IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

GLADYS ANDERSON, et al. **PLAINTIFFS**

VS. **NO. 4:23-CV-685-LPR**

NEWRAYS ONE, LLC **DEFENDANT**

MOTION FOR HEARING TO CONSIDER POST-BRIEFING DECLARATION OF PLAINTIFF GLADYS ANDERSON

Defendant NewRays One, LLC ("NewRays") moves to request a hearing on its pending motion to dismiss and to strike second amended complaint. Dkt. No. 42. Such a hearing would allow the Court to consider the post-briefing declaration of lead plaintiff Gladys Anderson, which contradicts the key allegation of the second amended complaint regarding the actual sound levels at NewRays' facility. For its motion, NewRays states:

1. The pivotal issue in this case is whether sound from New Rays' facility is at such levels sufficient to cause injury to each of the many plaintiffs.

2. In the face of NewRays' prior motion to dismiss and pursuant to this Court's directive at the hearing convened on January 5, 2014, on January 19, 2024, Plaintiffs filed their second amended complaint. Dkt. No. 40.

3. Plaintiffs had been directed by the Court to plead their individual claims with greater particularity. However, in its paragraph 38, Plaintiffs simply repeated almost verbatim the same claim regarding sound levels that served as the core allegation in each of their prior complaints, alleging "[t]he noise decibel rates

outside of the Defendant's facility continues to be 60-70dB and greater 24 hours a day, 7 days a week." *Compare* Dkt. No. 40, ¶ 38 *with* Dkt. No. 2, ¶ 37 *and* Dkt. No. 27, ¶ 38.

4. By electing not to plead the levels of sound at each plaintiff's respective location, Plaintiff's second amended complaint fails to state a claim upon which relief can be granted as outlined in NewRays' pending motion to dismiss and to strike the second amended complaint and supporting briefing, which are incorporated by reference herein. Dkt. Nos. 42, 43, 47, and 47-1.

5. Yet a more recent admission from Plaintiffs underscores the lack of factual basis for paragraph 38 and should be taken into consideration as the Court decides New Rays' pending motion to dismiss.

6. On April 12, 2024, NewRays received from Plaintiffs' counsel a new declaration that plaintiff Gladys Anderson[1] had executed on April 6, 2024 ("Anderson Declaration"), which is attached as Exhibit 1 to this motion.

7. The Anderson Declaration shows that, even at Anderson's property, the sound levels were ***not*** "60-70 dB and greater 24 hours a day, 7 days a week." Dkt. No. 40, ¶ 38. In fact, the Declaration acknowledges that after the Court's hearing of January 5, 2024, Gladys Anderson personally measured sound levels of 53 decibels, which she attributed to NewRays. *See* Ex. 1, at ¶ 11.

[1] Of the various plaintiffs' parcels, Anderson's residence lies in closest proximity to NewRays' facility. As such, compared to the other plaintiffs, her property would be exposed to the "highest" levels of sound from the facility.

8. Thus, the Anderson Declaration shows the lack of factual basis for the very allegations Plaintiffs made in their second amended complaint to stave off dismissal.

9. As an admission by a party that contradicts the allegations of that party's own pleadings, the Anderson Declaration should be considered as "necessarily embraced by the pleadings." *See Nelson Auto Center, Inc. v. Multimedia Holdings Corporation*, 951 F.3d 952, 956 (8th Cir. 2020); *see also Frye v. Novartis Pharmaceuticals Corporation*, 2022 WL 4305656 (E.D. Ark. Sept. 19, 2022).

10. While the allegations of a complaint are typically viewed in the light most favorable to the plaintiff, "[w]hen an exhibit incontrovertibly contradicts the allegations in the complaint, the exhibit ordinarily controls, even when considering a motion to dismiss." *Bogie v. Rosenberg*, 705 F.3d 603, 609 (7th Cir. 2013).

11. Thus, the Anderson Declaration, which demonstrates that the sound levels do not ***continue to be*** "60-70 dB and greater 24 hours a day, 7 days a week," controls over the self-contradicted allegations of paragraph 38, for purposes of the Court's consideration of NewRays' pending motion.

12. Simply stated, the vitality of Plaintiffs' second amended complaint must be assessed in light of the facts now conceded in the Anderson Declaration. And since the core allegation of Plaintiffs' second amended complaint is belied by the newly obtained Declaration from the lead Plaintiff, the Plaintiffs' second amended complaint is factually inadequate and must be dismissed.

13. For the foregoing reasons, NewRays believes the interests of justice would be served by a hearing on the motion to dismiss and to strike the second amended complaint at which the Court may examine the inconsistencies between the Anderson Declaration and the second amended complaint.

14. NewRays submits an accompanying memorandum brief in support of this motion as well as the Anderson Declaration as Exhibit 1; and Faulkner County Ordinance 20-23 as Exhibit 2.

WHEREFORE, defendant NewRays One, LLC, requests that the Court set a prompt hearing on its motion to dismiss and to strike the second amended complaint; that the Court consider the declaration executed by Gladys Anderson as necessarily embraced by the pleadings as the Court considers that motion; and for all other relief to which it is entitled.

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IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

GLADYS ANDERSON, individually and as next friend of F.A., a minor; SCOTT ANDERSON; NANCY DICKERSON; TREVA BRANSCUM; SCOTT LOVELADY; LAVEANE LOVELADY; MICKEY MCMILLEN; TAMMY MCMILLEN; SHERRY NEWTON; BRYAN STIRES; JAMIE STIRES; TOMMY KIRKPATRICK; RYAN LOVELADY; ASHLEY LOVELADY; STAN MCMILLEN; DAVID HARGROVE; RUBY DIANE HARGROVE; REBECCA EDWARDS; RICKEY CARRELL JOYNER; KELLEY TAPLEY; KIM WELTER; SHANE MARKUSON; and DANNY LANE, Plaintiffs,	)	
v.	)	No. 4:23-cv-685-LPR
NEWRAYS ONE, LLC, Defendant.	)	

DECLARATION OF GLADYS ANDERSON

Comes Gladys Anderson, a Plaintiff in the above-captioned case, who states the following unsworn declaration pursuant to 28 U.S.C. § 1746:

1. I am a competent adult resident and citizen of Bono, Faulkner County, Arkansas.

EXHIBIT 1

2. On July 21, 2023, I verified a Complaint that was subsequently filed on behalf of myself and my neighbors against Defendant Newrays One, LLC. In Paragraph 37 of that Complaint, I verified the following statement: "The noise decibel rates outside of the Defendant's facility is 60-70dB and greater 24 hours a day, 7 days a week."

3. On August 14, 2023, a First Amended Complaint was filed on my behalf. Paragraph one of that First Amended Complaint recited that "[t]his case is about the ultrahazardous, dangerous, obnoxious, offensive, damaging, and extremely loud noises and whine being almost constantly emitted in ranges from 53 to 95 decibels by a recently created Arkansas limited liability company's Bitcoin cryptocurrency server farm or 'mine' in Bono, Faulkner County, Arkansas."

4. That August 14, 2023, First Amended Complaint further stated in paragraph 38 that "[t]he noise decibel rates outside of the Defendant's facility is 60-70dB and greater 24 hours a day, 7 days a week."

5. In that First Amended Complaint, I signed Exhibit AA, which was entitled "Affidavit of Separate Plaintiff Gladys Anderson." Attached to that Exhibit were readings I had taken of the decibel ranges I personally recorded which ranged from 43 decibels at a low and 95 decibels at a high, with readings between May 7, 2023 and August 1, 2023.

6. On January 19, 2024, a Second Amended Complaint was filed on my behalf. Paragraph one of that Second Amended Complaint recited that "[t]his case is about the ultrahazardous, dangerous, obnoxious, offensive, damaging, and extremely loud noise and whine being almost constantly emitted in ranges from 53 to 95 decibels by a recently created Arkansas limited liability company's Bitcoin cryptocurrency server farm or "mine" in Bono, Faulkner County, Arkansas, which has caused and is causing damage to surrounding properties and the owners and occupants of those properties."

7. That January 19, 2024, Second Amended Complaint further stated in paragraph 4 certain facts about the experience I have endured due to the noise from the Bitcoin mine, including my description of that noise as a "train constantly running through [my] house and property," and that soon after the mine "began spewing loud and constant high-pitched whines onto [my] property, [I] began leaving televisions on inside [my] home 24 hours per day, seven days per week, with the volume turned up more than double its previous setting, in an effort to mask the noise from the mine."

8. The January 19, 2024, Second Amended Complaint further stated in paragraph 36 that "Sometime after this lawsuit was commenced,

Defendant attempted to erect a partial sound barrier on or about September or October 2023, but that sound barrier has been ineffective and has not eliminated the noise pollution and damage being experienced by the Plaintiffs."

9. The January 19, 2024, Second Amended Complaint further stated in paragraph 38 that "[t]he noise decibel rates outside of the Defendant's facility continues to be 60-70dB and greater 24 hours a day, 7 days a week."

10. The above allegations were true on the date each complaint was filed, to the best of my knowledge, information, and belief based upon my reasonable inquiry. I continued to conduct my own sound readings of the noise I have experienced on my property after August 2023, which confirmed readings above 70 decibels. I stopped taking readings for a period of time but the noise I experienced continued to be essentially unchanged until the weekend before Thanksgiving 2023. For short periods of time after that date the Bitcoin mine's noise decreased some and it also increased and returned to previous levels.

11. I started taking readings again sometime after the motions hearing in January 2024. Those readings further confirm my ongoing experience that the above allegations were true on the date each complaint

was filed, to the best of my knowledge, information, and belief based upon my reasonable inquiry. My readings to-date, after January 2024, have gone as low as 53 decibels and have exceeded 70 decibels.

12. This declaration is given free from any duress, undue influence, promise, or incentive by any person. It is true and accurate.

13. I declare, certify, verify, and state under penalty of perjury that the foregoing is true and correct.

Executed on this 16th day of April, 2024.

Gladys Anderson

FILED
JUL 19 2023
MARGARET DARTER
FAULKNER COUNTY CLERK
BY DC

ORDINANCE 23-20
SPONSORED BY JUSTICE MAREE COATS

BE IT ENACTED BY THE QUORUM COURT OF FAULKNER COUNTY, ARKANSAS, AN ORDINANCE TO BE ENTITLED:

AN EMERGENCY ORDINANCE ADOPTING CERTAIN RULES AND REGULATIONS CONCERNING EXTERNAL NOISE ATTENUATION OF DATA CENTERS AND TO PREVENT NOISE DISTURBANCE WITHIN FAULKNER COUNTY'S UNINCORPORATED LIMITS; TO DECLARE AN EMERGENCY; AND FOR OTHER PURPOSES

WHEREAS, the equipment associated with the cooling systems and generators required to operate Data Centers generate broadband noise and low-frequency hums that result in noise disturbance. Noise disturbance is the cause of degradation and may produce negative impacts on public health, property and the environment; and

WHEREAS, noise attenuation should be an integral part of the design and construction of Data Centers in order to prevent noise pollution and noise disturbance; and

WHEREAS, the county finds that the public interest is served by the prevention of unreasonable noise emanating externally from the Data Centers and the provisions of this Ordinance are enacted for the purpose of preserving and protecting the public health, safety, welfare and property of the citizens of Faulkner County, Arkansas.

THEREFORE, BE IT ORDAINED BY THE QUORUM COURT OF FAULKNER COUNTY, ARKANSAS, AS FOLLOWS:

ARTICLE 1. Purpose and Applicability

This ordinance shall only apply to noise disturbances originating within the unincorporated areas of Faulkner County, Arkansas.

ARTICLE 2: Definitions

For the purpose of this Ordinance, the following definitions shall apply unless the context clearly indicates or requires a different meaning:

1. *Ambient Noise*: The all-encompassing noise level associated with a given environment, being a composite of sounds from all sources, excusing the alleged offensive noise, at the

EXHIBIT 2

locations and approximate time at which comparison with the alleged offensive noise is to be made.

2. *Data Center*: Industrial or commercial building or facility that houses IT infrastructure for building, running, and delivering applications and services, and for storing and managing the data associated with those applications and services includes but is not limited to commercial crypto mining facilities.
3. *Decibel (dB)*: A unit for measuring the volume of a sound, equal to twenty (20) times to the base 10 (10) of the ratio of the pressure of the sound measured to the referenced pressure, which is twenty (20) micropascals (twenty (20) micronewtons per square meter.)
4. *Mechanical Equipment*: The networked computer systems along with supporting equipment such as batteries, backup generators, and cooling systems housed on the Data Center's property.
5. *Noise Disturbance* is any sound which:
    a. Endangers or injures the safety or health of humans or animals; or
    b. Annoys or disturbs a reasonable person of normal sensitivities; or
    c. Endangers or injures person or property.
6. *Person*: An individual, association, partnership, or corporation, including any officer, employee, department, or agency.
7. *Property Line*: An imaginary line along the ground surface, and its vertical extension, which separates the property owned by one person from that owned by another person, but not including intra-building property divisions.
8. *Sound*: An oscillation in pressure, particle displacement, particle velocity or other physical parameter, in a medium with internal forces that causes compression and rarefaction of that medium. The description of sound may include any characteristic of such sound, including duration, intensity and frequency.
9. *Sound Level*: The weighted sound pressure level obtained by the use of a sound level meter and frequency weighting network, such as A, B, or C as specified in American National Standards Institute specifications for sound level meters (ANSI SI. 4-1971, or the latest approved revision thereof). If the frequency weighting employed is not indicated, the A-weighting shall apply.
10. *Sound Level Meter*: An instrument which includes a microphone, an amplifier, RMS detector, integrator or time averager, output meter, and weighting networks used to measure sound pressure levels.

ARTICLE 3: Procedure for Measurement

All tests shall be conducted according to the following procedures:

1. *Complaint Driven:* When the measurement is the result of a complaint, measurements will be taken at the property line of the receiving property.

2. *Normal Monitoring:* When the measurement procedure is in the normal course of monitoring sound, the measurements will be taken at the property line of the source of the sound.
3. *Calibration:* The sound level meter must be calibrated at least every two years.
4. *Meter Placement*: The sound level meter must be placed a minimum of four feet above the ground or from any reflective surface. The microphone must be pointed at the sound source.
5. *Measurements:* Measurements must include "high", "average", and "low" readings. If the sound level meter does not provide these multiple readings, a minimum of three separate measurements must be taken at a single location at varying time intervals. The average sound level reading shall be used to determine whether there has been a violation of this Ordinance.
6. *Monitoring Report:* The report for each measurement session must include:
    a. The day, date and time of the measurements,
    b. Date and time of recent calibration of the sound meter,
    c. Temperature,
    d. Identification of the monitoring equipment,
    e. Location, land use, and description of the source,
    f. Location and land use of the listener, and
    g. Sound level measurements.
7. *Extraneous Sounds:* If there are extraneous sound sources that are unrelated to the measurements and increase the monitored sound level, the measurement shall be postponed until these noises subside.

ARTICLE 4: Noise Limitations

It shall be unlawful for any Data Center to make, or continue to cause or permit to be made or continued, noise levels constituting a noise disturbance.

For the purposes of this section, the external noise level emanating from Data Centers shall be deemed a noise disturbance per se, if the sound level is 60 dBa or higher during the hours of 8 A.M. to 8 P.M. or 55 dBa or higher during the hours of 8 P.M. to 8 A.M. measured at the property line of the receiving property.

The standard which may be considered in determining whether a violation of this Ordinance exists for a noise disturbance not meeting the threshold set forth in the immediately proceeding sentence includes, but is not limited to the following:

a. The level or volume of the noise;
b. The time of day or night the noise occurs;
c. The duration of the noise;
d. Whether the noise is recurrent, intermittent or constant; and

e. Whether proper and reasonable noise attenuation methods were followed and maintained

ARTICLE 5: Violations

1. Any or all of the following persons may be held responsible for noise violations:
   a. The person operating the equipment or creating the noise;
   b. The person who employs the person operating the equipment or creating the noise at the time of the violation;
   c. The person who owns or rents the property where the violation occurs.

ARTICLE 6: Penalties

(1) Any person(s), firm, corporation, partnership, association, owner, occupant, agent or anyone having ownership in the subject property or supervision or control over the Data Center that violates or fails to comply with any provision of this Ordinance, shall be guilty of a misdemeanor.

(2) Upon conviction of such violation, any offending party shall be punished by fine of up to $1,000 for any one specified offense or violation. Each day of a continuing violation constitutes a separate violation. Furthermore, if the prohibited act continues after the conviction of a violation, a court may issue a fine in an amount up to $500 for each day that the unlawful conduct continues. Additionally, the County may petition for an injunction in a court of proper jurisdiction to abate the nuisance. The county or any citizen shall be entitled to pursue all legal and equitable remedies available under the law in order to abate the nuisance and compel compliance with this Ordinance, including injunctive relief and any civil damages the court deems appropriate.

ARTICLE 7: Severability

If any provision of this Ordinance is found to be invalid by the decision of any court of competent jurisdiction, such invalidity shall not affect the remaining sections, phrases, and provisions of this Ordinance which shall remain valid and enforceable.

ARTICLE 8: Emergency Clause

The Quorum Court finds that the immediate implementation of this ordinance is necessary for the preservation of the public's peace, health, safety, welfare, and property, an emergency is hereby declared to exist and that this Ordinance is to be in effect immediately after its adoption.

PASSED AND APPROVED this 18th day of July, 2023.

APPROVED: _____
COUNTY JUDGE

ATTEST: Margaret Carter
COUNTY CLERK