

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

GARY JOHNSON and SARA)	
BLUM, on behalf of themselves,)	
and all others similarly situated)	Case No.
)	
Plaintiffs,)	
v.)	
)	
BIG OX ENERGY, LLC,)	
)	
Defendant.)	

CLASS ACTION COMPLAINT AND JURY DEMAND

INTRODUCTION

1. Plaintiffs bring this class action against the Defendant, Big Ox Energy LLC for emission impacts from its anaerobic digestion bio-energy facility ("Defendant" or the "facility") located in South Sioux City, Nebraska. Through its process of converting industrial food and agricultural waste into natural gas, Defendant releases noxious odors that invade Plaintiffs' property, causing damages through negligence, gross negligence and nuisance for which Plaintiffs seek compensatory and punitive relief against Defendant as well as injunctive relief not inconsistent with Defendant's federally and state enforced air permits.

PARTIES

2. At all times relevant hereto, Plaintiff Gary Johnson has resided and intended to remain at 604 S. Ridge Drive, in the City of South Sioux City, County of Dakota, State of Nebraska. Plaintiff is an individual domiciled in Nebraska; therefore, Plaintiff is a citizen of the State of Nebraska.

3. At all times relevant hereto, Plaintiff Sara Blum has resided and intended to remain at 473 N. Shore Dr., in the City of South Sioux City, County of Dakota, State of Nebraska. Plaintiff

is an individual domiciled in Nebraska; therefore, Plaintiff is a citizen of the State of Nebraska.

4. Defendant Big Ox Energy, LLC is a Limited Liability Company organized under the laws of Wisconsin.

5. Defendant's corporate activities are directed, controlled, and coordinated from its headquarters in Wisconsin.

6. No member of Defendant is a citizen of Nebraska.

7. Defendant its agents, and its predecessors constructed, operate and maintain the bio-energy production facility located at D, 1617 Dakota Ave., in South Sioux City, County of Dakota, and State of Nebraska.

JURISDICTION AND VENUE

8. Under 28 U.S.C. § 1332(d)(10), "an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized." Defendant is an LLC (i.e. an unincorporated organization) organized under the laws of Wisconsin with its principal place of business also located in Wisconsin. Pursuant to 28 U.S.C. § 1332(d)(10), Defendant is a citizen of Wisconsin.

9. This Court has subject matter jurisdiction pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d), because there are 100 or more Class Members and the aggregate amount in controversy exceeds Five Million Dollars (\$5,000,000.00) exclusive of interest and costs. Additionally, Class Members are citizens of a state different from the citizenship of the Defendant.

GENERAL ALLEGATIONS

10. Defendant operates a bio-gas energy production facility that converts industrial food and agricultural waste (i.e. manure) into natural gas. Through this process Defendant unnecessarily emits noxious odors into the nearby residential community.

11. The heart of Defendant's operations is its two (2) anaerobic digesters identified as DG1 and DG2. These digesters perform a series of biological processes where microorganisms break down the biodegradable material from Defendant's raw materials in the absence of oxygen. One of the end products in this process is biogas, which is then processed into renewable gas.

12. The uncontrolled anaerobic decomposition of Defendant's raw materials (i.e. industrial food and agricultural waste, such as manure) causes foul odors to be emitted from Defendant's digesters and into the adjacent residential community.

13. Due to Defendant's inadequate efforts to prevent its emissions from escaping into the adjacent residential neighborhood, Plaintiffs' property has been and continues to be physically invaded by noxious odors.

14. The noxious odors which entered Plaintiffs' property originated from the facility, where they are generated as a result of Defendant's operations.

15. Defendant, its predecessors and agents either constructed or directed the construction of the facility and exercised control and ownership over the facility.

16. Emissions from Defendant's facility have been the subject of frequent complaints from residents in the neighboring area.

17. Numerous residents have already communicated with Plaintiffs' counsel regarding their experiences with Defendant's emissions.

18. Defendant intentionally, recklessly, willfully, wantonly, maliciously, grossly and negligently failed to properly construct, maintain and operate the facility, and caused the invasion of Plaintiffs' property by noxious odors on intermittent and reoccurring dates.

19. Defendant has a well-documented administrative record of emitting noxious odors. Examples include, but are not limited to the following:

- A. On August 16, 2018 the Nebraska Department of Environmental Quality (“NE DEQ”) served Defendant with a Notice of Violation for Defendant’s failure to control its emissions. Specially, an inspection of Defendant’s facility revealed that hatches on anaerobic digesters DG1 and DG2 were open and venting uncontrolled emissions of hydrogen sulfide into the atmosphere. The violation also noted that specific areas of DG1 and DG2 such as the centrifuges, mixer, pH and temperature probes, and a section of the roof on DG1 were not properly maintained. The violation further identified data and sensor integrity faults in the pressure relief valve (PRV) monitoring and that overflows from both digesters had been ongoing since May of 2018;
 - B. A July 23, 2018 Notice of Violation issued to Defendant by the NE DEQ noting in part, Defendant’s failure to control biogas emissions from its anaerobic digesters. The violation stated that biogas emissions were unlawfully vented from the pressure relief valve (PRV) located on the southeast roof of the facility;
 - C. A July 20, 2018 NE DEQ Notice of Violation for Defendant’s faulty operation of its digesters resulting in the discharge of waste into the adjacent water and land areas.; and
 - D. Odor complaints attributed to Defendant's facility have been filed with the NE DEQ, the South Sioux City Department of Public Works, and the South Sioux City Police Department by residents from the adjacent neighborhood community. NE DEQ investigations into many of these complaints confirm the presence of noxious odors emanating from Defendant’s facility. Some of these odor emissions have been specifically traced to overflows from Defendant’s two anaerobic bio-gas digesters and the open doors from Defendant’s “receiving bay.”
20. A properly operated, maintained, and managed facility of the sort Defendant operates will collect, capture and destroy odorous compounds in order to prevent noxious emissions into the surrounding community.
21. Defendant failed to install and maintain adequate technology to properly control its emissions of noxious odors, including but not limited to the following:
- a. failure to maintain, operate and/or install the two anaerobic bio-digesters (DG1 and DG2) properly so as to limit odorous emissions, including hydrogen sulfide, into the adjacent residential community;
 - b. failure to monitor its pressure relief valve (PRV) to prevent biogas from venting;

- c. failure to operate the doors of Defendant's "receiving bay" so as to not release noxious odors into the adjacent residential community; and
- d. failure to prevent overflows in the anaerobic bio-digesters, DG1 and DG2.

CLASS ALLEGATIONS

A. Definition of the Class

22. 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 located within the geographic area outlined in Figure 1, below:

Figure 1: Proposed Class Definition Map:



The class area boundary is subject to modification as discovery will disclose the location of all persons properly included in the Class (“Class Members”). Plaintiffs reserve the right to propose one or more sub-classes if discovery reveals that such subclasses are appropriate.

23. This case is properly maintainable as a class action pursuant to and in accordance with Rule 23(a) of the Federal Rules of Civil Procedure in that:

- a. The class, which includes thousands of members, is so numerous that joinder of all members is impracticable;

- b. There are substantial questions of law and fact common to the class including those set forth in greater particularity herein;
- c. Questions of law and fact such as those enumerated below, which are all common to the class, predominate over any questions of law or fact affecting only individual members of the class;
- d. A class action is superior to any other type of action for the fair and efficient adjudication of the controversy;
- e. The relief sought in this class action will effectively and efficiently provide relief to all members of the class; and,
- f. There are no unusual difficulties foreseen in the management of this class action.
- g. Plaintiffs, whose claims are typical of those of the Class, through experienced counsel, will zealously and adequately represent the Class.

B. Numerosity

24. Data obtained from the US Census indicates that there are over 2,000 resident households within two (2) miles of Defendant's facility. Therefore the class is so numerous that joinder is impracticable.

C. Commonality

25. 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 negligently failed to construct, maintain and operate the facility;
- b. whether Defendant owed any duties to Plaintiffs;
- c. which duties Defendant owed to Plaintiffs;
- d. which steps Defendant has and has not taken in order to control the emission of noxious odors through the construction, maintenance and operation of the facility;

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

D. Typicality

26. 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, utilize the same complex evidence including expert testimony, rely upon the same legal theories and seek the same type of relief.

27. The claims of Plaintiffs and the other Class members have a common cause and their damages are of the same type. The claims originate from the same failure of the Defendant to properly construct, maintain and operate the facility.

28. All Class members have suffered injury in fact as a result of the invasion of their property by noxious odors emitted from Defendant's facility, causing damage in the form of losses to property values.

E. Adequacy of Representation

29. 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.

30. Plaintiffs have retained the services of counsel who are experienced in complex

class action litigation, and in particular class actions stemming from invasions of industrial emissions. Plaintiffs' counsel will vigorously 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

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

32. 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;

33. 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;

34. The concentration of litigation of these claims in one forum will achieve efficiency and promote judicial economy; and

35. The proposed class action is manageable.

CAUSE OF ACTION I

NUISANCE

36. Plaintiffs restate allegations 1 through 35 of this Complaint as if fully rewritten herein.

37. The noxious odors, which entered Plaintiffs' property originated from the facility constructed, maintained and operated by Defendant.

38. The noxious odors invading Plaintiffs' property are indecent and offensive to the senses and obstruct the free use of their property so as to substantially and unreasonably interfere with the comfortable enjoyment of life and property.

39. Defendant owed and continues to owe a duty to Plaintiffs to prevent and abate the interference with the invasion of the private interests of the Plaintiffs.

40. By constructing and then failing to reasonably repair and maintain its facility, Defendant has intentionally and negligently caused an unreasonable invasion of Plaintiffs' interest in the use and enjoyment of their property.

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

42. Plaintiffs did not consent to the invasion of their property by noxious odors.

43. By causing noxious odors 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.

44. While Defendant has interfered with rights common to the general public, including the right to breathe air that is not tainted with noxious odors, Plaintiffs have suffered a special injury given the impacts to their properties.

45. Whatever social utility Defendant's facility 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 property.

46. 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.

CAUSES OF ACTION II AND III

NEGLIGENCE AND GROSS NEGLIGENCE

47. Plaintiffs restate allegations 1 through 46 of this Complaint as if fully rewritten herein.

48. Defendant negligently and improperly constructed, maintained and operated the facility such that it caused the invasion of noxious odors onto Plaintiffs' homes, land, and property on occasions too numerous to mention,

49. As a direct and proximate result of Defendant's negligence and gross negligence in constructing, maintaining and operating the facility, Plaintiffs' property, on occasions too numerous to mention, was invaded by noxious odors.

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

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

52. By failing to properly construct, maintain and operate its facility, Defendant failed to exercise the duty of ordinary care and diligence, which it owes to Plaintiffs, so noxious odors would not invade Plaintiffs' property.

53. A properly constructed, operated, and maintained facility will not emit noxious odors into neighboring residential areas.

54. By failing to construct, maintain and operate its facility, Defendant has intentionally caused the invasion of Plaintiffs' property by noxious odors.

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

56. As a direct and proximate result of the failure of Defendant to exercise ordinary care, Plaintiffs' residences were invaded by noxious odors causing and constituting damage to their property.

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

58. Defendant's gross negligence was malicious and made with a wanton or reckless disregard for the 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 representatives 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. Injunctive relief not inconsistent with Defendant's federally and state enforced air permits;
- F. An Order holding that entrance of the aforementioned noxious odors upon Plaintiffs' property constitutes a nuisance; and
- G. Such further relief as the Court deems just and proper.

JURY DEMAND

Plaintiffs hereby demand a trial by jury.

Dated: January 9, 2019.

Respectfully Submitted:

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**Pro Hac Vice Applications to be submitted*