay*, 1999 PA Super 64, 728 A.2d 954 (Pa. Super. Ct. 1999), to suggest that the Baptistes cannot rely on the same nuisance conditions to state a separate negligence claim. Not so. The key difference between *Gilbert* and *Horne* on the one hand and this case on the other is the allegation of wrongful conduct (i.e., breach of a legal duty), which was not at issue in *Gilbert* or

> *Horne*. *See Gilbert*, 90 A.3d at 51 ("As in *Horne*, the operative facts here establish that the Residents have asserted nuisance claims, not negligence claims—namely claims based upon a use of property that 'is *not wrongful in itself*, but only in the consequences which may flow from it.'" (citing *Kramer v. Pittsburgh Coal Co.*, 341 Pa. 379, 19 A.2d 362, 363 (Pa. 1941) (emphasis added)).

Baptiste v. Bethlehem Landfill Co., 965 F.3d 214, 228 n.10 (3d. Cir. 2020). The allegations in the pleadings in Baptiste are materially indistinguishable from the allegations here, in that they both allege noxious odor violations and failures to operate and maintain the respective facilities in accordance with the common law standard of care that were wrongful in themselves. Binding precedent requires denial of Defendant's motion.

Plaintiff's negligence claims are not limited to the facts that establish their nuisance claims. The negligence claims include allegations of Defendant's acts and conduct that are beyond what is necessary to prevail on Plaintiff's nuisance claims. (*See, e.g.*, Doc. 1, ¶¶ 17-19) (discussing standard of care and breaches thereof) (¶27(1)) (listing Defendant's legal violations relating to operation of incinerator) (¶83(a-j)) (listing Defendant's acts and omissions that caused Plaintiff's injuries). Such alleged wrongful conduct, whether in violation of the law or the applicable standard of care, are separate and in addition to the proofs necessary to establish Plaintiff's nuisance claims.

In addition to the aforementioned legal duties, Plaintiff's negligence claims rely on numerous allegations that are not necessary to her nuisance claims, rendering them legally distinct and not duplicative of one another. In order to establish that Defendant created a nuisance, it is not necessary that Plaintiff prove that Defendant breached any particular duty or acted unlawfully. The nuisance claims focus on the harm to Plaintiff, the reasonableness of that harm, and whether Defendant caused it. Further, the nuisance claim stands on its own given the Solid Waste Management Act's (SWMA) establishment of a per se public nuisance for violations of that act. (1980 Act 97, Article VI).

It is also noteworthy that *Horne*, just like *Gilbert*, involved claims that were otherwise prohibited by the Pennsylvania Right to Farm Act. Thus, while Defendant accuses Plaintiff of trying to "shoehorn" negligence claims into a nuisance theory, it is Defendant that seeks to shoehorn rules from Right to Farm Act cases into cases that do not involve farming operations. The rationales from *Horne* and *Gilbert* are not persuasive here, even if the Third Circuit had not rejected their application. Most importantly, neither created the expansive, bright line rules that Defendant claims.

Plaintiff's claims involve allegations of wrongful conduct by the Defendant, and Plaintiff is entitled to proceed under both claims of nuisance and negligence.

C. Pennsylvania Law Does Not Require Allegations of a Physical Injury in Property Tort Claims, as Diminution of Property Value and Interference with Use and Enjoyment Are Each Separately and Independently Actionable Bases for Property Tort Claims.

The balance of Defendant's argument for dismissal is that Plaintiff's negligence claim does not involve cognizable property damages because the damages alleged are not recoverable due to a purported "physical" injury requirement in property damages cases. Defendant is incorrect, and its counsel knows it. Loss of use and enjoyment of property and diminution in market value are cognizable injuries for the purpose of negligence actions, and this Court, in *Baptiste* has already wholesale rejected Defendant's physical injury argument. *See Baptiste v. Bethlehem Landfill Co.*, Case No. 5:18-cv-2691-CFK (E.D. Pa., September 11, 2020) [Doc. No. 46-1; Doc. No. 48]. Pennsylvania law does not require that an injury to property be "physical" to recover under a negligence theory.[4]

[4] Further, it is entirely incorrect that nuisance and negligence actions are mutually exclusive and that the existence of one must defeat the other. *See Bruni v. Exxon Corp.*, 52 Pa. D. & C.4th 484, 505 (Ct. Comm. Pleas 2001) (finding Defendant oil company liable in class action by neighboring

Plaintiff alleges that Defendant's emission of noxious odors into her property has caused a substantial and unreasonable interference with the use and enjoyment of property and caused diminished property values. [Doc. 1, pg. 8 ¶30-31]. These are fundamental and axiomatic property rights, which are independently actionable.

It is well-established that "a reduction in market value is recoverable even absent permanent physical damage to the plaintiffs' property." *In re Paoli R.R. Yard Pcb Litig.*, 35 F.3d 717, 796 (3d. Cir. 1994) (permitting recovery for stigma damages to value of property without any physical impairment). Further, "[t]he law in this Commonwealth has long recognized that where injury is sustained to real property ***as a result of the negligence of another***, the property owner is entitled to damages for the inconvenience and discomfort caused thereby." *Dalton v. McCourt Elec., LLC*, 2013 U.S. Dist. LEXIS 37293, *5-6, 2013 WL 1124397 (E.D. Pa. March 19, 2013) (citing *Dussell v. Kaufman Construction Co.*, 398 Pa. 369, 378, 157 A.2d 740, 745 (1960); *Evans v. Moffat*, 192 Pa. Super. 204, 221, 160 A.2d 465, 473 (1960); *See also Moore v. Mobil Oil Co.*, 331 Pa. Super. 241, 257, 480 A.2d 1012, 1020 (1984); and, *accord*, Restatement (Second) of Torts § 929(c)) (emphasis added). Defendant fails to cite a single case that supports dismissal of a cause of action for negligence because these alleged damages are somehow not cognizable. They are.

Despite utilizing the word "physical" an astounding 55 times throughout its brief, Defendant also fails to cite a single case requiring a "physical" injury to property in negligence claims. In fact, Pennsylvania has never required a "physical" injury to property as a negligence pleading requirement. Rather, Defendant appears to conflate the economic loss rule with a purported bright line "physical" injury to property requirement. The economic loss rule states that

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residents for public and private nuisance and negligence as a result of exposing property holders to exposure to gasoline fumes).

"[t]he general rule of law is that economic losses may not be recovered in tort (negligence) absent ***physical injury or property damage***." *Spivack v. Berks Ridge Corp.*, 402 Pa. Super. 73, 78, 586 A.2d 402, 405 (Pa. Super. Ct. 1990) (emphasis added). However, even under this rule, a plaintiff must allege either a physical bodily injury ***or*** a recognized injury to property. Physical bodily injury and property damage are not coterminous. No case law requires that property be physically changed or altered as a prerequisite to recovery, and Plaintiff's negligence claim does not in any way rely on solely economic losses. Plaintiff has adequately alleged negligence damages based on harm to property.

Defendant references an inapplicable quote from *Getty Refining*, to suggest that physical harm to property is required. However, *Getty Refining* only involved claims where the plaintiff suffered contractual losses to third parties because of an alleged interruption with a cargo discharge from a ship. There, it was stipulated that "the cessation of cargo discharge 'did not cause any physical damage to the dock or marine terminal nor any pollution of the adjoining waters.'" *Getty Refining & Mktg. Co. v. MT FADI B*, 766 F.2d 829, 830 (3d. Cir. 1985). There was no alleged injury to person or property in that case, and Defendant's out-of-context quote from *Getty Refining* was nothing close to a talismanic requirement that an injury to property must physically alter the land. Rather, it was a restatement of the economic loss doctrine, which is inapplicable here.

Defendant also relies on *Menkes*, an unpublished, non-precedential opinion to claim that physical injury to property is required. While the Court used the term "physical damage," that case did not hold that loss of property value and interference with use and enjoyment are unrecoverable forms of property damage.[5] Rather, *Menkes* involved a dismissal *without* prejudice because the

[5] Significantly, the quote upon which Defendant relies cites *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 798 (3d Cir. 1994), which allowed for recovery of loss of value damages based on

plaintiffs "failed to allege that their property [was presently] affected by the contaminated groundwater or contaminated public water supply." *Menkes v. 3M Co.*, 2018 U.S. Dist. LEXIS 84574, *23, 2018 WL 2298620 (E.D. Pa. May 21, 2018). Thus, *Menkes* is meaningfully distinct because Plaintiff here has clearly alleged that Defendant's odors have repeatedly invaded and impacted her property. Further, the underlying case to which it relied, *In re Paoli*, confirms that physical destruction of property is not required.

Aside from those two out-of-context quotations, Defendant relies solely on the art of rhetorical repetition—not law—to advance its argument. There is no legal basis for prohibiting Plaintiff and the Class from pursuing well-pled negligence claims based on diminution of property values and interference with the use and enjoyment of private property. Such damages have long been the basis for property torts in Pennsylvania.

II. Defendant's Conduct Toward Plaintiff Was Taken with Reckless Disregard for the Known Consequences of Its Actions, and Plaintiff's Request for Punitive Damages Should Not Be Prematurely Dismissed.

Punitive damages are only "an element of damages" and not an independent cause of action. *See Shanks v. Alderson*, 399 Pa. Super. 485, 489, 582 A.2d 883, 885 (Pa. Super. Ct. 1990). Plaintiff alleges that Defendant continued to spew noxious odors into the community and refuse to abate the harmful conditions after learning about the impact that these odors had on hundreds of neighboring residents. [Doc. 1, ¶27-28, 37, 85]. Defendant's reckless disregard for the consequences its acts and omissions have had on Plaintiff and the Class, and this outrageous conduct gave rise to Plaintiff's line item prayer for punitive damages as an element of damages.

Plaintiff has presented facts which plausibly allege that Defendant acted deliberately and

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"stigma" alone, meaning that actual contamination was not a required proof. *In re Paoli* supports that Plaintiff's alleged loss of value damages are recoverable.

willfully in continuing to repeatedly damage her property. It is premature without any record to strike the pleadings and/or require an amendment based on a single line item request for damages at the end of the complaint. *See Artman v. Kochka*, 2012 Pa. Dist. & Cnty. Dec. LEXIS 268, *6 (Ct. Common Pleas, Westmoreland Cty. June 21, 2012) (stating that "striking the claim for punitive damages at this time would be inappropriate and untimely."). Just like Judge Kenney faced with an identical motion, the Court should not strike the request for punitive damages.

III. Plaintiff's Demand for Injunctive Relief Should Not Be Dismissed on the Pleadings.

Defendant erroneously seeks to strike Plaintiff's important request for injunctive relief. Fixing Defendant's widespread odor problem is a centrally important feature of this litigation. For too long, the people of Conshohocken have been smothered by Defendant's odors. Defendant's odors are "so offensive that you cannot breathe, open windows, or go outside." [Doc. 1, ¶25(a)]. Many hundreds of complaints have been made to the Pennsylvania DEP. [¶26]. This has led to media reports, notices of violation from the DEP, letters to the DEP by concerned local residents, and a Facebook group with over 700 members. [¶27]. This litigation arises because of Defendant's repeated failure to fix the problem. Now, Defendant has the audacity to request that injunctive relief be made unavailable on the pleadings based on an erroneous claim that Plaintiff's common law rights are preempted by Defendant's permit. They are not, and Defendant has failed to demonstrate that the regulatory scheme is an exclusive, rather than cumulative remedy. The Court should reject Defendant's request to strike Plaintiff's request for injunctive relief.

The fact that Pennsylvania has a governmental body like the DEP with authority to issue injunctive orders does not automatically deprive private property owners of their right to seek all remedies available to them at common law, such as remedial injunctive relief. Defendant does not even provide a legal argument for how it might.

The law on this is clear. The Pennsylvania Solid Waste Management Act (SWMA) contains a savings clause, which states as follows:

> Nothing in this act shall be construed as estopping the Commonwealth, or any district attorney or solicitor of a municipality, from proceeding in courts of law or equity to abate pollution forbidden under this act, or abate nuisances under existing law. It is hereby declared to be the purposes of this act to provide additional and cumulative remedies to control the collection, storage, transportation, processing, treatment, and disposal of solid waste within the Commonwealth, and ***nothing contained in this act shall in any way abridge or alter rights of action or remedies now or hereafter existing in equity, or under the common law or statutory law, criminal or civil***, nor shall any provision in this act, or the granting of any permit under this act, or any act done by virtue of this act, be construed as estopping the Commonwealth, ***persons*** or municipalities, ***in the exercise of their rights under the common law*** or decisional law or in equity, ***from proceeding in courts of law or equity to suppress nuisances, or to abate any pollution now or hereafter existing, or to enforce common law or statutory rights***. No courts of this Commonwealth having jurisdiction to abate public or private nuisances shall be deprived of such jurisdiction in any action to abate any private or public nuisance instituted ***by any person*** for the reasons that such nuisance constitutes air or water pollution.

35 P.S. § 6018.607 (emphasis added). Plaintiff's common law rights are expressly preserved by the SWMA, and Defendant's argument must fail.

Even if the SWMA did not contain a savings clause, the rules of statutory interpretation and Third Circuit case law support that a statute must explicitly state that it is the exclusive remedy, or supplant existing rights, in order to obtain primary and exclusive jurisdiction over the specific common law rights which it seeks to supersede. In *Bell v. Cheswick Generating Station*, 734 F.3d 188, 197 (3d. Cir. 2013), the Third Circuit held that the federal "Clean Air Act does not preempt state common law claims based on the law of the state where the source of the pollution is located." The Court reasoned, in part, that "[w]e see nothing in the Clean Air Act to indicate that Congress intended to preempt source state common law tort claims. If Congress intended to eliminate such private causes of action, 'its failure even to hint at' this result would be 'spectacularly odd.'" *Id.* at 198 (quoting *Medtronic, Inc., v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700

(1996)). Similarly, if as Defendant contends the SWMA or the PADEP were in fact vested with exclusive authority to take legal action against industrial entities operating in violation of common law and/or permit, the law would say so. It plainly does not. Rather, it expressly saves "common law" rights of "any person" in the Commonwealth to make their claims in court. Defendant's request to strike the request for injunctive relief from the pleadings must be denied.

IV. Plaintiff Should Be Permitted Leave to Amend and Cure Should the Court Deem the Pleadings to Be Lacking in Any Material Respect.

Should the Court determine for any reason that Plaintiff's complaint is lacking, Plaintiff should be provided an opportunity to amend and cure.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests this Honorable Court deny Defendant's motion in its entirety.

Dated: November 23, 2020

Respectfully submitted,

/s/ Nicholas A. Coulson

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CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the Electronic Mail notice list, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to any non-CM/ECF participants indicated on the Manual Notice list.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on November 23, 2020

By: _____*/s/Nicholas A. Coulson*_____