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

GLADYS ANDERSON, *et al.*, Plaintiffs,	)	
v.	)	No. 4:23-cv-685-LPR
NEWRAYS ONE, LLC, Defendant.	)	

BRIEF IN SUPPORT OF
OBJECTION AND MOTION TO EXCLUDE

This Court should exclude and not consider Gladys Anderson's Declaration, *Document No. 49-1*, Faulkner County Ordinance 23-20, *Document No. 49-2*, and the alleged recitations about "testimony" of Faulkner County Administrator Randy Higgins before a Committee of the Arkansas General Assembly, *Document No. 50*, at 2 n.1, 4, & 4 n.3. Each of these items, which fall outside the pleadings, should not be considered on the pending motion to dismiss or strike Plaintiffs' Second Amended Complaint.

None of those items were embraced by the Second Amended Complaint. The Ordinance is a public record but it is presently absent from any pleaded allegation, claim, or defense asserted by any party. Randy Higgins's oral comments to the General Assembly are inadmissible hearsay. And no material outside the pleadings and not embraced by the

pleadings may be considered on a motion to dismiss which contradicts the complaint.

Legal Standard

Motions to dismiss are confined to the allegations of the complaint.

> To survive a motion to dismiss for failure to state a claim, the [Second] Amended Complaint must allege sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. We ignore materials outside the pleadings but may consider materials that are part of the public record or do not contradict the complaint, and materials that are necessarily embraced by the pleadings.

Nelson Auto Center, *Inc. v. Multimedia Holdings Corporation*, 951 F.3d 952, 955 (8th Cir. 2020) (quotation omitted). In *Nelson*, the Plaintiff did not challenge the Court's consideration of extra materials added by the Defendant in its motion to dismiss. *Id.* at 956. Plaintiffs here, however, object to and move to exclude these new improper items.

Anderson Declaration. Gladys Anderson's April 6, 2024, Declaration is a material outside the pleadings that must be ignored on a Rule 12(b)(6) analysis. *Nelson Auto Center*, *Inc.*, 951 F.3d at 955. That Declaration is not a public record. It was not exhibited to the Second Amended Complaint. And it was not necessarily embraced by the Second Amended Complaint.

That Declaration affirms, moreover, rather than contradicts, the pleaded allegations in the January 2024 Second Amended Complaint. The Declaration adds that, after January 2024, Gladys Anderson recorded readings on her property as low as 53 decibels and readings that have exceeded 70 decibels. *Document No. 49-1*, at 4–5 ¶ 11. February 2024 through April 2024 readings are not embraced by the Second Amended Complaint, which was operative in January 2024. Even assuming the Declaration was somehow necessarily embraced by the Second Amended Complaint, whether Defendant's noise is constantly expelled at a range of 60-70 decibels and greater or 53-70 decibels and greater on and after February 2024 is irrelevant to a Rule 12(b)(6) analysis.

Newrays One relies upon Gladys Anderson's February through April 2024 readings, however, claiming those readings contradict her Second Amended Complaint. That position mandates the Declaration be excluded from a Rule 12(b)(6) analysis.

> We ignore materials outside the pleadings but **may** consider materials that [. . .] **do not contradict the complaint**[.]

Nelson Auto Center, *Inc.*, 951 F.3d at 955 (emphasis added). The Declaration was not necessarily embraced by the pleadings and is not a public record. *Nelson Auto Center*, *Inc.*, 951 F.3d at 955. It is not proper

for consideration on a fully briefed and long-pending motion to dismiss. That Declaration is not a reason for further delay. The Anderson Declaration should thus be excluded from consideration on the pending motion to dismiss or to strike.

Again, whether the lower range of Newrays One's incessant noise is 60 or 53 decibels on and after February 2024, it continues to harass the Plaintiffs with constant noise, emitting sounds that exceed 70 decibels, as pleaded. Plaintiffs stand ready to press forward with discovery. Further expanding the motion to dismiss briefing and record to include a subsequent, consistent declaration is inappropriate, in violation of the Eighth Circuit's standard, and should be excluded.

Faulkner County Ordinance 23-20. The July 2023 Faulkner County Ordinance was not cited in any complaint,* and was cited to this Court by Newrays One for the first time on April 18, 2024. Newrays One could have cited that July 2023 Ordinance in its previous filings if it thought that Ordinance relevant to any of the pleaded allegations or a 12(b)(6) analysis. It failed to do so.

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* Exhibit 7 to the Second Amended Complaint does reference "After ordinance signed" in Gladys Anderson's readings that occurred after July 2, 2023, which recorded a range of 68-75 decibels. *Document No. 40-7.*

Whether Newrays One has violated that Ordinance all of the time or just some of the time is not presently a pleaded issue by any party. That Ordinance thus falls short of being necessarily embraced by the Second Amended Complaint. *Nelson Auto Center, Inc.*, 951 F.3d at 955. Although the Ordinance is a public record, it has no bearing on the claims pleaded by Plaintiffs or any defense pleaded by Defendant. Defendant fails to explain how that Ordinance has any bearing on the pending motion to dismiss. If anything, that Ordinance appears to confirm Defendant's noise as pleaded violates the ranges set in that Ordinance.

For these reasons, Faulkner County Ordinance 23-20 should be excluded from consideration on the pending motion to dismiss or to strike. Defendant should not be allowed to further expand the Rule 12(b)(6) record with extraneous material.

Footnote References to General Assembly Committees. Defendant improperly recites an excerpt of "testimony" of Faulkner County Administrator Randy Higgins before a Committee of the Arkansas General Assembly that is not appropriate for consideration on a motion to dismiss or strike, *Document No. 50*, at 2 n.1, 4, & 4 n.3. A number of federal district courts have excluded oral statements by government officials as falling short of the hearsay exception for a public record in

Federal Rule of Evidence 803(8). *Cooper v. Meritor, Inc.*, No. 4:16cv-52-DMB-JMV, 2019 WL 1028530, at 3 (N.D. Mis. Mar. 4, 2019) (collecting cases). Although recorded oral statements by public officials might meet the intent of the exception, recorded statements of a county official before a legislative committee may not meet the standard.

The District of Minnesota recently excluded a complete transcript of a public hearing from consideration on a motion to dismiss. *Pro-Life Action Ministries v. City of Minneapolis*, No. 23-cv-853-ECT/DJF, 2023 WL 7131517, at 3–4 (D. Minn. Oct. 30, 2022).

> Although transcripts of public hearings may be considered "matters of public record," the court "may merely take notice of the existence of the transcript and hearing;" it "may not evaluate testimonial statements recorded in the transcript that contradict the pleadings."

Id. at 4. Newrays One has not offered a transcript of the full hearing. Nor has it offered a copy of the findings from the interim study that following that hearing. Instead, it attempts to excise quotes from Administrator Higgins about the decibel ranges he has recorded after Defendant erected its sound wall. This Court should follow *Pro-Life Action Ministries* and exclude Defendant's improper quotation of Administrator Higgins from a Rule 12(b)(6) analysis.

It appears Administrator Randy Higgins was not placed under oath during his conversation at the General Assembly on February 29, 2024. Defendant's excerpted quotation in footnotes is inadmissible hearsay, FED. R. EVID. 801 & 803, was not a statement under oath, neither party was present and able to cross examine Administrator Higgins, and the snippet quoted by Defendant is not the entirety of Administrator Higgins's comments about the Defendant's violation of the ordinance and the sound barrier.

Even assuming that conversation met the standard of a public record under Federal Rule of Evidence 803(8), Defendant appears to be using it to "contradict" the Second Amended Complaint, which is expressly prohibited by the standard articulated in the Eighth Circuit.

> We ignore materials outside the pleadings but **may** consider materials that [. . .] **do not contradict the complaint**[.]

Nelson Auto Center, *Inc.*, 951 F.3d at 955 (emphasis added). If the excerpted quote is a public record being offered to contradict the Second Amended Complaint, it is not proper for consideration under Rule 12(b)(6). *Id.*; *Pro-Life Action Ministries*, 2023 WL 7131517, at 3–4. Defendant's improper excerpting of comments to a Committee of the General Assembly should therefore be excluded from consideration on the motion to dismiss.

Ongoing Behavior. Defendant opened the January 5, 2024, hearing by attempting to circulate an exhibit it had created and hoped to use in support of its then-pending motion to dismiss. Plaintiffs objected and this Court sustained that objection, holding it was inappropriate for Defendant to attempt to introduce new items or evidence beyond the pleadings on a Rule 12(b)(6) motion analysis. Yet Defendant has again, in the instant motion, sought to inject extraneous material for consideration on a months-ripe motion to dismiss.

WHEREFORE, Plaintiffs Gladys Anderson, individually and as parent and next friend of F.A., a minor child; 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; Dianne Hargrove; Rebecca Edwards; Rickey Carrell Joyner; Kelley Tapley; Kim Welter; Shane Markuson; and Danny Lane object to and move to exclude the April 6, 2024, Declaration of Gladys Anderson, *Document No. 49-1*; Faulkner County Ordinance 20-23, *Document No. 49-2*; references to an excerpt of Administrator Randy Higgins's comments to the Arkansas General Assembly, *Document No. 50*, at 2 n.1, 4, & 4 n.3, and Defendant's "reincorporation by reference" of its

pending Motion to Dismiss, *Document No. 49*, at 2 ¶ 4, from consideration on the pending motion to dismiss or strike, *Document No. 42*, and from consideration on the improper motion for hearing to consider post-briefing declaration, *Document No. 49*, and for all other just, proper, legal, and equitable relief to which Plaintiffs may be entitled.

Respectfully submitted,

GLADYS ANDERSON, individually and as parent and 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; DIANNE HARGROVE; REBECCA EDWARDS; RICKEY CARRELL JOYNER; KELLEY TAPLEY; KIM WELTER; SHANE MARKUSON; and DANNY LANE,

Plaintiffs

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