IN THE THIRD JUDICIAL DISTRICT FOR THE STATE OF TENNESSEE
GREENE COUNTY CHANCERY COURT

DONAHUE BIBLE, BEN DYER and wife, JANE DYER, JACK RENNER and wife, MARGARET RENNER, JOE NEILL and wife, GLENNA NEILL, APRIL BRYANT, EDDIE OVERHOLT, CHESTER PURGASON, KEVIN DUBOSE and wife, JAYNE DUBOSE, PEGGY SMILEY, ROGER COEN and wife, LYNN COEN, JIMMY FOX and wife, TAMMY FOX, CATHY STEELE, AMBER MOORE, LARRY SMITH, RONALD RENNER, DENNIS WOODS and wife, CATHY WOODS, RANDY MCCAMEY and wife, BETH MCCAMEY, MICKEY MCCAMEY and wife, LINDA MCCAMEY, BILL SNOWDEN and daughter, DONNA SNOWDEN, JACK DANIELS and wife, RUBY DANIELS, BOB SAPP, RALPH JONES and wife, ONEITA JONES, SAMMY VOILES, BARBARA WAMPLER, DANIEL WAMPLER, KYLE SMITH and wife, SHERRY SMITH, RUBY COMBS, GARY STEPHENS and wife, BARBARA STEPHENS, BROCK WAMPLER, KIM STEPHENS and wife, PHYLLIS STEPHENS, CHESTER ATKINS and wife, BLANCHE ATKINS	)	NO. 20140236 JURY DEMANDED
Plaintiffs,	)	
v.	)	
INDUSTRIAL DEVELOPMENT BOARD OF THE TOWN OF GREENEVILLE AND GREENE COUNTY; and US NITROGEN, LLC,	)	
Defendants.	)	

DEFENDANTS THE INDUSTRIAL DEVELOPMENT BOARD OF THE TOWN OF GREENEVILLE AND GREENE COUNTY, TENNESSEE AND US NITROGEN LLC'S JOINT MEMORANDUM OF LAW IN SUPPORT OF THEIR JOINT MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

Pursuant to Rule 12 of the Tennessee Rules of Civil Procedure, Defendants The Industrial Development Board of the Town of Greeneville and Greene County, Tennessee ("IDB") and US Nitrogen LLC ("US Nitrogen") respectfully submit this Memorandum of Law in Support of their contemporaneously filed Motion to Dismiss Plaintiffs' First Amended Complaint for Declaratory Judgment and Injunctive Relief for failure to state a claim upon which relief can be granted.

INTRODUCTION

City of Greeneville and Greene County political and economic development leaders have devoted tireless efforts over the last four years to ensure that US Nitrogen locate its newest facility in Greene County. The IDB has been at the forefront of efforts to recruit US Nitrogen to Greene County and provide the support it needs to plan, permit, and construct its new facility. The IDB hopes the US Nitrogen project will serve as an impetus to further economic development in western Greene County.

After a lengthy planning and permitting process, US Nitrogen's Greene County plant is being constructed and is set to become fully operational in 2015. The state-of-the-art facility will provide more than eighty technical jobs with an average hourly salary that is double the state's average and a total annual payroll of $4 million. Over eighty-five percent of US Nitrogen's current permanent employees are from Greene and surrounding counties. US Nitrogen to date has invested more than $100 million into the more than $200 million project–the largest capital project in Greene County's history. Clearly, the economic and employment impact of US Nitrogen's new facility is substantial.

US Nitrogen's operations, located in the Midway community on Pottertown Road, will produce ammonium nitrate and related products. The highly sophisticated manufacturing

process will require significant amounts of water for cooling purposes, and much of the planning has involved this aspect of the project. While numerous plans and arrangements with various local utilities were explored and investigated, US Nitrogen could not reach an agreement that would adequately guarantee its water supply or discharge needs. Ultimately, US Nitrogen and the IDB decided upon a pipeline plan whereby two pipelines will convey non-potable water from and to the Nolichucky River to meet the water requirements of US Nitrogen, two other companies to be co-located with US Nitrogen on the IDB-owned Pottertown Road property, and potential other industries recruited by the IDB to western Greene County. While the IDB will own the pipelines, US Nitrogen is serving as the contractor to construct the pipelines and will operate and maintain them at no cost to Greene County, its citizens, or the IDB. The water pipelines and associated infrastructure will be located in the rights-of-way of State Highways 340 and 348 and on property owned by the IDB. The pipelines will not traverse the private property of local citizens unless their permission has been obtained. Furthermore, the pipelines and the primary water intake and discharge structures at the Nolichucky River will be below grade.

City of Greeneville and Greene County officials have been instrumental in navigating the various hurdles throughout, including the extensive permitting process. Permits have been obtained from the Tennessee Department of Environment and Conservation, the Tennessee Department of Transportation, the Tennessee Valley Authority, the U.S. Army Corps of Engineers, and Greene County that require strict requirements to protect the environment and regular monitoring and reporting to ensure compliance with various environmental and regulatory standards. In the permitting process, US Nitrogen documented through third-party studies that all areas of historical and archaeological significance will be avoided, appropriate

wildlife and resource management measures will be implemented, and the project will not affect the view from the historic Conway Bridge over the Nolichucky River.

Despite all of these measures, the unwavering commitment of local officials and the IDB, and the unquestionable positive economic impact of US Nitrogen's presence in Greene County, Plaintiffs have filed their Amended Complaint alleging various claims against the IDB and US Nitrogen, all of which lack merit. Even taking all of the facts alleged as true, Plaintiffs' claims are not viable.

Plaintiffs first allege that the IDB meeting whereby the IDB approved the pipelines plan did not comply with the Open Meetings Act requirements in Tennessee Code Annotated Section 7-53-303(c) and seek to void the actions taken at the meeting. As shown below, Plaintiffs attach a requirement to the statute that does not exist. Moreover, Plaintiffs' own allegations illustrate that the meeting was entirely open to the public, the IDB took reasonable steps to accommodate the overflow standing-room-only crowd that was in attendance, and the purpose and goal of the statute was fulfilled: the public attended the meeting, deliberations took place in the public's presence, and a vote was held before the public's watchful eyes. This claim should be dismissed.

Second, Plaintiffs complain that the IDB's alleged "operation" of the pipelines violates (1) Tennessee Code Annotated Section 7-53-102(a) because it constitutes a "manufacturing, industrial, governmental [or] commercial enterprise," and (2) Tennessee Code Annotated Section 7-53-302(b) because it constitutes a "business." However, by Plaintiffs' own admission, the IDB will not be operating the pipelines. Moreover, the pipelines do not amount to an enterprise or business, as they are merely ancillary to the IDB's economic development activities and to US Nitrogen's and other companies' operations. The IDB will not own the pipelines to make a

profit. In fact, the IDB will not charge for water conveyed by the pipelines. This claim must fail.

Third, Plaintiffs include a nuisance claim regarding the proposed pipelines, which are not yet constructed or operational. Any impact of pipeline operations on the use and enjoyment of Plaintiffs' property is purely speculative, and a nuisance claim cannot be sustained where Plaintiffs merely fear potential harm. Water pipelines cannot constitute a nuisance per se, and Plaintiffs have failed to plead that they do. Thus, Plaintiffs' anticipatory nuisance claim should be dismissed.

Finally, Plaintiffs include a riparian rights claim, but made only conclusory statements and provide absolutely no facts or an indication as to how the pipelines will negatively affect their riparian rights—if they even have any such rights. Such a barebones claim, entirely void of any factual support, should not survive Tennessee's pleading standards. This claim must fail.

For the foregoing reasons, Plaintiffs have not stated a claim against Defendants for which relief can be granted. Accordingly, Plaintiffs' claims should be dismissed with prejudice.

FACTUAL BACKGROUND

When considering a motion to dismiss, the Court must accept the facts in the complaint as true. *Bell ex rel. Snyder v. Icard, Merrill, Cullis, Timm, Furen and Ginsburg, P.A.*, 986 S.W.2d 550, 554 (Tenn. 1999). Thus, this brief recitation of the factual background comes entirely from Plaintiffs' Amended Complaint. In 2011, US Nitrogen decided to locate a facility in Greeneville, Tennessee, and has been planning and constructing this facility since that time. (Amend. Compl. ¶ 38). US Nitrogen's Greeneville facility will produce ammonium nitrate. (*Id.*). The process of selecting Greeneville was an extensive one and was a product of much

effort and coordination among city and county officials. (*Id.* ¶ 39). Various permits from numerous government agencies were also necessary and have been obtained by US Nitrogen in conjunction with construction of its Greeneville plant. (*Id.*).

As part of its production process at the planned facility, US Nitrogen will need significant amounts of water. (*Id.* ¶ 40). From the inception of the Greeneville project, US Nitrogen intended and wished to obtain the water that was needed from local water providers. (*Id.* ¶ 40). When it became clear that local utilities were unable to meet US Nitrogen's water needs and no reasonable agreement could be reached, US Nitrogen began exploring other options, including coordinating with the IDB for development of a water infrastructure project that could benefit US Nitrogen and other potential industries in western Greene County. (¶ 42). This coordinated effort involved the installation of water intake and outfall pipelines—which will be owned by the IDB—between US Nitrogen's facility and the Nolichucky River. (*Id.*). The pipeline plan was conveyed to numerous agencies, who then issued the necessary approvals and permits. (*Id.* ¶¶ 43, 44-46).

Following the IDB's public meeting on July 18, 2014, where it voted to approve the pipelines plan, the IDB sought and ultimately received the necessary permit from the Tennessee Department of Transportation to locate the pipelines along State right-of-ways. (*Id.* ¶¶ 47-48). The IDB will own the pipelines. (*Id.* at 49). US Nitrogen is responsible for construction of the pipelines and will maintain and operate them. (*Id.*). The pipelines will serve US Nitrogen, along with two other associated industries in the immediate vicinity. (*Id.*). Currently, US Nitrogen plans to withdraw approximately 1.5 million gallons of water daily from the river, and discharge approximately .5 million gallons daily back into the river. (*Id.* ¶ 71). US Nitrogen and the IDB have obtained all of the necessary permits and approvals from various agencies, and construction

of the pipelines has commenced. (*Id.* ¶ 51). Despite the pipelines not yet being completed, much less being put into operation, Plaintiffs have filed this Amended Complaint alleging various harms that have not occurred.

ARGUMENT

I. STANDARD OF REVIEW.

Plaintiffs' Amended Complaint fails to state any viable claims. "A Tenn. R. Civ. P. 12.02(6) motion to dismiss for failure to state a claim upon which relief can be granted tests only the legal sufficiency of the complaint, not the strength of a plaintiff's proof." *Bell*, 986 S.W.2d at 554. "The basis for the motion is that the allegations contained in the complaint, considered alone and taken as true, are insufficient to state a claim as a matter of law." *Cook By & Through Uithoven v. Spinnaker's of Rivergate, Inc.*, 878 S.W.2d 934, 938 (Tenn. 1994).

"Such a motion admits the truth of all relevant and material averments contained in the complaint, but asserts that such facts do not constitute a cause of action as a matter of law." *Bell*, 986 S.W.2d at 554. While courts should construe the complaint liberally in favor of the plaintiff and accept all allegations of fact as true, a motion to dismiss should nevertheless be granted if it appears that the plaintiff cannot prove facts in support of its claim that would entitle it to relief. *Id.* As shown below, even accepting all of the facts alleged in the Amended Complaint as true, Plaintiffs fail to state a claim as a matter of law, and their Amended Complaint should be dismissed with prejudice.

II. THE IDB'S JULY 18, 2014 MEETING DID NOT VIOLATE THE OPEN MEETINGS ACT.

Plaintiffs' claim regarding the IDB's alleged violation of the Open Meetings Act is legally unsubstantiated, in that it inaccurately represents the requirements of the law. Tennessee's Open Meetings Act is codified at Tennessee Code Annotated Sections 8–44–101

through -201. As stated, the Act's purpose is to ensure "that the formation of public policy and decisions is public business and shall not be conducted in secret." Tenn. Code Ann. § 8–44–101(a). To effectuate this purpose, the Act provides, "All meetings of any governing body are declared to be public meetings open to the public at all times . . . ." *Id.* § 8–44–102(a). The term "meeting" is defined as "the convening of a governing body of a public body for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter." *Id.* § 8–44–102(b)(2).

The goal of the statute is to ensure that the "public [can] be present" during such meetings regarding public business. *Johnson v. Metro. Gov't of Nashville & Davidson County*, 320 S.W.3d 299, 310 (Tenn. Ct. App. 2009). Where the public is "afforded ample opportunity to know the facts and to be heard with reference to the matters at issue," there is no violation of the Open Meetings Act. *Neese v. Paris Special Sch. Dist.*, 813 S.W.2d 432, 436 (Tenn. Ct. App. 1990). Moreover, "where substantial and substantive deliberations were held and the vote on the [issue] [was] conducted at the public meeting," this shows compliance with the requirements of the statute. *Johnson*, 320 S.W.3d at 313 (quoting *Neese*, 813 S.W.2d at 436).

In their Amended Complaint, Plaintiffs concede that on July 18, 2014, the IDB held a public meeting where it voted to approve the pipelines plan, whereby the IDB would own the pipelines and US Nitrogen would construct and maintain them. (Amend. Compl. ¶ 49). Plaintiffs also concede that the IDB had deliberations during this meeting. (*Id.* ¶ 57). Plaintiffs' sole argument is that "numerous citizens in attendance were purposefully or negligently prevented from hearing the deliberations" and that the Open Meetings Act and Tennessee Code Annotated Section 7-53-303(c) require that citizens "be able to reasonably hear the deliberations and decisions which occur at the public meeting." (Amend. Compl. ¶¶ 56, 58).

First, Tennessee Code Annotated Section 7-53-303(c) has nothing to do with open meetings and is irrelevant to Plaintiffs' claims. Second, nothing about the July 18, 2014 public meeting was secret, which is what the Open Meetings Act seeks to prohibit. *See* Tenn. Code Ann. § 8–44–101(a). Moreover, the meeting was without question "open to the public," which is what the Act requires. *See Id.* § 8–44–102(a). In fact, approximately fifty to seventy-five citizens attended the meeting, resulting in a "standing-room" only situation. Plaintiffs have not alleged—nor can they—that any citizens were turned away or prohibited from attending the meeting.[1] Nothing in the Plaintiffs' Amended Complaint suggests that the IDB violated the statute at issue. The public was undoubtedly not only present at the meeting, but some citizens were permitted to speak and voice their concerns and opinions, although this is above and beyond what the Open Meetings Act requires. *See Johnson*, 320 S.W.3d at 310. The facts, as pleaded by Plaintiffs, illustrate that interested citizens were "afforded ample opportunity to know the facts and to be heard" regarding the subject matter of the meeting, which was the Defendants' pipelines plan. *See Neese,* 813 S.W.2d at 436. Furthermore, Plaintiffs' Amended Complaint evidences that deliberations and a vote took place in the public's presence, both of which signal compliance with the Open Meetings Act. *Johnson*, 320 S.W.3d at 313.

The entire basis of Plaintiff's claim revolves around its assertion that some citizens could not hear all of the deliberations and that Tennessee law requires that citizens be able to "reasonably hear the deliberations." (Amend. Compl. ¶¶ 56, 58). While Defendants affirmatively aver that nothing was done intentionally to prevent citizens from hearing the proceedings, Plaintiffs are attaching a requirement to the Open Meetings Act that does not exist

[1] Plaintiff states that "one citizen was arrested when he asked the board to speak louder because citizens could not hear the deliberations." (Amend. Compl. ¶ 57). In actuality, the citizen was deemed by the Board to be a distraction to the deliberations and was asked to be escorted out of the meeting room, so that the Board could effectively conduct the public meeting. Upon information and belief, once outside, the citizen was arrested by City of Greeneville authorities unrelated to the IDB and US Nitrogen and outside of the Defendants' control.

▷(but they were off.)

in the statute or in case law. Nonetheless, as stated by the Plaintiffs, the room was equipped with microphones, and the IDB conducted its round-table meeting in the presence of those citizens who wished to attend. The IDB complied with the statute's requirements and took reasonable steps to accommodate those in the room. Opponents of the pipeline plan were vocal and likely contributed to any difficulties in hearing the proceedings.

A similar argument was raised by the plaintiffs and rejected by the court regarding Wisconsin's open meetings law in *State ex rel. Badke v. Village Bd. of Village of Greendale*, 494 N.W.2d 408, 418-19 (Wis. 1993). In that case, the plaintiffs argued that the open meetings law was violated because the meeting at issue was not held in a venue that "provide[d] amplification so that everyone present could clearly hear the proceedings." *Id.* The court explained that "to the extent hearing was difficult, it was intermittent and due to some disruptive attendees." *Id.* The court ultimately found that the defendant "provided reasonable access to those members of the public wishing to attend." *Id.*

Like in *Badke*, hearing the deliberations of the IDB likely was made more difficult by the large crowd and chatter among attendees. However, nothing pled by the Plaintiffs amounts to the IDB restricting "reasonable access to those members of the public wishing to attend" the public meeting. *See id.* at 419. Aside from a conclusory allegation, Plaintiffs have not shown that the IDB "systematically exclude[d] or arbitrarily refuse[d] admittance" to the meeting. *See id.* at 418. Even taking as true the Plaintiffs' allegation that some citizens could not hear the deliberations, this is not enough to void the actions taken at the meeting, given the steps taken by the IDB and the openness of the meeting. As such, this claim should be dismissed with prejudice.

III. THE IDB WILL NOT OPERATE THE PIPELINE, AND THE PIPELINE WILL NOT BE RUN AS A BUSINESS.

Because neither Tennessee Code Annotated Section 7-53-102(a) nor Section 7-53-302(b) is implicated by the planned pipelines, Plaintiffs claim based on these statutes fails and should be dismissed. Plaintiffs allege that "operation of the proposed [pipelines] by the IDB is prohibited by T.C.A. § 7-53-102(a), as such activity would necessarily constitute the operation of a manufacturing, industrial [or] commercial enterprise . . . or pollution control facility." (Amend. Compl. ¶ 66). Plaintiffs further allege that Tennessee Code Annotated Section 7-53-302(b)'s provision stating that the IDB cannot "operate any project financed under this chapter as a business," prohibits the IDB from owning the pipelines and allowing US Nitrogen to operate them. (Amend. Compl. ¶ 67). There are numerous shortcomings with these arguments, and as such, Plaintiffs have failed to state a claim.

Both of the statutes relied upon in this claim use the term "operate" in relation to activities prohibited by the IDB—Section 7-53-102(a) prohibits the IDB from operating a manufacturing, industrial, or commercial enterprise or pollution control facility, and Section 7-53-302(b) prohibits the IDB from operating a project as a business. As explicitly admitted in their Amended Complaint, Plaintiffs state that "the water pipeline project will be constructed, *operated* and maintained by US Nitrogen." (Amend. Compl. ¶ 49) (emphasis added). Plaintiffs' own pleadings show that the IDB will not be operating the pipelines, but will only own them. (*Id.*). Such ownership of property is one of the express purposes of industrial development corporations such as the IDB. *See* Tenn. Code Ann. § 7-53-102(a) ("It is the intent of the generally assembly . . . to authorize the incorporation . . . of public corporations to finance, acquire, own, lease, or dispose of properties"). The sections relied upon by Plaintiffs govern industrial development corporations such as the IDB. Neither the IDB's ownership nor US

Nitrogen's operation of the pipeline implicates either Section 7-53-102(a) or Section 7-53-302(b).

Assuming for the sake of argument that the IDB will operate the pipelines—which it unquestionably will not—the pipelines do not constitute either (1) a manufacturing, industrial or commercial enterprise or pollution control facility (Tenn. Code Ann. § 7-53-102(a)), or (2) a business (*Id.* § 7-53-302(b)). The IDB's ownership of the pipelines is not the equivalent of operating a manufacturing, industrial or commercial enterprise. The IDB merely owns some of the physical property upon which the pipelines will be located, which as shown above, Section 7-53-102(a) expressly allows. In fact, the IDB owns the entire plant site upon which US Nitrogen is constructing its facilities. It is not uncommon for an IDB in general to own property upon which businesses locate and operate. While an IDB may own the real property, it does not operate the business situated on it. The water pipelines merely will support and be ancillary to US Nitrogen's and other companies' facilities. The pipelines do not constitute a stand-alone commercial venture. Nonetheless, even if they did, the IDB will not be operating them, which is what Section 7-53-102(a) prohibits.

The pipelines will not be operated as a business; thus, the pipelines project does not violate Tennessee Code Annotated Section 7-53-302(b). Neither the IDB nor US Nitrogen plans to sell water to any individual or entity. Currently, the IDB pipelines will provide for the non-potable water needs of US Nitrogen and two other associated companies. The IDB in the future may make non-potable water from the Nolichucky River available via the pipelines as an economic development incentive to attract other industries to western Greene County. Neither the IDB nor US Nitrogen stands to make a penny from selling water conveyed by the pipelines.

While no reported cases have construed the meaning of "business" in Section 7-53-302(b), numerous courts in various other contexts overwhelmingly hold that the term "business" implies the notion of operating for a profit. *See State Farm Fire & Cas. Co. v. Sparks*, No. W2006-01036-COA-R3-CV, 2007 WL 4277454, at *7-8 (Tenn. Ct. App. Dec. 7, 2007) (explaining that a pursuit is a "business only if there is a motive for profit"); *Black v. Corder*, 399 S.W.2d 762, 764 (Tenn. 1966) ("business . . . means an activity having a gain or profit motive" in the workers' compensation context); *Vanderbilt Univ. v. Cheney*, 94 S.W. 90, 93 (Tenn. 1906) (where the court held that the term "business" in a tax statute referred to the exercise of a business "where the property is employed for the purpose of profit"). Where the Defendants have no motive or interest in earning a profit from the service of water via the pipelines, no business exists, and Section 7-53-302(b) is not implicated.

Because the IDB will not operate the pipelines and the pipelines do not constitute a business, this claim is without merit and should be dismissed.

IV. PLAINTIFFS HAVE FAILED TO STATE A CLAIM FOR ANTICIPATORY NUISANCE, AND THE PLANNED PIPELINES DO NOT CONSTITUTE A NUISANCE PER SE.

Plaintiffs' claim for an anticipatory nuisance must fail, because they have not pled facts to support a showing of nuisance per se, and the water pipelines are not a nuisance per se. While Plaintiffs have not labeled their claim as one for an anticipatory nuisance, that is the correct description given the facts of this case. *See State ex rel Cunningham v. Feezell*, 400 S.W.2d 716, 718-19 (Tenn. 1966). Plaintiffs assert that the pipelines, once they become operational, "will create a continuous and permanent private nuisance." (Amend. Compl. ¶ 69). Plaintiffs are asking for what amounts to be relief "prior to the alleged nuisance coming into being." *Cunningham*, 400 S.W.2d at 718. Plaintiffs' Amended Complaint contains no allegations of a

current nuisance or damages. (Amend. Compl. ¶ 69, "will create"; ¶ 70 "will be diminished"; ¶ 71 "intend to utilize"). In order for such an anticipatory nuisance claim to survive a motion to dismiss, "it must be sufficiently shown in the [complaint] that the proposed establishment is a nuisance per se." *Cunningham*, 400 S.W.2d at 718; *see also Pace v. Diversified Scientific Servs., Inc.*, 1993 WL 573, at *1 (Tenn. Ct. App. Jan. 4, 1993) (upholding dismissal of lawsuit where complaint was "insufficient concerning the issue of an anticipatory nuisance" because it did not show any "imminent or certain" nuisance).

The court in *Cunningham* explained the distinction between a nuisance per se and a nuisance in fact.

> A nuisance at law or a nuisance per se is an act, occupation, or structure which is a nuisance at all times and under any circumstances, *regardless* of *location or surroundings*. Nuisances in fact or per accidens are those which become nuisances by reason of circumstances and surroundings and an act may be found to be a nuisance as a matter of fact where the natural tendency of the act is to create danger or inflict injury on person or property.

Cunningham at 718-19 (quoting 66 C.J.S. Nuisances § 3 (1950)). The court added further that a nuisance per se involves an activity that

> is of itself hurtful to the health, tranquility, or morals, or which outrages the decency of the community; that which *cannot* be so *conducted* or *maintained* as to be *lawfully carried on* or *permitted* to *exist*; and, as related to private persons, an act or use of property of a continuing nature, offensive to and legally injurious to health and property, or both.

Id. at 719 (quoting 39 Am.Jur., Nuisances, § 11 (1942)). Relief for an anticipatory nuisance will not be granted where injury is "uncertain or contingent," as such relief is not proper "merely to relieve the fears or apprehensions" of the plaintiff. *Id.; see Bivens v. Ballenger*, 1990 WL 182256, at *3 (Tenn. Ct. App. Nov. 28, 1990) (explaining that relief for an anticipatory nuisance "is not proper in light of mere apprehensions that the business may become a nuisance or may possibly cause irreparable injury"). Ultimately, where an activity is "not a nuisance in and of

itself, a court of equity will not anticipate that it will be operated injuriously to others." *Central Drug Store v. Adams*, 201 S.W.2d 682, 685 (Tenn. 1947).

To properly state a claim for an anticipatory nuisance, the plaintiff should demonstrate how the alleged nuisance "would affect the plaintiffs." *Ballenger*, 1990 WL 182256, at *4. The court must be able to conclude from the allegations that injury from the alleged nuisance "is probable or certain to occur." *Id.* The Amended Complaint does not come close to meeting the standard to survive a motion to dismiss. Plaintiffs merely recite the anticipated water intake and discharge statistics and state that (1) "the Nolichucky River will not support the proposed [pipelines] without creating dangerous and/or undesirable conditions" (Amend. Compl. ¶ 74); and (2) the pipelines would "interfere, annoy, and/or disturb the free use of [Plaintiffs'] property" (Amend. Compl. ¶ 75). Nothing in the Amended Complaint or the pipelines project suggests that harm or injury to Plaintiffs' property is imminent or certain to occur, and this alone requires dismissal of the anticipatory nuisance claim. *See Pace*, 1993 WL 573 at *1.

Below-grade pipelines such as those at issue here cannot, as a matter of law, be said to be an "act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings." *See Cunningham*, 400 S.W.2d at 718-19. Moreover, water pipelines are not in and of themselves "hurtful to the health [or] tranquility" and incapable of being "so conducted or maintained as to be lawfully carried on or permitted to exist." *Id.* at 719. *Compare Dill v. Brinkley*, 1988 WL 28561, at *5 (Tenn. Ct. App. Mar. 28, 1988) (where nuisance per se was found regarding a proposed commercial automotive race track because the "noise level [was] relatively certain and that the noise factor [would] be offensive to the residents [and] the increased traffic would constitute a danger to the residents of the area"). In fact, water pipelines currently are in the ground along State Highways 340 and 348 and all over Greene

County; these are not alleged to present a nuisance. If Plaintiffs' argument was accepted, then all water pipelines would constitute a nuisance per se. Common sense, logic, and the law preclude such an absurd result.

Any impact on the use and enjoyment of Plaintiffs' property is purely speculative given the nature of the water pipelines. In addition, the extensive analysis and evaluation performed during the permitting process resulted in permitting the pipeline project activities, implicitly concluding that the activities as permitted comply with Tennessee Law. As such, the water pipelines are not a nuisance per se, and Plaintiffs' claim must be dismissed.

V. PLAINTIFFS HAVE NOT ALLEGED ANY FACTS TO SUPPORT A RIPARIAN RIGHTS CLAIM.

Plaintiffs' riparian rights claim is entirely void of any specific facts and falls short of Tennessee's pleading requirements; therefore, it should be dismissed. Plaintiffs allege only that the pipelines will "unreasonably interfere with their riparian rights." (Amend. Compl. ¶ 76). Plaintiffs essentially repeat this conclusory statement in the following paragraph of the Amended Complaint, stating that the pipelines "would interfere with Plaintiffs' rights to" various water-related activities. (*Id.* ¶ 77). Plaintiffs' Amended Complaint fails to explain that Plaintiffs have any riparian *rights.* In addition, Plaintiffs fail to offer any facts or indication as to *how* their riparian rights—assuming they have any—have been or will be violated by operation of the pipelines. Plaintiffs have not included, nor can they, a single legitimate fact explaining how the pipelines will affect any surface or groundwater in such a way to impair any of their alleged riparian rights.

As explained by the Tennessee Court of Appeals,

> Plaintiffs [may not] merely assert broad and vague accusations and legal conclusions. "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions . . . . Additionally, . . . even

> though a complaint need not contain detailed factual allegations, its factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true."

Déjà Vu of Nashville v. Metropolitan Government of Nashville & Davidson County, 311 S.W.3d 913, 918 (Tenn. Ct. App. 2009) (quoting *Ass'n of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 548-549 (6th Cir. 2007)) (internal citations omitted). As shown above, Plaintiffs' riparian rights claim is composed entirely of broad and vague accusations and legal conclusions.

In addition to the pleading requirements laid out by the Tennessee courts, Rule 8.01 of the Tennessee Rules of Civil Procedure requires that a pleading setting forth a claim for relief "contain: (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief the pleader seeks." With nothing more than a conclusory statement that riparian rights will be affected, Plaintiffs cannot illustrate that they are entitled to relief.

"The doctrine of riparian rights provides that owners of land through which a natural watercourse runs have the right to use the water for useful purposes." *Keltner v. Open Lake Sporting Club*, No. W2002-00449-COA-R3-CV, 2003 WL 346932, at *4 (Tenn. Ct. App. Feb. 12, 2003) (quoting Black's Law Dictionary 1192 (5th ed. 1979)). Nonetheless, Plaintiffs' Amended Complaint does not provide any specific allegations of how their use of surface water or groundwater will be affected by the water pipelines. The Defendants are left to guess what specific rights the Plaintiffs claim to have or how these purported rights will be adversely affected by the pipelines.

Because Plaintiffs have failed to offer any explanation as to how any purported riparian rights are in jeopardy, their claim cannot be sustained.

CONCLUSION

For the foregoing reasons, Defendants the IDB and US Nitrogen request that Plaintiffs' claims against them be dismissed with prejudice.

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