

19-1692

IN THE
United States Court of Appeals
FOR THE THIRD CIRCUIT

ROBIN BAPTISTE; DEXTER BAPTISTE, On Behalf of
Themselves and All Others Similarly Situated,

Plaintiffs-Appellants,

—v.—

BETHLEHEM LANDFILL COMPANY, A Delaware Corporation
doing business as IESI PA BETHLEHEM LANDFILL,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

**JOINT APPENDIX
VOLUME II OF II
(Pages A19 to A85)**

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CLOSED,APPEAL,A/R,STANDARD

**United States District Court
Eastern District of Pennsylvania (Allentown)
CIVIL DOCKET FOR CASE #: 5:18-cv-02691-CFK**

BAPTISTE et al v. BETHLEHEM LANDFILL COMPANY
Assigned to: HONORABLE CHAD F. KENNEY
Case in other court: THIRD CIRCUIT, 19-01692
Cause: 28:1332 Diversity-Personal Injury

Date Filed: 06/26/2018
Date Terminated: 03/13/2019
Jury Demand: Plaintiff
Nature of Suit: 360 P.I.: Other
Jurisdiction: Diversity

Plaintiff

ROBIN BAPTISTE

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Plaintiff

DEXTER BAPTISTE
*ON BEHALF OF THEMSELVES AND
ALL OTHERS SIMILARLY SITUATED*

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V.

Defendant

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COMPANY**
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doing business as
IESI PA BETHLEHEM LANDFILL

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Date Filed	#	Docket Text
06/26/2018	<u>1</u>	COMPLAINT against BETHLEHEM LANDFILL COMPANY (Filing fee \$ 400 receipt number PPE180536.) filed by ROBIN BAPTISTE, DEXTER BAPTISTE.(jaa,) (Entered: 06/27/2018)
06/26/2018		1 Summons Issued as to BETHLEHEM LANDFILL COMPANY. Forwarded To: COUNSEL on 6/27/18 (jaa,) (Entered: 06/27/2018)
06/26/2018		DEMAND for Trial by Jury by DEXTER BAPTISTE, ROBIN BAPTISTE. (jaa,) (Entered: 06/27/2018)
06/27/2018	<u>2</u>	INITIAL PROCEDURAL ORDER. SIGNED BY HONORABLE JOSEPH F. LEESON, JR ON 6/27/18. 6/27/18 ENTERED AND COPIES E-MAILED.(er,) (Entered: 06/27/2018)
08/27/2018	<u>3</u>	NOTICE of Appearance by ROY PRATHER, III on behalf of BETHLEHEM LANDFILL COMPANY with Certificate of Service(PRATHER, ROY) (Entered: 08/27/2018)
08/29/2018	<u>4</u>	Notice to Plaintiffs of 8/29/2018. Re: No Proof of Service on Docket. (DT) (Entered: 08/29/2018)
08/29/2018	<u>5</u>	WAIVER OF SERVICE Returned Executed by ROBIN BAPTISTE, DEXTER BAPTISTE. BETHLEHEM LANDFILL COMPANY waiver sent on 7/3/2018, answer due 9/4/2018. (COHEN, PHILIP) (Entered: 08/29/2018)
08/30/2018	<u>6</u>	NOTICE of Appearance by ROBERT MICHAEL DONCHEZ on behalf of BETHLEHEM LANDFILL COMPANY with Certificate of Service (Attachments: # <u>1</u> Certificate of Service)(DONCHEZ, ROBERT) (Entered: 08/30/2018)
09/04/2018	<u>7</u>	First MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by BETHLEHEM LANDFILL COMPANY.Memorandum, Declaration, Certificate of Concurrence/Nonconcurrence, Certificate of Service. (Attachments: # <u>1</u> Memorandum In Support, # <u>2</u> Declaration In Support, # <u>3</u> Exhibit 1, # <u>4</u> Exhibit 2, # <u>5</u> Text of Proposed Order, # <u>6</u> Certificate of Concurrence/Nonconcurrence, # <u>7</u> Certificate of Service)(PRATHER, ROY) (Entered: 09/04/2018)
09/04/2018	<u>8</u>	Disclosure Statement Form pursuant to FRCP 7.1 by BETHLEHEM LANDFILL COMPANY. (Attachments: # <u>1</u> Certificate of Service)(PRATHER, ROY) (Entered: 09/04/2018)
09/10/2018	<u>9</u>	NOTICE of Appearance by ROBERT A FREEDBERG on behalf of BETHLEHEM LANDFILL COMPANY with Certificate of Service (Attachments: # <u>1</u> Certificate of Service)(FREEDBERG, ROBERT) (Entered: 09/10/2018)
09/14/2018	<u>10</u>	APPLICATION for Pro Hac Vice Admission of Nicholas A. Coulson, Esquire filed by DEXTER BAPTISTE, ROBIN BAPTISTE, Statement. (Attachments: # <u>1</u> ORDER, # <u>2</u> Certificate of Service)(COHEN, PHILIP) Modified on 9/17/2018 (md). Modified on 10/2/2018 (rf,). *FILING FEE PAID ON 10/2/18* (Entered: 09/14/2018)
09/14/2018	<u>11</u>	APPLICATION for Pro Hac Vice Admission of Steven D. Liddle, Esquire filed by DEXTER BAPTISTE, ROBIN BAPTISTE.APPLICATION. (Attachments: # <u>1</u> ORDER, # <u>2</u> Certificate of Service)(COHEN, PHILIP) Modified on 9/17/2018 (md). Modified on 10/1/2018 (rf,). *FILING FEE PAID ON 10/1/18* (Entered: 09/14/2018)

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09/19/2018	<u>12</u>	STIPULATION AND ORDER THAT PLAINTIFFS, ROBIN BAPTISTE AND DEXTER BAPTISTE, AND DEFENDANT BETHLEHEM LANDFILL COMPANY (FONNERLY KNOWN AS IESI PA BETHLEHEM LANDFILL CORPORATION), BY THEIR ATTORNEYS, CONSENT TO PLAINTIFFS' REQUEST FOR AN EXTENSION OF TIME UNTIL OCTOBER 2, 2018 TO FILE THEIR ANSWER IN RESPONSE TO DEFENDANT'S MOTION TO DISMISS. IT IS FURTHER STIPULATED AND AGREED, THAT PLAINTIFFS AND DEFENDANT, BY THEIR ATTORNEYS, CONSENT TO AN EXTENSION OF TIME UNTIL OCTOBER 16, 2018 FOR DEFENDANT TO FILE ITS REPLY TO PLAINTIFFS' ANSWER. SIGNED BY HONORABLE JOSEPH F. LEESON, JR ON 9/18/18. 9/19/18 ENTERED AND COPIES E-MAILED.(er,) (Entered: 09/19/2018)
09/19/2018		Set/Reset Deadlines as to <u>7</u> First MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM . RESPONSES DUE BY 10/16/2018. (er,) (Entered: 09/19/2018)
09/21/2018	<u>13</u>	RESPONSE in Opposition re <u>10</u> MOTION for Pro Hac Vice for <i>Nicholas A. Coulson, Esquire</i> , <u>11</u> MOTION for Pro Hac Vice for <i>Steven D. Liddle, Esquire</i> filed by BETHLEHEM LANDFILL COMPANY. (Attachments: # <u>1</u> Brief, # <u>2</u> Exhibit 1, # <u>3</u> Text of Proposed Order)(PRATHER, ROY) (Entered: 09/21/2018)
09/21/2018	<u>14</u>	CERTIFICATE OF SERVICE by BETHLEHEM LANDFILL COMPANY re <u>13</u> Response in Opposition to Motion, (PRATHER, ROY) (Entered: 09/21/2018)
09/24/2018	<u>15</u>	MOTION for Pro Hac Vice for <i>James B. Slaughter, Esquire</i> (Filing fee \$ 40 receipt number 0313-13065630.) filed by BETHLEHEM LANDFILL COMPANY.. (Attachments: # <u>1</u> Text of Proposed Order, # <u>2</u> Certificate of Service)(PRATHER, ROY) (Entered: 09/24/2018)
09/24/2018	<u>16</u>	MOTION for Pro Hac Vice for <i>John H. Paul, Esquire</i> (Filing fee \$ 40 receipt number 0313-13065739.) filed by BETHLEHEM LANDFILL COMPANY.. (Attachments: # <u>1</u> Text of Proposed Order, # <u>2</u> Certificate of Service)(PRATHER, ROY) (Entered: 09/24/2018)
09/24/2018	<u>17</u>	MOTION for Pro Hac Vice for <i>Nicole B. Weinstein, Esquire</i> (Filing fee \$ 40 receipt number 0313-13065779.) filed by BETHLEHEM LANDFILL COMPANY.. (Attachments: # <u>1</u> Text of Proposed Order, # <u>2</u> Certificate of Service)(PRATHER, ROY) (Entered: 09/24/2018)
09/24/2018	<u>18</u>	MOTION for Pro Hac Vice for <i>Michael G. Murphy, Esquire</i> (Filing fee \$ 40 receipt number 0313-13065829.) filed by BETHLEHEM LANDFILL COMPANY.. (Attachments: # <u>1</u> Text of Proposed Order, # <u>2</u> Certificate of Service)(PRATHER, ROY) (Entered: 09/24/2018)
09/25/2018	<u>19</u>	ORDER OF 9/24/2018 THAT THE APPLICAITON OF JAMES B. SLAUGHTER, ESQUIRE TO PRACTICE IN THIS COURT PURSUANT TO LOCAL RULE OF CIVIL PROCEDURE 83.5.2(b) IS GRANTED. SIGNED BY JUDGE: JOSEPH F. LEESON, JR. 9/25/2018 ENTERED AND COPIES MAILED E-MAILED, ECF FORM MAILED TO COUNSEL.(DT) Modified on 9/25/2018 (dt,). Modified on 9/27/2018 (dt,). (Entered: 09/25/2018)
09/25/2018	<u>20</u>	ORDER OF 9/24/2018 THAT THE APPLICATION OF JOHN H. PAUL, ESQUIRE TO PRACTICE IN THIS COURT PURSUANT TO LRCP 83.5.2(b) IS GRANTED. SIGNED BY JUDGE: JOSEPH F. LEESON, JR. 9/25/2018 ENTERED AND COPIES MAILED AND E-MAILED ECF FORM MAILED TO COUNSEL.(DT) . (DT) Modified on 9/25/2018 (dt). Modified on 9/27/2018 (dt,). (Entered: 09/25/2018)
09/25/2018	<u>21</u>	ORDER OF 9/24/2018 THAT THE APPLICATION OF NICOLE B. WEINSTEIN, ESQUIRE TO PRACTICE IN THIS COURT PURSUANT TO LRCP 83.5.2(b) IS GRANTED. SIGNED BY JUDGE: JOSEPH F. LEESON, JR. 9/25/2018 ENTERED AND COPIS E-MAILED AND MAILED ECF FORM MAILED TO COUNSEL.(DT) . (DT) Modified on 9/27/2018 (dt,). (Entered: 09/25/2018)
09/25/2018	<u>22</u>	ORDER OF 9/24/2018 THAT THE APPLICATION OF MICHAEL G. MURPHY, ESQUIRE TO PRACTICE IN THIS COURT PURSUANT TO LRCP 83.5.2(b) IS GRANTED. SIGNED BY JUDGE: JOSEPH F. LEESON, JR. 9/25/2018 ENTERED AND COPIES E-MAILED AND MAILED; ECF FORM MAILED TO COUNSEL.(DT) . (DT) Modified on 9/27/2018 (dt,). (Entered: 09/25/2018)

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10/02/2018	<u>23</u>	Declaration <i>OF STEVEN D. LIDDLE IN SUPPORT OF PLAINTIFFS REPLY TO DEFENDANT'S OPPOSITION TO THE PRO HAC VICE APPLICATIONS OF STEVEN D. LIDDLE AND NICHOLAS A. COULSON</i> by DEXTER BAPTISTE, ROBIN BAPTISTE. (COHEN, PHILIP) (Entered: 10/02/2018)
10/02/2018	<u>24</u>	RESPONSE in Opposition re <u>7</u> First MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by DEXTER BAPTISTE, ROBIN BAPTISTE. (COHEN, PHILIP) (Entered: 10/02/2018)
10/16/2018	<u>25</u>	RESPONSE in Support re <u>7</u> First MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by BETHLEHEM LANDFILL COMPANY. (Attachments: # <u>1</u> Certificate of Service)(PRATHER, ROY) (Entered: 10/16/2018)
10/30/2018	<u>26</u>	ORDER THAT THE APPLICATION OF STEVEN D. LIDDLE, ESQUIRE, TO PRACTICE IN THIS COURT PURSUANT TO LOCAL RULE OF CIVIL PROCEDURE 83.5.2(B) IS GRANTED. SIGNED BY HONORABLE JOSEPH F. LEESON, JR ON 10/30/18. 10/31/18 ENTERED AND COPIES MAILED AND E-MAILED.(er,) Modified on 10/31/2018 (er,). (Entered: 10/31/2018)
10/30/2018	<u>27</u>	ORDER THAT THE APPLICATION OF NICHOLAS A. COULSON, ESQUIRE, TO PRACTICE IN THIS COURT PURSUANT TO LOCAL RULE OF CIVIL PROCEDURE 83.5.2(B) IS GRANTED. SIGNED BY HONORABLE JOSEPH F. LEESON, JR ON 10/30/18. 10/31/18 ENTERED AND COPIES MAILED AND E-MAILED.(er,) (Entered: 10/31/2018)
11/26/2018	<u>28</u>	ORDER THAT THIS CASE IS REASSIGNED FROM HONORABLE JOSEPH F. LEESON, JR TO HONORABLE CHAD F. KENNEY FOR ALL FURTHER PROCEEDINGS. SIGNED BY CLERK OF COURT KATE BARKMAN, CLERK OF COURT ON 11/26/18. 11/26/18 ENTERED AND COPIES MAILED AND E-MAILED.(rf,) (Entered: 11/26/2018)
12/06/2018	<u>29</u>	ORDER THAT MOTION HEARING SET FOR 1/11/2019 01:30 PM. SIGNED BY HONORABLE CHAD F. KENNEY ON 12/6/18. 12/6/18 ENTERED AND COPIES MAILED AND E-MAILED.(rf,) (Entered: 12/06/2018)
12/11/2018	<u>30</u>	ORDER THAT MOTION HEARING SET FOR 2/19/2019 02:00 PM. SIGNED BY HONORABLE CHAD F. KENNEY ON 12/11/18. 12/12/18 ENTERED AND COPIES MAILED AND E-MAILED.(rf,) (Entered: 12/12/2018)
02/15/2019	<u>31</u>	NOTICE of Supplemental Authority by DEXTER BAPTISTE, ROBIN BAPTISTE re <u>7</u> First MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM.(COULSON, NICHOLAS) Modified on 2/15/2019 (md). (Entered: 02/15/2019)
02/19/2019	<u>32</u>	Minute Entry for proceedings held before HONORABLE CHAD F. KENNEY Motion Hearing held on 2/19/19 re <u>7</u> First MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM filed by BETHLEHEM LANDFILL COMPANY Court Reporter: ESR. (rf,) (Entered: 02/19/2019)
03/13/2019	<u>33</u>	MEMORANDUM AND/OR OPINION. SIGNED BY HONORABLE CHAD F. KENNEY ON 3/13/19. 3/14/19 ENTERED AND COPIES MAILED AND E-MAILED.(rf,) (Entered: 03/14/2019)
03/13/2019	<u>34</u>	MEMORANDUM AND ORDER DEFENDANTS MOTION TO DISMISS (DOC. 7) IS GRANTED. PLAINTIFFS' COMPLAINT (DOC. 1) IS DISMISSED. SIGNED BY HONORABLE CHAD F. KENNEY ON 3/13/19. 3/14/19 ENTERED AND COPIES MAILED AND E-MAILED.(rf,) (Entered: 03/14/2019)
03/28/2019	<u>35</u>	NOTICE OF APPEAL as to <u>34</u> Order (Memorandum and/or Opinion), by DEXTER BAPTISTE, ROBIN BAPTISTE, Certificate of Service. Filing fee \$ 505, receipt number 0313-13441482. Copies to Judge, Clerk USCA, Appeals Clerk. (COULSON, NICHOLAS) Modified on 3/28/2019 (md). (Entered: 03/28/2019)
04/05/2019	<u>36</u>	NOTICE of Docketing Record on Appeal from USCA re <u>35</u> Notice of Appeal (Credit Card Payment), filed by DEXTER BAPTISTE, ROBIN BAPTISTE. USCA Case Number 19-1692 (ke) (Entered: 04/05/2019)
04/22/2019	<u>37</u>	Copy of TPO Form re <u>35</u> Notice of Appeal (Credit Card Payment).(amas) (Entered: 04/23/2019)

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05/14/2019	<u>38</u>	Transcript of MOTION HEARING held on 2/19/19, before Judge KENNEY. Court Reporter/Transcriber: PRECISE TRANSCRIPTS. (fdc) (Entered: 05/14/2019)
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CIVIL COVER SHEET

JS 44 (Rev. 06/17)

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

<p>I. (a) PLAINTIFFS ROBIN BAPTISTE and DEXTER BAPTISTE, on behalf of themselves and all others similarly situated</p> <p>(b) County of Residence of First Listed Plaintiff _____ (EXCEPT IN U.S. PLAINTIFF CASES)</p> <p>(c) Attorneys (Firm Name, Address, and Telephone Number) KEVIN S. RIECHELSON, ESQ., KAMENSKY, COHEN & RIECHELSON 194 South Broad St., Trenton, NJ 08608</p>	<p>DEFENDANTS BETHLEHEM LANDFILL COMPANY d/b/a IESI PA BETHLEHEM LANDFILL, a Delaware Corporation</p> <p>County of Residence of First Listed Defendant <u>Northhampton</u> (IN U.S. PLAINTIFF CASES ONLY)</p> <p>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.</p> <p>Attorneys (If Known)</p>
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<p>II. BASIS OF JURISDICTION (Place an "X" in One Box Only)</p> <p><input type="checkbox"/> 1 U.S. Government Plaintiff</p> <p><input type="checkbox"/> 2 U.S. Government Defendant</p> <p><input type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)</p> <p><input checked="" type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)</p>	<p>III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)</p> <table style="width:100%; border-collapse: collapse;"> <tr> <td style="width:33%;"></td> <td style="width:10%; text-align: center;">PTF</td> <td style="width:10%; text-align: center;">DEF</td> <td style="width:33%;"></td> <td style="width:10%; text-align: center;">PTF</td> <td style="width:10%; text-align: center;">DEF</td> </tr> <tr> <td>Citizen of This State</td> <td style="text-align: center;"><input checked="" type="checkbox"/> 1</td> <td style="text-align: center;"><input checked="" type="checkbox"/> 1</td> <td>Incorporated or Principal Place of Business In This State</td> <td style="text-align: center;"><input type="checkbox"/> 4</td> <td style="text-align: center;"><input type="checkbox"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td style="text-align: center;"><input type="checkbox"/> 2</td> <td>Incorporated and Principal Place of Business In Another State</td> <td style="text-align: center;"><input type="checkbox"/> 5</td> <td style="text-align: center;"><input checked="" type="checkbox"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td style="text-align: center;"><input type="checkbox"/> 3</td> <td>Foreign Nation</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> <td style="text-align: center;"><input type="checkbox"/> 6</td> </tr> </table>		PTF	DEF		PTF	DEF	Citizen of This State	<input checked="" type="checkbox"/> 1	<input checked="" type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4	Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input checked="" type="checkbox"/> 5	Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6
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Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6																				

IV. NATURE OF SUIT (Place an "X" in One Box Only) Click here for: [Nature of Suit Code Descriptions.](#)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<p>PERSONAL INJURY</p> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input checked="" type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<p>PERSONAL INJURY</p> <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <p>PERSONAL PROPERTY</p> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <p style="text-align: center;">PROPERTY RIGHTS</p> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 835 Patent - Abbreviated New Drug Application <input type="checkbox"/> 840 Trademark <p style="text-align: center;">SOCIAL SECURITY</p> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
<p>REAL PROPERTY</p> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<p>CIVIL RIGHTS</p> <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	<p>PRISONER PETITIONS</p> <p>Habeas Corpus:</p> <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <p>Other:</p> <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement	<p>LABOR</p> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act	<p>FEDERAL TAX SUITS</p> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	
		<p>IMMIGRATION</p> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions			

V. ORIGIN (Place an "X" in One Box Only)

1 Original Proceeding
 2 Removed from State Court
 3 Remanded from Appellate Court
 4 Reinstated or Reopened
 5 Transferred from Another District (specify)
 6 Multidistrict Litigation - Transfer
 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

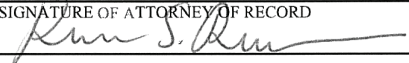
Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): _____

Brief description of cause: _____

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.
DEMAND \$ 5,000,000.00
 CHECK YES only if demanded in complaint: **JURY DEMAND:** Yes No

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE _____ DOCKET NUMBER _____

DATE 06/22/2018 SIGNATURE OF ATTORNEY OF RECORD 

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

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

CASE MANAGEMENT TRACK DESIGNATION FORM

Robin Baptiste and Dexter
Baptiste, on behalf of themselves:
and all similarly situated v.

CIVIL ACTION

Bethlehem Landfill Company
d/b/a IESPA Bethlehem Landfill

NO.

In accordance with the Civil Justice Expense and Delay Reduction Plan of this court, counsel for plaintiff shall complete a Case Management Track Designation Form in all civil cases at the time of filing the complaint and serve a copy on all defendants. (See § 1:03 of the plan set forth on the reverse side of this form.) In the event that a defendant does not agree with the plaintiff regarding said designation, that defendant shall, with its first appearance, submit to the clerk of court and serve on the plaintiff and all other parties, a Case Management Track Designation Form specifying the track to which that defendant believes the case should be assigned.

SELECT ONE OF THE FOLLOWING CASE MANAGEMENT TRACKS:

- (a) Habeas Corpus – Cases brought under 28 U.S.C. § 2241 through § 2255. ()
- (b) Social Security – Cases requesting review of a decision of the Secretary of Health and Human Services denying plaintiff Social Security Benefits. ()
- (c) Arbitration – Cases required to be designated for arbitration under Local Civil Rule 53.2. ()
- (d) Asbestos – Cases involving claims for personal injury or property damage from exposure to asbestos. ()
- (e) Special Management – Cases that do not fall into tracks (a) through (d) that are commonly referred to as complex and that need special or intense management by the court. (See reverse side of this form for a detailed explanation of special management cases.) ()
- (f) Standard Management – Cases that do not fall into any one of the other tracks.

<u>6/22/18</u>	<u>Kevin S. Kriechelson</u>	<u>Robin Baptiste, et als.</u>
Date	Attorney-at-law	Attorney for Plaintiff
<u>609-394-8585</u>	<u>609-394-8620</u>	<u>KRIECHELSON@KORLAWFIRM.COM</u>
Telephone	FAX Number	E-Mail Address

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DESIGNATION FORM

(to be used by counsel or pro se plaintiff to indicate the category of the case for the purpose of assignment to the appropriate calendar)

Address of Plaintiff: 397 South Oak Street, Freemansburg, Pennsylvania
Address of Defendant: 2335 Applebutter Road, Bethlehem, Northampton Co, Pennsylvania
Place of Accident, Incident or Transaction: Lower Saucon Twp, btwn Riverside Drive and Applebutter Rd

RELATED CASE, IF ANY:

Case Number: _____ Judge: _____ Date Terminated: _____

Civil cases are deemed related when **Yes** is answered to any of the following questions:

- | | | |
|--|------------------------------|--|
| 1. Is this case related to property included in an earlier numbered suit pending or within one year previously terminated action in this court? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> |
| 2. Does this case involve the same issue of fact or grow out of the same transaction as a prior suit pending or within one year previously terminated action in this court? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> |
| 3. Does this case involve the validity or infringement of a patent already in suit or any earlier numbered case pending or within one year previously terminated action of this court? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> |
| 4. Is this case a second or successive habeas corpus, social security appeal, or pro se civil rights case filed by the same individual? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> |

I certify that, to my knowledge, the within case is / is not related to any case now pending or within one year previously terminated action in this court except as noted above.

DATE: 06/22/2018

Kevin S. Riechelton
Attorney-at-Law / Pro Se Plaintiff

58960

Attorney I.D. # (if applicable)

CIVIL: (Place a ✓ in one category only)

A. Federal Question Cases:

- 1. Indemnity Contract, Marine Contract, and All Other Contracts
- 2. FELA
- 3. Jones Act-Personal Injury
- 4. Antitrust
- 5. Patent
- 6. Labor-Management Relations
- 7. Civil Rights
- 8. Habeas Corpus
- 9. Securities Act(s) Cases
- 10. Social Security Review Cases
- 11. All other Federal Question Cases
(Please specify): _____

B. Diversity Jurisdiction Cases:

- 1. Insurance Contract and Other Contracts
- 2. Airplane Personal Injury
- 3. Assault, Defamation
- 4. Marine Personal Injury
- 5. Motor Vehicle Personal Injury
- 6. Other Personal Injury (Please specify): Landfill Contamination
- 7. Products Liability
- 8. Products Liability – Asbestos
- 9. All other Diversity Cases
(Please specify): _____

ARBITRATION CERTIFICATION

(The effect of this certification is to remove the case from eligibility for arbitration.)

I, Kevin S. Riechelton, Esq., counsel of record or pro se plaintiff, do hereby certify:

- Pursuant to Local Civil Rule 53.2, § 3(c) (2), that to the best of my knowledge and belief, the damages recoverable in this civil action case exceed the sum of \$150,000.00 exclusive of interest and costs:
- Relief other than monetary damages is sought.

DATE: 06/22/2018

Kevin S. Riechelton
Attorney-at-Law / Pro Se Plaintiff

58960

Attorney I.D. # (if applicable)

NOTE: A trial de novo will be a trial by jury only if there has been compliance with F.R.C.P. 38.

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

ROBIN BAPTISTE and DEXTER)	
BAPTISTE, on behalf of themselves and all)	
others similarly situated,)	
)	
Plaintiffs,)	Case No.
)	
vs.)	
)	
BETHLEHEM LANDFILL COMPANY d/b/a)	
IESI PA BETHLEHEM LANDFILL, a)	
Delaware Corporation,)	
)	
Defendant.)	
)	
)	

CLASS ACTION COMPLAINT AND JURY DEMAND

INTRODUCTION

1. Plaintiffs bring this class action against Bethlehem Landfill Company d/b/a IESI PA Bethlehem Landfill. Defendant owns and operates the landfill known as Bethlehem Landfill, which releases pollutants, air contaminants, and noxious odors, causing material injury to Plaintiffs' property through public nuisance, private nuisance, and negligence.

PARTIES

2. Plaintiffs, Robin Baptiste and Dexter Baptiste reside at 397 South Oak Street, Freemansburg, Pennsylvania.

3. At all relevant times hereto, Defendant, Bethlehem Landfill Company, has been a Delaware business corporation headquartered in the State of Texas. Defendant, its predecessors, agents, and parents, constructed, operate, and/or maintain Bethlehem Landfill, located at 2335 Applebutter Road, Bethlehem, Northampton County, Pennsylvania.

4. At all relevant times herein, Defendant, its agents and its predecessors did and do business in Bethlehem, Pennsylvania. There existed and exists a unity of interest and ownership

between each of them, such that any individuality and separateness between them has ceased, and each such entity is the alter ego of each other entity.

JURISDICTION AND VENUE

5. This Court has jurisdiction under 28 U.S.C. §1332(d)(2)(a). Jurisdiction is proper because the amount in controversy exceeds \$5,000,000, exclusive of interest and costs. Venue is proper in this Court under 28 U.S.C. 1391(b)(2), because a substantial portion of the events or omissions giving rise to Plaintiffs' claims took place in this District, and because much of the property that is the subject of this action is situated in this District.

GENERAL ALLEGATIONS

6. Defendant's landfill ("Bethlehem Landfill") is a 224 acre waste disposal facility in the Lower Saucon Township, situated between Riverside Drive and Applebutter Road, less than a mile south of the Lehigh River and northwest of Interstate 78, that abuts Steel City residential and recreational area on the northern property line.

7. Bethlehem Landfill can currently accept up to 1,375 tons of waste on a daily basis.

8. Landfills, like Defendant's, inherently generate odors when waste in the landfill decomposes, creating odorous landfill gas, leachate and other byproducts.

9. Defendant, like similar operators, has the legal duty and responsibility to control the landfill's odorous emissions by capturing and destroying them to prevent them from traveling offsite and impacting the landfill's neighbors.

10. Defendant is required to control its odorous emissions by, among other things, following proper landfilling practices, utilizing adequate landfill cover, and installing, operating, and maintaining a sufficient landfill gas collection system to capture and destroy landfill gas.

11. A properly operated landfill will not cause offensive offsite odor impacts.

12. On recurrent and intermittent occasions, Plaintiffs' property including Plaintiffs' neighborhoods, residences, and yards have been and continue to be physically invaded by noxious odors, pollutants and air contaminants that originate from Bethlehem Landfill.

13. Defendant's landfill, and especially its odorous emissions, has been the subject of frequent complaints from residents in nearby residential areas.

14. For years the Township of Lower Saucon, by and through its representatives such as Councilwoman Donna Louder, has repeatedly notified Defendant of residents' discomfort from the stench the landfill continuously emits.

15. Area residents have made countless complaints to the Pennsylvania Department of Environmental Protection ("DEP") regarding odors from Defendant's facility.

16. Despite the large number of complaints, Defendant's Bethlehem landfill has a well documented history of repeated failures in the proper maintenance and management of the landfill, and the effective control of odor emanating from the landfill such that odors do not constitute a nuisance or hazard to health, safety, or property. Illustrations of such failures include, but are not limited to, the following:

- a. On April 16, 2012, Water & Sewer Resources Director for the Township of Saucon issued an Order of Compliance to Defendant Bethlehem Landfill in an enforcement action, and assessed \$45,243.51 in fines.
- b. On April 10, 2014, the DEP found Bethlehem Landfill in violation for not complying with permit conditions by not placing an intermediate cover atop the trash piles at the end of each day.
- c. On August 27, 2014, the DEP found Bethlehem Landfill in violation because the intermediate cover did not prevent vectors, odors, blowing litter, and other nuisances.
- d. On May 12, 2015, the DEP issued Bethlehem Landfill a NOV after the inspector detected strong landfill odors near the landfill's slope, gas wells, and leachate cleanout due to resultant Defendant's failure to maintain intermediate cover to prevent odors and cover solid waste after its placement on the slope. The DEP also noted Defendant's failure to implement a gas control and monitoring plan to effectively monitor gas collection for nuisance potential.

- e. On June 24, 2015, the DEP found Defendant's intermediate cover still did not prevent vectors, odors, blowing litter, and other nuisances, and their gas venting and monitoring was still inadequate.
- f. On May 7, 2018, the DEP determined Bethlehem Landfill not in compliance of Pennsylvania's Solid Waste Management Act and Municipal Waste Management Rules for various violations including its failure to perform waste management practice in reducing the potential for offsite odor creation, failure to promptly address and correct problems in deficiencies discovered during the course of DEP's inspection, failure to implement the Nuisance Minimization and Control Plan to minimize and control conditions that are harmful to the environment or public health, or which create safety hazards, odors, dust, noise, unsightliness, and other public nuisances, failure to maintain a uniform intermediate cover that prevents odors and litter, and failure to implement the approved gas control and monitoring plan.

17. Still, Defendant has failed to install and maintain adequate technology to properly control the landfill's emissions, which in the absence of adequate mitigation, are transported onto Plaintiffs' property. Such failures include, but are not limited to: the landfill's daily, intermediate, and long-term cover and gas collection system; an inadequate and/or improper odor management plan; inadequate treatment of leachate prior to discharge; improper use of vents and/or flares; the failure to prevent landfill gas collection wells from becoming "watered in," including by utilizing adequate drainage systems; inadequate and/or improper cover and covering practices; and inadequate use of odor neutralizing systems and products.

18. As a direct and foreseeable result of Defendant's failure to control the landfill's odorous emissions, those odorous emissions are routinely emitted and transported onto the property of Plaintiffs on occasions too numerous to recount individually.

19. Approximately eighty-five (85) households have already contacted Plaintiffs' counsel documenting the odors they attribute to Defendant's landfill.

20. Resident complainants describe the sickening odors as obnoxious, foul, and nauseating.

21. Class Members note, among other things, their inability to utilize the outside areas of their property, to include swimming pools and porches; the inability of their children to play in their yards; their inability to host guests to their homes due to embarrassment; and even their inability to walk their dogs.

22. At times, the stench becomes so pungent it permeates the walls of Class Members homes, requires them to keep all windows and doors sealed shut, and virtually renders them entrapped in their own homes.

23. Defendant's malodorous emissions, an issue clearly characterized as gross and pervasive, have substantially impacted the Class Members' ability to use and enjoy their homes, and have reduced the value of the homes of Plaintiffs and the Class.

24. The invasion of Plaintiffs' property by pollutants, noxious odors, and air contaminants has caused Plaintiffs to suffer injuries including the loss of use and enjoyment of their property.

25. These atrocious odors are offensive, would be offensive to a reasonable person, and have caused property damage, including lost property value.

26. The invasion of Plaintiffs' property by pollutants, noxious odors, and air contaminants has interfered with Plaintiffs' use and enjoyment of their property, resulting in damages in excess of \$5,000,000.

27. Defendant intentionally, recklessly, willfully, wantonly, maliciously, grossly and negligently failed to construct, maintain and/or operate the landfill, and caused the invasion of Plaintiffs' property by noxious odors, air contaminants, and other airborne pollutants on intermittent and reoccurring dates.

28. Defendant's emissions are especially injurious to the Class as compared with the public at large, given the impacts to their homes.

29. Defendant is vicariously liable for all damages suffered by Plaintiffs, caused by Defendant's employees, representatives and agents, who, during the course and scope of their employment, allowed or failed to correct the problem(s) which caused noxious odors, and air contaminants to physically invade Plaintiffs' property.

CLASS ALLEGATIONS

A. Definition of the Class

35. Plaintiffs bring this action individually and on behalf of all persons as the Court may determine to be appropriate for class certification, pursuant to Federal Rule of Civil Procedure 23. Plaintiffs seek to represent a Class of persons preliminarily defined as:

All owner/occupants and renters of residential property within a 2.5 mile radius of the Bethlehem Landfill Company Facility.

Excluded from the Class are Defendant and its affiliates, predecessors, successors, officers, directors, agents, servants, or employees, and the immediate family members of such persons. Plaintiffs reserve the right to modify the class definition and/or propose one or more subclasses if discovery reveals such modifications are appropriate.

B. Numerosity

36. Upon information and belief, there are in excess of 8,400 households within a 2.5 mile radius of the landfill. Accordingly, the members of the Class are so numerous that joinder of all parties is impracticable.

C. Commonality

37. Numerous common questions of law and fact predominate over any individual questions affecting Class members, including, but not limited to the following:

- a. whether and how Defendant intentionally, recklessly, willfully, wantonly, maliciously, grossly and/or negligently failed to construct, maintain and/or operate the landfill;
- b. whether Defendant owed any duties to Plaintiffs;
- c. which duties Defendant owed to Plaintiffs;

- d. the way in which the landfill's odors were dispersed over the class area;
- e. whether it was reasonably foreseeable that Defendant's failure to properly construct, maintain and/or operate the landfill would result in an invasion of Plaintiffs' possessory interests;
- f. whether the degree of harm suffered by Plaintiffs and the class constitutes a substantial annoyance or interference; and
- g. the proper measure of damages incurred by Plaintiffs and the Class.

D. Typicality

38. Plaintiffs have the same interests in this matter as all the other members of the Class, and their claims are typical of all members of the Class. If brought and prosecuted individually, the claims of each Class member would require proof of many of the same material and substantive facts, rely upon the same legal theories and seek the same type of relief.

39. The claims of Plaintiffs and the other Class members have a common origin and share a common basis. The claims originate from the same failure of the Defendant to properly construct, maintain and/or operate the landfill.

40. All Class members have suffered injury in fact resulting in the loss of property value by reason of Defendant's failure to properly construct, maintain and/or operate the landfill.

E. Adequacy of Representation

41. Plaintiffs' claims are sufficiently aligned with the interests of the absent members of the Class to ensure that the Class claims will be prosecuted with diligence and care by Plaintiffs as representatives of the Class. Plaintiffs will fairly and adequately represent the interests of the Class and do not have interests adverse to the Class.

42. Plaintiffs have retained the services of counsel, who are experienced in complex class action litigation, and in particular class actions involving odors, including those from landfills. Plaintiffs' counsel will adequately prosecute this action and will otherwise protect and fairly and adequately represent Plaintiffs and all absent Class members.

F. Class Treatment Is the Superior Method of Adjudication

43. A class action is superior to other methods for the fair and efficient adjudication of the controversies raised in this Complaint because:

- a. Individual claims by the Class members would be impracticable as the costs of pursuit would far exceed what any one Class member has at stake;
- b. Little or no individual litigation has been commenced over the controversies alleged in this Complaint and individual Class members are unlikely to have an interest in separately prosecuting and controlling individual actions;
- c. The concentration of litigation of these claims in one forum will achieve efficiency and promote judicial economy; and
- d. The proposed class action is manageable.

CAUSE OF ACTION I

PUBLIC NUISANCE

44. Plaintiffs restate all allegations of this Complaint as if full rewritten herein.

45. The noxious odors, pollutants, and air contaminants which entered Plaintiffs' property originated from the landfill constructed, maintained and/or operated by Defendant.

46. The odors, pollutants, and air contaminants invading Plaintiffs' property are indecent and/or offensive to the senses, and obstruct the free use of their property so as to significantly and unreasonably interfere with the comfortable enjoyment of life and/or property, including in but not limited to the following ways:

- a. causing Plaintiffs to remain inside their homes and forego use of their yards;
- b. causing Plaintiffs to keep doors and windows closed when weather conditions otherwise would not so require; and
- c. causing Plaintiffs embarrassment and reluctance to invite guests to their homes.

47. Defendant, by failing to reasonably repair and/or maintain its landfill so to abate nuisances such as malodorous emissions, has acted, and continues to act, in conscious disregard to public health, safety, peace, comfort, and/or convenience.

48. Defendant's emission of odors, pollutants, and air contaminates is proscribed by

municipal and Pennsylvania state law.

49. The odors, pollutants, and air contaminates produced by Defendant's landfill are continuous in nature and have a permanent and long-lasting effect.

50. Defendant is aware of the odors, pollutants, and air contaminates that emanate from its landfill, and has knowledge of the significant impact the odors have on residents' lives.

CAUSE OF ACTION II

PRIVATE NUISANCE

51. Plaintiffs restate all allegations of this Complaint as if fully rewritten herein.

52. Defendant owed, and continues to owe, a duty to Plaintiffs to take positive action to prevent and/or abate the interference with the the invasion of the private interests of the Plaintiffs.

53. By constructing and then failing to reasonably repair and/or maintain its landfill, Defendant has negligently created an unreasonable risk of foreseeable harm by causing the invasion of Plaintiffs' property by noxious odors, pollutants, and air contaminants.

54. As a foreseeable, direct and proximate result of the foregoing conduct of Defendant, Plaintiffs suffered injuries and damages to their property as alleged herein.

55. The injuries and damages suffered by Plaintiffs are specially injurious to themselves because they uniquely suffer harm relating to the use and enjoyment of their land and property, and decreased property values, which are not harms suffered by the general public.

56. Plaintiffs did not consent for noxious odors, pollutants and air contaminants to enter and settle upon their land and property.

57. By causing noxious odors, pollutants, and air contaminants produced and controlled by Defendant to physically invade Plaintiffs' land and property, Defendant intentionally, recklessly, and negligently created a nuisance which substantially and unreasonably interfered with Plaintiffs' use and enjoyment of their property.

58. Whatever social utility Defendant's landfill provides is clearly outweighed by the harm suffered by the Plaintiffs and the putative class, who have on frequent occasions been

deprived of the full use and enjoyment of their properties and have been forced to endure substantial loss in the value of their properties.

59. Defendant's substantial and unreasonable interference with Plaintiffs' use and enjoyment of their property constitutes a nuisance for which Defendant is liable to Plaintiffs for all damages arising from such nuisance, including compensatory, exemplary, injunctive and punitive relief since Defendant's actions were, and continue to be, intentional, willful, malicious and made with a conscious disregard for the rights of Plaintiffs, entitling Plaintiffs to compensatory and punitive damages.

CAUSE OF ACTION III

NEGLIGENCE

55. Plaintiffs restate all allegations of this Complaint as if fully rewritten herein.

56. On occasions too numerous to mention, Defendant negligently and improperly constructed, maintained and/or operated the landfill such that it caused the emission of noxious odors, pollutants, and air contaminants onto Plaintiffs' homes, land and property.

57. As a direct and proximate result of Defendant's negligence and gross negligence in constructing, maintaining and/or operating the landfill, Plaintiffs' property, on occasions too numerous to mention, was invaded by noxious odors, pollutants, and air contaminants.

58. As a further direct and proximate result of the foregoing conduct of the Defendant, Plaintiffs suffered damages to their property as alleged herein.

59. The invasion and subsequent damages suffered by Plaintiffs were reasonably foreseeable by the Defendant.

60. By failing to properly construct, maintain and/or operate its landfill, Defendant failed to exercise its duty of ordinary care and diligence so that noxious odors, pollutants, noise, dust, debris and air contaminants would not invade Plaintiffs' property.

61. A properly constructed, operated, and maintained landfill will not emit substantial odors and/or air pollutants into neighboring residential areas.

62. By failing to construct, maintain and/or operate its landfill, Defendant has

intentionally caused the invasion of Plaintiffs' property by noxious odors, pollutants, and air contaminants.

63. Defendant knowingly breached its duty to exercise ordinary care and diligence when it improperly constructed, maintained and/or operated the landfill and knew, or should have known upon reasonable inspection that such actions would cause Plaintiffs' property to be invaded by noxious odors, pollutants, and air contaminants.

64. As a direct and proximate result of the failure of Defendant to exercise ordinary care, Plaintiffs' residences were invaded by noxious odors, pollutants, and air contaminants.

65. The conduct of Defendant in knowingly allowing conditions to exist which caused noxious odors, pollutants, and air contaminants to physically invade Plaintiffs' property constitutes gross negligence as it demonstrates a substantial lack of concern for whether an injury resulted to Plaintiffs.

66. Defendant's gross negligence was malicious and made with a wanton or reckless disregard for the lives, safety or property of Plaintiffs, which entitles Plaintiffs to an award of compensatory, exemplary, and punitive relief.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, individually and on behalf of the proposed Class, pray for judgment as follows:

- A. Certification of the proposed Class pursuant to Federal Rule of Civil Procedure 23;
- B. Designation of Plaintiffs as representative of the proposed Class and designation of their counsel as Class counsel;
- C. Judgment in favor of Plaintiffs and the Class members and against Defendant;
- D. Award Plaintiffs and the Class members compensatory and punitive damages, and attorneys' fees and costs, including pre-judgment and post-judgment interest thereupon;
- E. An Order holding that entrance of the aforementioned odors upon Plaintiffs' property constituted a nuisance;

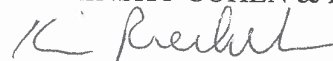
- F. Temporary, preliminary, and permanent orders for injunctive relief consistent with Defendant's permit and regulatory requirements that requires Defendant to cease emitting odors, pollutants, and air contaminants such that they no longer invade Plaintiffs' property;
- G. Such further relief as the Court deems just and proper.

JURY DEMAND

Plaintiffs hereby demand a trial by jury.

Dated: June 21, 2018

KAMENSKY COHEN & RIECHELSON



Kevin S. Riechelson
Attorney I.D. 58960
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Trenton, NJ 08608
(609) 394-8585
kriechelson@kcrlawfirm.com

LIDDLE & DUBIN, P.C.

Steven D. Liddle (*Pro Hac Vice to be filed*)

Nicholas A. Coulson (*Pro Hac Vice to be
filed*)

975 E. Jefferson Avenue
Detroit, Michigan 48207
(313) 392-0025


Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2018, 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 the 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 June 22, 2018

By: 

Kevin S. Riechelson

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

ROBIN BAPTISTE and DEXTER
BAPTISTE, on behalf of themselves and all others
similarly situated,

Plaintiffs,

vs.

BETHLEHEM LANDFILL COMPANY d/b/a
IESI PA BETHLEHEM LANDFILL, a
Delaware Corporation

Defendant.

No. 5:18-cv-2691-JFL

[Electronically filed]

JUDGE JOSEPH F. LEESON, JR.

**DECLARATION OF ROY D. PRATHER III IN SUPPORT
OF BETHLEHEM LANDFILL COMPANY'S MOTION TO DISMISS**

I, Roy D. Prather III, hereby declare as follows:

1. I am a member in good standing of the bar of the Commonwealth of Pennsylvania, and have been admitted to practice before this Court. I am a member of the law firm of Beveridge & Diamond P.C., attorneys of record for Defendant Bethlehem Landfill Company.

2. I have knowledge of the matters stated herein and respectfully submit this declaration in support of Bethlehem Landfill Company's Motion to Dismiss.

3. Annexed hereto as Exhibit 1 is the Notice of Violation from the Pennsylvania Department of Environmental Protection dated May 7, 2018.

4. Annexed hereto as Exhibit 2 are Google Maps print-outs showing satellite images of the area surrounding the Bethlehem Landfill, located at 2335 Applebutter Road, in Lower Saucon Township, Pennsylvania. Named Plaintiffs' property, alleged in the Complaint to be

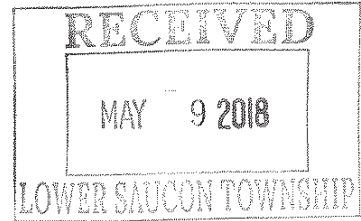
located at 397 South Oak Street, Freemansburg, Pennsylvania, is marked by a red arrow in Exhibit 2A. Other businesses, industrial interests, and other features have been automatically labeled by Google.

Dated: September 4, 2018

/s/ Roy D. Prather III
Roy D. Prather, III ID No: 306803
201 North Charles Street, Ste 2210
Baltimore, MD 21201-4150
(410) 230-1300
rprather@bdlaw.com

*Attorney for Defendant Bethlehem Landfill
Company*

Exhibit 1



May 7, 2018

NOTICE OF VIOLATION

CERTIFIED MAIL NO.: 7017 2400 0000 0920 2589

Mr. Donald Hallock, District Manager
IESI PA Bethlehem Landfill
2335 Applebutter Road
Bethlehem, Pennsylvania 18015

Re: IESI PA Bethlehem Landfill
Solid Waste Management Permit No. 100020
Lower Saucon Township, Northampton County

Dear Mr. Hallock:

As a result of an April 18, 2018 inspection at the above-referenced facility, the Pennsylvania Department of Environmental Protection ("Department") has determined that IESI PA Bethlehem Landfill Corporation ("IESI") was in violation of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, No. 97, 35 P.S. Sections 6018.101 *et seq.*, the Municipal Waste Management Rules and Regulations found at 25 Pa. Code Chapters 271 to 285, and the facility permit conditions as follows:

1. IESI failed to perform regular, frequent and comprehensive site inspections to evaluate the effectiveness of cover, capping, gas collection and destruction, waste acceptance and all other waste management practices in reducing the potential for offsite odor creation, in violation of 25 Pa. Code §§ 273.201(c)(2) and 273.218(b)(2) and Solid Waste Management Permit No. 100020 Part II Section II Condition 8.b. Specifically, site inspection logs did not include all observable leachate seeps identified during the Department's April 18, 2018 inspection.

2. IESI failed to promptly address and correct problems and deficiencies discovered in the course of inspections performed under 25 Pa. Code § 273.218(b)(2), in violation of 25 Pa. Code §§ 273.201(c)(2) and 273.218(b)(3) and Solid Waste Management Permit No. 100020 Part II Section 8.b. Specifically, at least one leachate seep was noted during the Department's February 13, 2018 inspection which was not addressed prior to the April 18, 2018 inspection.

IESI failed to implement the Nuisance Minimization and Control Plan to minimize and control conditions that are harmful to the environment or public health, or which create safety hazards, odors, dust, noise, unsightliness and other public nuisances, in violation of 25 Pa. Code §§ 273.201(c)(2) and 273.218(c) and Solid Waste Management Permit No. 100020 Part II Section 8.b. Specifically, IESI did not minimize and control potential sources of public nuisances, issues including leachate seeps, inadequate cover, flagging, odors and surface emissions identified during the Department's April 18, 2018 inspection.

ROUTING

- Council
- Manager
- Asst. Mgr.
- Zoning
- Finance
- Police
- P. Works
- P/C
- P & R
- EAC
- Engineer
- Solicitor
- Planner
- Landfill
- EMC
- Other

S
ey
web

IESI PA Bethlehem Landfill

-2-

May 7, 2018

4. IESI failed to maintain a uniform intermediate cover that prevents odors, litter and other nuisances, in violation of 25 Pa. Code §§ 273.201(c)(2) and 273.233(b)(1) and Solid Waste Management Permit No. 100020 Part II Section III Condition 3.b. Specifically, objects protruding through the cover and strong gas odors were observed in the cover area along the northern slopes of the landfill.
5. IESI failed to maintain a uniform twelve (12) inch thick layer of intermediate cover, in violation of 25 Pa. Code §§ 273.201(c)(2) and 273.233(c)(1) and Solid Waste Management Permit No. 100020 Part II Section III Condition 3.a. Specifically, areas of exposed waste were observed, including objects protruding through the cover along the north slopes, and areas of exposed waste in "low areas" surrounding gas wells EW 4-48 and EW 4-33R.
6. IESI failed to implement the gas control and monitoring plan approved under 25 Pa. Code § 273.171 (relating to the gas monitoring and control plan), and failed to effectively monitor gas collection for nuisance potential, in violation of 25 Pa. Code §§ 273.201(c)(2) and 273.292(a) and Permit 100020 Part III Section I Condition VII-1. Specifically, methane exceedances and gas odors were identified by the Department's Air Quality Program during the April 18, 2018 inspection at gas wells, leachate seeps, cover protrusions, and general surface cover areas.

Within fifteen (15) days of receipt of this notice, please submit to the Department a proposed plan and schedule that addresses the correction and prevention of the above violations. The response should be sent to my attention at the letterhead address.

You are hereby notified of both the existence of the violations as well as the need to provide for prompt correction. Under the Solid Waste Management Act, each day a violation continues is considered a distinct and separate offense. The violations noted herein may result in an enforcement action under the Solid Waste Management Act.

This Notice of Violation is neither an order nor any other final action of the Department. It neither imposes nor waives any enforcement action available to the Department under any of its statutes. If the Department determines that an enforcement action is appropriate, you will be notified of the action.

If you have any questions about this letter, please contact me at (570) 826-2434.

Sincerely,



Rachel Miller
Compliance Specialist
Waste Management Program

cc: Lower Saucon Township

Exhibit 2



Exhibit 2A: Google Maps, Satellite Image of Named Plaintiffs' Address as Alleged, 397 South Oak Street Freemansburg, Pennsylvania and Areas to the East, including the Bethlehem Landfill.

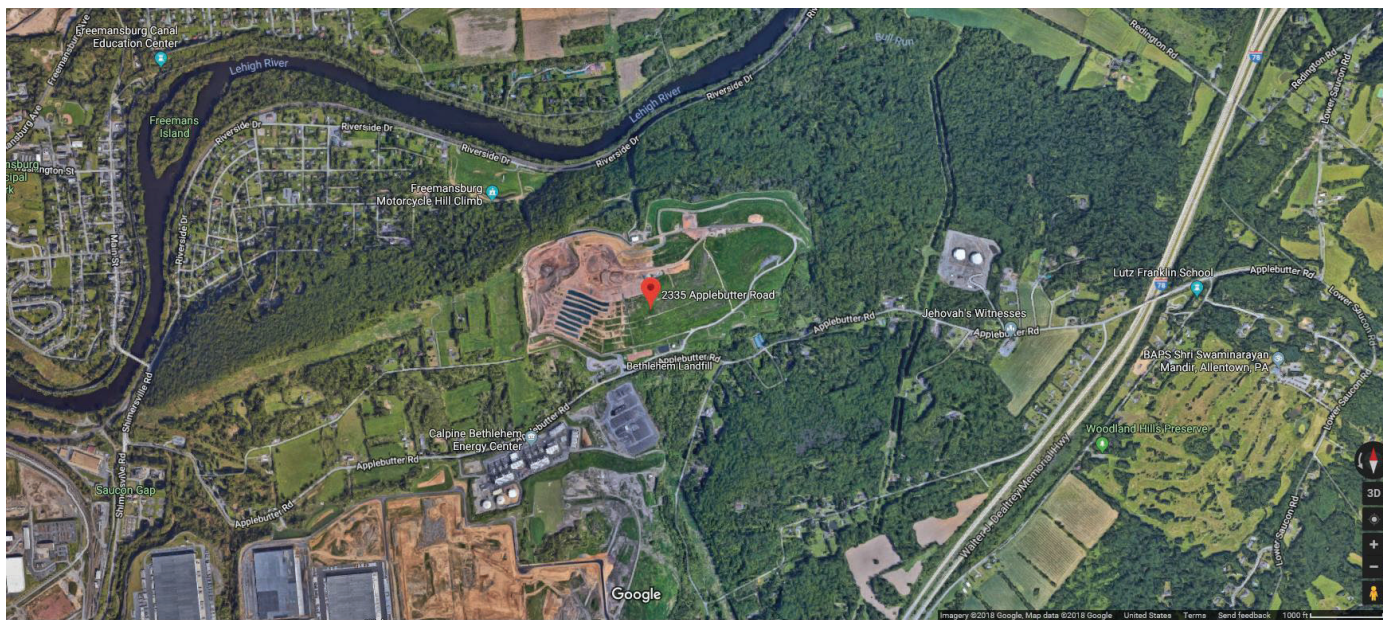


Exhibit 2B: Google Maps, Satellite Image of Bethlehem Landfill, 2335 Applebutter Road, Bethlehem, Pennsylvania 18015.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

ROBIN BAPTISTE et al, : CIVIL CASE
: :
Plaintiff : Case No. 5:18-cv-02691-CFK
: :
v. : Philadelphia, Pennsylvania
: February 19, 2019
BETHLEHEM LANDFILL : Time 1:04 p.m. to 1:55 p.m.
COMPANY, : :
: :
Defendant : :
.

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE CHAD F. KENNEY
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiff: Kevin S. Riechelison
Kamensky, Cohen & Riechelison
194 South Broad Street
Trenton, NJ 07726

For the Plaintiff: Nicholas A. Coulson
Liddle & Dubin, P.C.
975 E Jefferson Ave
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For Defendant Name: James B. Slaughter
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1350 I Street, NW Ste. 700
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For Defendant Name: John H. Paul
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477 Madison Ave, 15th Floor
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For Defendant Name: Michael G. Murphy
Beveridge & Diamond, P.C.
477 Madison Ave, 15th Floor
New York, NY 10022

For Defendant Name: Robert Michael Donchez
Florio Perrucci Steinhardt
Fader, LLC
60 West Broad Street, Ste. 102
Bethlehem, PA 18018

ESR Operator: Christopher Kurek
Clerk's Office
U.S. District Court

Transcription Service: Precise Transcripts
45 N. Broad Street
Ridgewood, NJ 07450

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

1 (Proceedings started at 1:04 p.m.)

2 CLERK: All rise please. United States District
3 Court Eastern District of Pennsylvania is now in session.
4 The Honorable Chad F. Kenney presiding.

5 JUDGE CHAD F. KENNEY: Good afternoon everyone.

6 EVERYONE: Good afternoon.

7 THE COURT: On the record, Baptiste versus
8 Bethlehem and it is 2691 of 18. Counsel for the record.

9 COUNSEL KEVIN S. RIECHELSON: Your Honor, Kevin
10 Riechelson from the firm Kamensky, Cohen, and Riechelson
11 for the Plaintiff.

12 COUNSEL NICHOLAS A. COULSON: Good afternoon,
13 Your Honor. Nick Coulson from Liddle and Dubin for the
14 Plaintiffs.

15 COUNSEL MICHAEL G. MURPHY: Good afternoon, Your
16 Honor. Michael Murphy, Beveridge and Diamond for the
17 Defendant.

18 COUNSEL JOHN H. PAUL: Good afternoon, Your
19 Honor. John Paul, Beveridge and Diamond for the
20 Defendant.

21 COUNSEL ROBERT MICHAEL DONCHEZ: Good afternoon,
22 Your Honor. Robert Donchez, Florio, Perrucci, Steinhardt,
23 and Cappelli on behalf of the Defendant.

24 COUNSEL JAMES B. SLAUGHTER: James Slaughter,
25 Beveridge and Diamond for the Defendant.

1 THE COURT: Alright, are you ready to proceed?

2 MALE SPEAKER: Yes, Your Honor.

3 THE COURT: Okay. Counsel you filed a motion to
4 dismiss, you argue it.

5 MALE SPEAKER: Thank you, Your Honor. Do you
6 have a preference?

7 THE COURT: Everybody else may be seated. You
8 can stand, sit, whatever. Whatever your preference.

9 MALE SPEAKER: Thank you, Your Honor.

10 MR. MURPHY: Judge Kenney, may it please the
11 Court, Michael Murphy of Beveridge and Diamond for the
12 Defendant, Bethlehem Landfill Company. Your Honor
13 Bethlehem Landfill has moved to dismiss Plaintiff's claims
14 for public nuisance, private nuisance, and negligence. In
15 addition, the motion separately seeks dismissal of the
16 claim for punitive damages and for injunctive relief. For
17 purposes of this motion, we do not address merits. The
18 motion is based on the facts alleged in the complaint.
19 The facts are as follows: Plaintiffs Robin and Dexter
20 Baptiste alleged that odors from the Bethlehem Landfill
21 Operations are interfering with the use and enjoyment of
22 the property. They do not claim that the harm they suffer
23 is unique in any way. To the contrary, they assert in the
24 complaint that the harm they suffer is alleged to be
25 shared with approximately 8400 other households spread out

1 over a 19 square mile area. Importantly also the
2 Baptiste's home is not close to the Bethlehem Landfill.
3 They live approximately a mile and a half west of the
4 landfill, across the Lehigh River with varied topography
5 and different land uses in between. As a result, the
6 Plaintiffs do not assert and they have no basis to assert
7 that the harm they have suffered due to the alleged odors
8 is different or distinct compared to that of other members
9 of the public including other residents and property
10 owners in the area. The Baptiste's are the named
11 Plaintiffs in this case Your Honor. They must satisfy the
12 element of a tort claim under Pennsylvania law. Given the
13 facts above, they do not have a viable claim against our
14 client. Because they don't have a viable claim, we submit
15 that the complaint must be dismissed. Your Honor, I'll
16 turn to each claim.

17 Public nuisance. Their public nuisance claim
18 fails for two reasons and I'll address each in turn.
19 First, the Plaintiff pursuing a private claim for public
20 nuisance must have suffered a special or particular harm
21 compared to that suffered by the general public. The
22 reason for this is described in the Society of Prevention
23 of Cruelty to Animals case that -- where the Supreme Court
24 of Pennsylvania explained that public nuisances are the
25 province of quote, "appropriate public authorities." That

1 is the default position regarding public nuisances under
2 Pennsylvania law. An impacted party always has the
3 ability to engage with the appropriate public authority to
4 address a perceived public nuisance, in this case the
5 public authority is known, it's the Pennsylvania
6 Department of Environmental Protection. And, the
7 Plaintiffs acknowledge in their complaint in their other
8 papers that DEP has direct regulatory and enforcement
9 authority over Bethlehem Landfill. Because of this, the
10 availability of a private claim for public nuisance is
11 limited, and the decision in One Meridian Plaza is
12 directly on point. That case, Your Honor, involved a
13 significant fire that occurred at the One Meridian Plaza
14 complex in the early 1990s. There were a number of
15 lawsuits that followed and they were consolidated into one
16 matter. Several classes were proposed including one for
17 businesses and property owners who alleged that access to
18 their properties was limited or blocked due to the fire.
19 In discussing public nuisance, the Court explained that
20 quote, "where there are a large numbers of Plaintiffs, the
21 harm those Plaintiffs suffered is not special." Applying
22 that basic principal the Court ruled that 10 businesses
23 along the same street as One Meridian Plaza would be
24 permitted to amend their public nuisance claim to see if
25 they could allege facts showing that their harm was

1 special compared to others. Then it said quote, "all
2 other Plaintiffs were not uniquely effected and the
3 inclusion of those -- these parties would increase the
4 number of Plaintiffs so as to generalize the harm."
5 Therefore, all other Plaintiffs' claims for public
6 nuisance are dismissed. When we apply these principals
7 here, we see there's a problem based on the facts and the
8 allegations in the complaint. The Baptiste's allege a
9 harm that is shared with over 8000 other households and
10 that is fatal to their public nuisance claim because the
11 harm by definition is generalized and not special. In ter
12 -- in terms of the shared harm they talk about inability
13 to use their property, they talk about inability to walk
14 their dogs, they talk about preventing children going
15 outside to play. These are the shared harms alleged in
16 the complaint that are spread across, according to the
17 complaint, 8000, over 8000 households. The public
18 nuisance claim is also flawed for another reasons. The
19 Baptiste's live one and a half mile from the landfill and
20 they do not and have not alleged a distinct harm in
21 comparison to other households and they make no allegation
22 in the complaint in that regard. They are not like the 10
23 businesses in One Meridian Plaza that were allowed to
24 amend their complaint. They're like all the other
25 Plaintiffs who had their public nuisance claim dismissed.

1 The Plaintiffs in their opposition cite too the Beck (ph)
2 case. That's a, an unpublished District Court case
3 applying Pennsylvania law, not -- excuse me, applying Ohio
4 law, not Pennsylvania law. We, we submit that that case
5 has no relevance to this case. For the Court to embrace
6 the decision in Beck applying Ohio law, it necessarily
7 would have to reject the One Meridian Plaza case applying
8 Pennsylvania law and we do not see a basis for doing that.
9 Because the complaint alleges a generalized harm, suffered
10 by the Baptiste's and thousands of other households, the
11 Plaintiff's public nuisance law we submit should be
12 dismissed. Public -- their, their public nuisance claim
13 also isn't viable because the complaint does not include
14 allegations showing a violation of a right of, of the
15 general public distinct from what the Baptiste are
16 alleging. The Marauz (ph) case that we cite in our papers
17 is directly on point Your Honor. There the Court
18 dismissed the public nuisance claim because the complaint
19 failed to quote, "include a set of factual allegations
20 describing how the community at large had been effected by
21 the Defendant's actions." Just like the Plaintiffs are
22 trying -- attempting to do here in their opposition papers
23 to our motion, the Plaintiff in Marauz tried to articulate
24 such a violation of a public right in their opposition
25 papers. There are two problems with that. First, the,

1 the, the complaint here and there consists of conclusory
2 characterizations on this issue as opposed to factual
3 allegations, and second, in attempting to show how the
4 general public has been effected by their opposition -- in
5 their opposition papers, they fair a little better because
6 they don't cite to any allegation in the complaint because
7 those allegations don't exist in the complaint. And, we
8 would cite -- we would refer to the Zimmerman (ph)
9 decision in the Third Circuit where the Court said you
10 don't get to amend your complaint through an opposition
11 paper on a motion to dismiss. Your Honor, the complaint
12 doesn't include any allegations showing a violation of a
13 public right from which the Baptiste -- different from
14 which the Baptiste allegedly suffered so the public
15 nuisance claim for that separate reason should be
16 dismissed.

17 Turning to the private nuisance claim.
18 Plaintiffs assert a private nuis -- nuisance claim on
19 behalf of over 8000 households and the Baptiste themselves
20 are not proximate to the landfill. They live, as I said,
21 one and a half miles west of the landfill. A private
22 nuisance claim does not exist under these circumstances.
23 The Pennsylvania Supreme Court in Phillips v. Donaldson
24 explained the difference between a public and a private
25 nuisance that's critical to this motion. The difference,

1 and I quote, "the difference between a public and a
2 private nuisance does not depend on the nature of the
3 thing done but upon the question of whether it effects the
4 general public or merely some private individual or
5 individuals." More guidance is also found in the
6 Philadelphia Electric case we cite in our papers where the
7 Third Circuit explained in Pennsylvania law said private
8 nuisance law is intended quote, "as a means officially
9 resolving conflicts between neighboring contemporaneous
10 land uses." The implication of these two decisions is
11 clear. Private nuisance Plaintiffs need to be relatively
12 few in number and they need to be near the alleged source
13 of the nuisance. In the dozen or so cases that we cite in
14 our motion papers reflect this principal. They all speak
15 to situations where the Plaintiff asserting a private
16 nuisance claim was near, adjacent, or neighboring in
17 relation to the source of the nuisance. The Plaintiffs
18 here have alleged that Bethlehem activities have affected
19 thousands of people stretching out two and half miles in
20 every direction from the landfill. The Baptiste
21 themselves are not close to the landfill. Under the
22 distinction in Phillips v. Donaldson and the other cases
23 we cite, those allegations do not state a viable claim for
24 private nuisance. The Plaintiffs simply ignore our case
25 law in their opposition papers and refer to two sections

1 of the restatement. Those two sections do not answer the
2 question. One relates to the type of conduct by a
3 defendant that might give rise to a nuisance claim and the
4 other is a list of Plaintiffs based on their possessor --
5 possessory rights to land that makes them eligible to
6 potentially assert a private nuisance claim assuming all
7 other elements are satisfied. And, since the complaint
8 alleges that the odors impact thousands of households
9 stretching out two and a half miles from the landfill, the
10 Baptistes are not close or proximate to the landfill, they
11 don't have a viable private nuisance claim and, and for
12 that reason it should be dismissed.

13 Your Honor, we know that on Friday the Plaintiffs
14 submitted a copy of a decision, a state court decision,
15 it, it's the Keystone Landfill case and I'd just like to
16 touch on that because it's relevant here. That's of
17 course an, an unpublished state court decision that's not
18 binding on this Court and it reaches several conclusions
19 that, that we believe are in error to the extent they are
20 addressing arguments in our motion. The first thing we'd
21 note Your Honor is that the Court did not address public
22 nuisance. The reason for that is that complaint did not
23 include public nuisance claim. The main argument advanced
24 by the Keystone defendant was that the complaint
25 constituted an impermissible collateral attack on the

1 landfill's permits. This is not an argument we made in
2 our papers. On the issue of private nuisance, the Court
3 primarily focused on whether the complaint sufficiently
4 alleged the Plaintiffs' ownership or possessory interest
5 in, in support of the claim, and again, this is another
6 argument we have not made in our papers. Then in a short
7 paragraph at the end of that section discussing private
8 nuisance, the Court without citing any authority has
9 stated that there is no authority regarding a neighboring
10 requirement associated with private nuisance.
11 Respectfully Your Honor, as our motion papers show,
12 there's ample authority for that and in fact that's
13 exactly what the Phillips v. Donaldson and Philadelphia
14 Electric Company decisions are getting at. This is the
15 notion that in, in the realm of private nuisance, you're
16 talking about a few impacted parties and, and they need --
17 and they're proximate to the alleged source of the
18 nuisance, otherwise, you're in a different realm. You're
19 in the public nuisance realm where the impacts are broad
20 impacting the general public as a whole. The only case
21 cited in the Keystone decision is the (Indiscernible)
22 case, which we cite in our papers. The interesting thing
23 about that case is it was a land -- alleged nuisance
24 associated with landscaping activities and the Plaintiffs
25 were all adjacent or nearby property owners, so that court

1 wasn't called upon to answer that question.

2 The second thing I'd like to note with regard the
3 Keystone case is that it doesn't at all address on, on the
4 issue of private nuisance the notion articulated in
5 Phillips where the court explained that Plaintiffs
6 necessarily for private nuisance are few in number. The,
7 the, the Keystone decision simply doesn't address that
8 issue. So, based on, on the, on the Keystone decision's
9 failure to address this authority, we believe it has no
10 persuasive import in relation to our motion.

11 Your Honor, turning to negligence. As Your Honor
12 knows, a negligence claim, an essential element is that
13 there be duty of care. If there's no duty of care,
14 there's no negligence claim that's viable. The duty that
15 Plaintiffs allege in their complaint does not exist under
16 Pennsylvania law. This issue is squarely addressed in the
17 Gilbert (ph) case, which we cite in our papers, and there
18 the Court explained quote, "that there is no duty under
19 Pennsylvania law that requires a property owner to use his
20 or her property in such a manner that protects neighboring
21 landodors -- owners from offensive odors or other nuisance
22 conditions." The Plaintiffs relay in opposition on the
23 Bruny (ph) case. The Bruny case was cited to Pennsylvania
24 Storage Tank and Spill Prevention Act and in that case
25 the, the Court explained that there was a negligence per

1 se claim based upon the violations of that act. In our
2 reply we cite several cases that explains the difference
3 between the Storage Tank Act and the Solid Waste
4 Management Act, which governs the landfills operations,
5 and both of those cases clearly explain, explain that
6 while the Storage Tank Act may create a private right of
7 action in relation to a nuisance claim quote -- excuse me,
8 a negligence claim, I'm quoting from both of those
9 decisions, "violations of the Solid Waste Management Act
10 do not provide basis for a negligence claim," so the, the
11 Bruny case and the Storage Tank Act don't disturb the
12 notion asserted in the Gilbert case that there is no duty
13 of care in relation to the allegations asserted in this
14 complaint.

15 The second issue or flaw with the negligence
16 claim here is that it relates to the use of when. The
17 complaint is alleging that Bethlehem Landfill's
18 landfilling operations have caused odors that have
19 impacted the area. So, there's no question that as a
20 factual foundation that it relates to the use of land.
21 There's also no question that, that's a legally permitted
22 use. Your Honor, the Bethlehem Landfill has been in
23 existence for decades, it served the community, the city
24 of Bethlehem, the, the Township of Lower Saucon where
25 it's, it's located for many years serving a vital public

1 interest in relation to waste disposal needs. And, and,
2 that's relevant here Your Honor because they don't contest
3 that this is a lawfully permanent facility, and in fact,
4 they elude to it in their papers. What we know from the
5 Horn (ph) and Gilbert decisions that we cite in our papers
6 is that when there's a lawful activity occurring on
7 property, a negligence claim cannot be based solely on
8 facts that establish a nuisance claim and that's what we
9 have here. We have at, at it's core an allegation that
10 Bethlehem Landfill's use of its property has caused a
11 condition that Plaintiffs assert is harming them. It is
12 not anything other than that. Because of that, if there's
13 a claim at all, it's a nuisance claim and not a negligence
14 claim, and Pennsylvania law as articulated in Horn and
15 Gilbert preclude a negligence claim under these
16 circumstances. The Keystone case does discuss in a
17 footnote towards the end the issue of whether the
18 negligence claim is merged into the nuisance claim and
19 it's, it's, it's only a few sentences and a footnote.
20 They don't -- the Court doesn't address any authority.
21 What the Court said was nuisance -- the negligence claim
22 does not merge into the nuisance claim because it has
23 different elements and the Court specifically zeroed in on
24 the duty of care element associated with a negligence
25 claim. But Horn and Gilbert you show that you don't look

1 at the elements of the claims to determine whether or not
2 ne-negligence is viable, you look at the set of facts that
3 underlie the claims, and if there's a common set of facts
4 that underlie all the claims and it relates to the use of
5 property, then the negligence claim is not viable as a
6 matter of law. So, we would submit that the Keystone
7 decision and, and again there's no authority in that
8 footnote, it's, it's right towards the end of the
9 decision, is not, is not applicable here or perhaps maybe
10 in error because Horn and Gilbert are clearly on point and
11 show that there's no viable negligence claim here.

12 Your Honor if -- based on, based on our motion,
13 we believe each of the claims in the complaint should be
14 dismissed and the complaint therefore should be dismissed
15 in its entirety. But, in the event that one of the claims
16 survive for now, we submit that under the doctrine of
17 primary jurisdiction, the, the demand for relief for
18 injunctive -- excuse me, the demand of injunctive relief
19 in this complaint should be dismissed. The reason for
20 this is the following: The -- in their prayer for relief,
21 the Plaintiff's demand quote, "orders for injunctive
22 relief consistent with Defendant's permit and regulatory
23 requirements." So, the, the prayer for relief -- for
24 injunctive relief I should say, is specifically linked to
25 permits that have been issued by the Pennsylvania

1 Department of Environmental Protection and the
2 requirements associated with that permit. In this
3 instance, we believe that the Court, in its discretion,
4 should invoke the primary jurisdiction doctrine and
5 dismiss the claim for injunctive relief. Every aspect of
6 Bethlehem Landfill's operation is, is subject to DEP
7 oversight including the or-order of controlled measures
8 that are implemented at the landfill. They -- under the
9 Solid Waste Management Act, the Department of
10 Environmental Protection can investigate the landfill, it
11 gets to issue permits and modify permits in relation to
12 the landfill, it gets to issue enforcement orders for the
13 landfill, it gets to assess penalties under the Solid
14 Waste Management Act if there are violations, and it may
15 pursue injunctive relief. And in fact, Your Honor, the
16 complaint itself proves the point. The complaint refers
17 to six compliance orders that have been issued by DEP over
18 the years. Why -- while we don't believe that supports
19 the merits of their claims because five of the six for
20 example are outside -- well outside the statute of
21 limitations period and the, the six one, when you look at
22 the findings, which we submitted on our, our -- in our
23 motion papers, they don't, they don't have a finding
24 regarding outside orders, what it does show is that DEP
25 will act if there is an issue it finds at the landfill and

1 it will under its authority under the Solid Waste
2 Management Act. The landfill also has an air permit
3 that's governed by federal and state law and so the, the
4 DEP oversees that air permit as well, and if it sees a
5 violation, it has the authority to act and will act if it
6 makes a finding that there has been a violation. Your
7 Honor we believe that in this instance because of the
8 nature of the injunctive relief they've requested, it's
9 appropriate to invoke the primary jurisdiction doctrine.
10 As the Er -- county of Erie case explains, courts should
11 defer to demands for injunctive relief to agencies with
12 primary jurisdiction. This will quote, "protect the
13 integrity of the re-regulatory scheme" and quote, "promote
14 consistency and uniformity in the area of administrative
15 policy." Your Honor if you're going to step in and impose
16 injunctive relief, you're stepping into the toes -- into
17 the shoes I should say, of Pennsylvania DEP. Pennsylvania
18 DEP with due respect has the expertise to, to regulate and
19 impose injunctive relief if it deems fit under the
20 authority it has under state and federal law. We would
21 submit that for you to step in, Your Honor, would, would
22 basically contradict and undercut the agency's authority.

23 In Plaintiff's opposition they raise a different
24 issue. Plaintiffs claim that their demand for jun --
25 injunctive relief is not conflict preemptive, but this is

1 a separate and distinct issue from primary jurisdiction.
2 In essence, we understand that, that primary jurisdiction
3 is, is, is pru-prudential exercise in the Court's
4 authority and we assert that the, the, the facts are
5 present here to allow the Court to do that in this
6 instance. Again, our demand on this, on this issue is not
7 seeking to prevent them from seeking damages merely to
8 prevent inconsistent injunctive obligations being imposed
9 on the landfill separate and distinct from what DEP would
10 require. In essence, when we -- in reviewing the
11 Plaintiff's opposition, we don't see a substantive
12 opposition at all because they're arguing it -- they're
13 making an argument we have not made or trying to impose an
14 argument we've not made so we would submit the -- that,
15 that primary jurisdiction should be invoked here.

16 Lastly, Your Honor, I want to address the issue
17 of punitive damages. The Plaintiffs here are focusing in
18 on the effects of Bethlehem Landfill's operations. They
19 are not contending that Bethlehem Landfill's activities
20 are unlawful in anyway. As I mentioned before, this is a
21 facility that's been in operation for decades providing
22 critical public service in the City of Bethlehem and
23 surrounding areas. The standard under Pennsylvania law
24 for punitive damages is high. The Plaintiff must allege
25 facts that show an evil motive or reckless indifference

1 and that's based on the Supreme Court decision of Phillips
2 v. (Indiscernible). The (Indiscernible) decision, which
3 we mentioned before, explained that when there's a lawful
4 business activity, the (indiscernible) -- the Court
5 described the Defendant's activities as follows:
6 (indiscernible) conduct in engaging in a legitimate
7 business can hardly be viewed as evil, outrageous, or
8 indifferent. The situation is exactly the same here Your
9 Honor. The, the knowledge -- the Marose (ph) case, which
10 we also cite on this issue, explains that even if a, the
11 business defendant had knowledge of the effects of its
12 operations, that is insufficient to show evil intent or
13 reckless indifference. When you look at the allegations
14 in the complaint beyond characterizations of the
15 Defendant's conduct, there are no facts whatsoever to show
16 anything that rises to the level to support the punitive
17 damages claim. And so, we believe that under the standard
18 articulated in Marose in particular, which is a very
19 similar fact pattern, that there's, there's just, the --
20 (indiscernible) allegations about intent or knowledge are
21 just simply inefficient to survive a motion to dismiss and
22 we would ask that you follow the reasoning in the Marose
23 case and dismiss the punitive damages claim. The
24 Plaintiffs in their opposition really don't offer anything
25 to counter that authority. For example, they cite too the

1 Hutchinson (ph) v. Luddy (ph) case but that case is just
2 remarkably different. That was about a known sexual
3 molestation of children and, and so the very act itself is
4 evil and that is not the situation here where Bethlehem
5 Landfill is engaged in unlawful business activity. So, we
6 don't believe there's any punitive damage basis here
7 alleged based on the allegations in, in the complaint
8 where we ask that they be dismissed, Judge Kenney, there
9 are ample reasons to dismiss the Plaintiff's claims for
10 public nuisance, private nuisance, and negligence here.
11 The dismissal requires no novel extension of law. Our
12 motion merely asks that the basic principles of
13 Pennsylvania law be applied to the facts as alleged in the
14 complaint, however, if the Court does determine that any
15 of the claims should survive for now then we would submit
16 that Plaintiff's demands for injunctive relief and
17 punitive damages be dismissed at this time. Thank you,
18 Your Honor.

19 THE COURT: Thank you.

20 MR. COULSON: Good afternoon, Your Honor.

21 Briefly I just want to thank the Court for accommodating
22 the scheduling change that, that we requested, it's much
23 appreciated. Your Honor, I believe that at the end of
24 brother counsel's presentation there we heard what
25 might've been a bit of an admission. He noted that, that

1 they're not asking for any novel extensions of the law,
2 but if we look at the actual arguments that are being made
3 here, in order to find for the Defendant, this case would
4 become the case that represents the proposition that there
5 is an upper limit on the number of parties who can claim a
6 special injury under the public nuisance standard.
7 Similarly, there is no existing case that establishes that
8 the number of persons impacted has a threshold issue for a
9 private nuisance cause of action. There's also no case
10 that establishes the distance from the source of the
11 nuisance as a threshold issue for private nuisance and
12 there's no case that aggregates the traditional common law
13 duty of due care that arises anytime one carries out an
14 affirmative action like those at issues here. So, these
15 are all extensions from the law that this case would be a
16 truly remarkable case if the Court were to grant Defendant
17 the things that it's asking for here. While this is a
18 sort of niche type of case and it's a niche area that I
19 practice in, these are not rare or unique cases. I'm
20 litigating four similar cases currently in state court in
21 Pennsylvania and this would be a sea change in the, the
22 jurisprudence on these issues. These are simply -- these
23 are novel issues, these are novel extensions of, of, of
24 the law and, and what it appears that the Defendant is
25 trying to do, in a number of instances, is take commentary

1 about the nature of a nuisance action, both public and
2 private, and then seek to morph that into a, a threshold
3 requirement or an element of the cause of action to say
4 that we, we've not pled these, these causes of action and
5 that's -- it's simply just not what's required. With
6 respect to a public nuisance and, and the special injury
7 requirement, under the One Meridian Plaza opinion, which
8 by the way is approximately a 26 year old case, what is of
9 key importance is the nature and the degree of the harm
10 and here the nature of the harm is property damage and the
11 degree of that harm as we allege is severe. And, when
12 compared with the relevant community, which is those who
13 have not suffered property damage, there is indeed a
14 special injury. It's the nature of that injury which
15 makes it a special injury, not the number of people that
16 are affected. Now, the court in that case does discuss
17 that generally and, and frankly what, what seems to amount
18 to commentary, I believe that the above-cited cases and
19 the statement are all in agreement, where there are a
20 large number of Plaintiffs, the harm those Plaintiff's
21 suffer is not special. But that doesn't undertake any
22 analysis of the difference between the affected population
23 generally and those who are subject to this particular
24 type of harm, that case also was limited or -- in scope
25 because of the economic loss doctrine which is an

1 important consideration that's not present here. Here
2 we're talking about property damage, we're talking about a
3 discrete concrete harm that these people have suffered as
4 compared with the community at large whose impacts have
5 simply been the inability to breathe fresh air. And,
6 it's, it's worth noting that in the 26 years since that
7 case was decided, the Defendants have been able to cite no
8 authority for the proposition that there is some
9 numerical, strict numerical upper limit on the number of
10 people who can claim this harm. Again, the, the focus
11 comes back to the nature and the degree of the harm. With
12 respect to the private nuisance claim, Your Honor, it was
13 stated that we simply didn't respond to this notion that
14 there is a numerical or a proximity limit. That's because
15 there simply isn't one. It's not a threshold issue --
16 it's not a threshold issue frankly in any jurisdiction
17 around the country from -- in my experience because it's
18 the nature of the harm that's at issue, again here, this
19 is a possessory interest in property that's being
20 interfered with and it's the nature that's, that's the
21 determinative effect, not the number of people who are
22 impacted. And, and as the court in the Keystone case that
23 we submitted got right, there, there is no requirement
24 about the distance that one must be from the facility.
25 It's certainly not adjacent. Obviously it has to be near

1 enough that it's being impacted as, as we allege is the
2 case here, but there's no requirement that it be within
3 any particular distance and the Court would be, would be
4 breaking new ground if it were to find that, that's the
5 case. I'd also note that the Defendant noted that there's
6 a, a river and several, several intervening land uses
7 between the landfill and the Plaintiff's complaint.
8 That's not part of the record. That's not before the
9 Court on this motion.

10 With respect to our negligence claims Your Honor,
11 and for this I'll apologize because I think we got a bit
12 into the weeds in our briefing on this issue, there's a,
13 an absolute mess of case law in the State of Pennsylvania
14 as it pertains to the, the establishment of a duty of care
15 under the Solid Waste Act. Upon further review of that
16 issue, it does appear that the more recent and more
17 comprehensive analysis of that states that no it cannot be
18 the basis of, of a nuisance per se action. But there's
19 nothing about the Gilbert or any other case that abrogates
20 the traditional run of the mill duty of care that a person
21 or entity owes in the state of Pennsylvania when it
22 undertakes affirmative acts. This is not like Gilbert
23 where what we're talking about is functionally a form of
24 landowner liability. This is a Defendant who has
25 undertaken affirmative acts, bringing in waste, burying

1 that waste, and then failing to take the requisite
2 measures to do it with due care as do operators of
3 landfills around the country to control its emissions and
4 prevent it from injuring others. So, this is the, the run
5 of the mill negligence duty that, that one has when one
6 undertakes an affirmative act and that, that standard has
7 been reaffirmed as of last year by the Supreme Court of
8 Pennsylvania in the case of Dittman v. UPMC and that's 196
9 A.3d 1036. And so, what that case stands for is a
10 proposition that, that duty exists independent of any
11 particular landowner duty that, that was addressed as in
12 Gilbert. And so, the fact that it's the same type of harm
13 that we're talking about here, odors, doesn't mean that,
14 that duty is abrogated are that the Defendant is relieved
15 of that duty. In addition, with respect to the negligence
16 claim, there's this issue that it's -- the argument that
17 it's duplicative of the nuisance claims, and I would point
18 out obviously that one, it can only be duplicative in the
19 alternative. That is that if the, the, the nuisance
20 claims survive Defendant's motion, then the negligence
21 claim could be argued to be duplicative except for the
22 fact that there are different facts, not only different
23 allegations but different facts underlying the negligence
24 claim than the nuisance claim. The ne -- the, the
25 nuisance claim does not require that the Defendant engage

1 in any particular conduct, it's concerned with the effects
2 on the Plaintiff. The negligence claim makes clear that
3 we allege that there are particular standards that the
4 Defendant is required to adhere to, there are particular
5 measures that the Defendant is required to take in order
6 to control the emissions from its landfill, and it has
7 failed to do so. And so, those factual allegations are
8 central to the negligence claim but they're not
9 necessarily -- they're not necessary for the nuisance
10 claims. I'd also like to address that the brother's
11 counsel contention, that we're not contending that there's
12 -- this is an unlawful operation. Certainly, we're not
13 contending that the landfill exists in violation of the
14 law, but it is indeed an unlawful operation. We cite
15 myriad complaints -- I'm sorry, myriad violations that
16 have been issued by the state regulatory authority
17 (indiscernible) up here indicating that this, this
18 landfill is not operating according to state law and not
19 operating indeed pursuant to its own permits in a
20 satisfactory way. So, we are talking about functionally
21 an unlawful operation and part of the reason that, that
22 lengthy history of violations is so important is because
23 of this issue of reckless indifference as it relates to
24 the punitive damages. The, the Marose case is -- which is
25 a case I was involved in, did not involve the same lengthy

1 history of violations. It was not so abundantly clear,
2 that was a facility that had only recently reopened, it
3 hadn't been operating for a number of years prior to the
4 initiation of the case. And, in this instance it's very
5 clear that if the Defendant didn't change its landfilling
6 practices, that if it didn't improve its pollution control
7 technology, it knew exactly what the impacts were going to
8 be on the community, they were, they were longstanding and
9 well documented and the Defendant demonstrated the
10 requisite reckless indifference to the effects of its
11 conduct. It doesn't require something so shocking as
12 child molestation, it doesn't require something that is
13 evil and utterly shocks the conscious, it just requires
14 reckless indifference. And, we submit that when a
15 Defendant is so plainly on notice of the effects of its
16 conduct and yet it continues to, to engage in that conduct
17 that demonstrates the requisite reckless indifference to
18 the, the, the plight of the Plaintiff. Your Honor, I have
19 nothing further unless the Court has questions.

20 THE COURT: Thank you, Counsel.

21 MR. MURPHY: Your Honor, may address a few points
22 in rebuttal?

23 THE COURT: You may.

24 MR. MURPHY: Thank you. Your Honor -- I'm not as
25 tall as Mr. Coulson. Your Honor, to accept Plaintiff's

1 arguments in relation to the motion to dismiss a nuisance,
2 you'd have to basically completely disregard what the
3 Pennsylvania Supreme Court explained in Phillips v.
4 Donaldson and this goes to the issue of how many people
5 are affected. It's absolutely clear that if you're
6 talking about an impact, an effect that spreads across the
7 general public as a whole, you're in the realm of public
8 nuisance. If you're in a situation where the activity is
9 affecting one or a few people, then you're in the realm of
10 private nuisance. That's exactly what the Supreme Court
11 in Phillips v. Donaldson explained. Now, it's true there
12 may not be a decision that there's a magic number.
13 There's no, there's no decision that says if you get above
14 20 you may -- you might be in public nuisance but you're
15 not in private nuisance realm, but that's really not at
16 issue here. The allegations in the complaint say that the
17 Baptistes' are suffering a harm that they share with 8400
18 other households in the area, that's not even a close
19 call. So, if there's any nuisance present here, and again
20 this isn't about the merits, this is based on the
21 allegations in the complaints, if there's any nuisance in
22 the picture here, it necessarily has to be a public
23 nuisance. And the One Meridian -- excuse me, what, what
24 we're seeing here is a situation where Plaintiffs are
25 trying to shave the edges but the edges have been blown

1 out of the water when you're talking about thousands of
2 people harmed in the same way. And so, the special or
3 distinct injury requirement is exactly the issue here and
4 the Baptiste who live -- again, they're not like One
5 Meridian Plaza where there were 10 business owner,
6 property owners on the same street as One Meridian Plaza
7 where the fire occurred where the court found that they
8 might have suffered a substantial special injury and gave
9 them the opportunity to amend the complaint. The Court
10 affirmatively dismissed all other nuisance claims in that
11 case because it made -- it, it explained it clearly, if
12 the harm is generalized, then you cannot possibly show a
13 special harm. When you're talking about 8400 households,
14 it's a generalized harm. It doesn't matter if it's a
15 segment of the public at large, property owners,
16 residences. One Meridian Plaza was assessing a, a clia --
17 a set of claims, nuisance claims for businesses and
18 property owners. That wasn't on behalf of the general
19 public at whole it was on behalf of a segment of the prop
20 -- of, of the public as a whole. So, the One Meridian
21 Plaza case, yes, it's 26 years old, but there's no
22 authority saying that that's not -- there's no subsequent
23 decision saying that that's not property authority today.
24 And, it's entirely consistent with what, with Phillips v.
25 Donaldson and the Philadelphia Electric decisions that we

1 cite in our papers. On the issue of negligence Your
2 Honor, the case itself explains that -- it related to the
3 use of biosolids, sewage sludge on farms, and the case
4 itself explains that, that had to be a permitted activity,
5 just like the landfill operation is a permitted activity
6 by the Pennsylvania DEP, the use of biosolids is similarly
7 authorized by Pennsylvania DEP so the situations aren't
8 dissimilar at all. There was a lawful activity that was
9 occurring and the, the, the Plaintiffs allege that odors
10 were impacting them, and the Court explained that you
11 don't have a negligence claim. There is no duty
12 recognized under Pennsylvania law, that's a legal issue.
13 And, then the other issue that -- this notion that well,
14 they're stating their claims are the alternative. That's
15 not relevant Your Honor. The underlying facts here as
16 alleged in the complaint relate to Bethlehem Landfill's
17 use of its property and the harm they're claiming as a
18 result of that use. The -- Mr. Coulson was referring to,
19 you know, facts on the edge of -- edges of the issue that
20 relate to the different elements of the claims. Horn and
21 Gilbert clearly state that when you're talking about a
22 legally permitted use on a property and the, and the, the
23 arena of facts are the same for all claims, you do not
24 have a negligence claim. If anything, you have a nuisance
25 claim and I'll point to the fact, Your Honor, that

1 regarding the alternative issue, in Gilbert the nuisance
2 claim was also dismissed so it wasn't a situation where
3 the court concluded that I'm dismissing your negligence
4 claim because you still have a nuisance claim. Both of
5 them were dismissed so that's not the relevant inquiry.
6 The relevant inquiry with respect to the negligence claim
7 is solely whether it was related to a lawful use of
8 property and the common set of facts were alleged in
9 support of both claims. Regarding the reckless
10 indifference argument, Your Honor, the Plaintiff's counsel
11 made, the Marose case that they were involved in is quite
12 clear, knowledge about the effects of the activity does
13 not rise to reckless indifference or evil motive to
14 support a punitive damages claim. We're relying on that
15 and the other case law in motion papers to show that just
16 accepting the facts alleged in the complaint there is no
17 basis to assert punitive damages claim. Thank you, Your
18 Honor, if you have no questions.

19 THE COURT: Thank you.

20 MR. COULSON: Your Honor, if I might just very
21 briefly.

22 THE COURT: Sure.

23 MR. COULSON: Just very briefly two points. One
24 is that the import of the argument that the Defendant is
25 making here and, and very literally speaking, this is the

1 import of that argument is that, if you are going to
2 create a nuisance, so long as you make sure that, that
3 nuisance impacts enough people severely enough, you cannot
4 be held accountable for it, that's a preposterous outcome.
5 It's -- because if, if there's too many people they can't
6 sue for private nuisance and if there's too many people,
7 none of them have a special injury to allow them to sue
8 for public nuisance, so perhaps if you have a small
9 nuisance and you, you impact a very small number of people
10 severely, then you might be sued but as long as you cross
11 some magical threshold, at some point your liability is
12 extinguished. That cannot possibly be a just result. And
13 then Your Honor just once more I would, I would reiterate
14 the salient difference between the Gilbert case is that
15 we're talking about the duty that arises when, when one
16 acts affirmatively versus a passive duty that arises
17 through the ownership of property where the manure's being
18 spread. Thank you, Your Honor.

19 MR. MURPHY: I apologize Your Honor. Can I just
20 make one more point?

21 THE COURT: Mm-hmm.

22 MR. MURPHY: Your Honor, this motion that we're
23 claiming that there are just a miniscule set of facts that
24 could support a private or public nuisance claim, it's
25 just not the case. The complaint was filed with the

1 Baptistes as the named Plaintiffs. They're the ones that
2 live a mile and a half away from the landfill so they're
3 in this vortex if you will where they're not in the
4 position to assert a private claim for public nuisance and
5 they're not in a position to assert a private nuisance.
6 We're not claiming that there are no circumstance where
7 someone may not have -- be able to pursue relief in court.
8 For example, if there was a neighbor, someone across the
9 street from the landfill who are the named Plaintiffs,
10 that would be a different question. Now, we're not
11 conceding they'd absolutely have and this is claimed in
12 those circumstances, it would depend on the other
13 allegations in the complaint but we don't have that here
14 so that question isn't before you. And lastly Your Honor,
15 it is also true and this harkens back to the Society for,
16 for Prevention of Cruelty to Animals case that public
17 nuisances are typically the province of, of the
18 authorities. Anybody in the community can always engage
19 with the appropriate public authority if they have -- if
20 they perceive a public nuisance, and in this instance,
21 that entity is obvious, it's the Pennsylvania Department
22 of Environmental Protection. Thank you, Your Honor.

23 THE COURT: Anything else counselor?

24 MR. COULSON: Your Honor, at the risk of
25 prolonging the proceedings, just, just very, very briefly.

1 Having -- this, this is obviously interpractice (ph)
2 hearing, I do these cases all around the country and I can
3 tell you, the Court, from experience that very often
4 someone who's situated a mile and a half from the landfill
5 will be impacted every bit as strongly or even perhaps
6 more strongly than those who are directly adjacent to it
7 because of the way air dispersion modeling works. I think
8 that highlights the fact that in many ways Defendant's
9 motion is premature. It's premature on that front because
10 we have no evidence before the Court to, to show any
11 discrepancy between whether someone close by is, is
12 impacted more strongly or whether the Baptistes are. All
13 we have is allegations at this stage and so it's, it's
14 premature to make any determinations about who's impacted
15 to what extent, and that also shows why the Defendant's
16 argument with respect to primary jurisdiction is
17 premature. Not only is there not a decision or any, any
18 decision-making process right now to which the Court can
19 defer before PDEP, but we've not requested any specific
20 injunctive relief because we haven't taken a single page
21 of discovery. The Defendant would have a different
22 argument if we came to the Court and said we -- after
23 taking discovery, we want this particular form of
24 injunctive relief and oh, by the way, it may conflict
25 with, with PDEP's regulatory oversight. That's not the

1 case. We stated plainly in the complaint that we intend
2 only to seek regulatory relief -- I'm sorry, injunctive
3 relief, which is consistent with the Defendant's
4 regulatory obligations, but it's premature to just say the
5 Court's going to exercise its discretion to completely
6 stay away from any injunctive relief no matter what it may
7 be before we've even delved into that issue.

8 MR. COULSON: Thank you.

9 THE COURT: Thank you, Counsel. I'll take it
10 under advisement.

11 EVERYONE: Thank you Your Honor.

12 (Court adjourned at 1:55 p.m.)

CERTIFICATE

I, Stephanie Garcia, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.



April 22, 2019

CERTIFICATE OF SERVICE & CM/ECF FILING

I hereby certify that I electronically filed the foregoing Joint Appendix with the Clerk of the Court of the United States Court of Appeals for the Third Circuit via the Court's Electronic Filing System CM/ECF and served electronically upon all counsel of record through that system.

Dated: June 24, 2019

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