**MEMORANDUM**

To: Florence King (fking@king-plattlaw.com)

From: New Associate

Date: November 2nd, 2018

Re: Sazonado/nuisance-complaint

QUESTION PRESENTED

Under Illinois law, would a motion to dismiss a private nuisance complaint likely be successful, where Sazonado Inc.’s (Sazonado) chili sauce manufactory causes the Plaintiffs having sealed their houses, making their eyes sting, and having them cease their outside activities; where Sazonado received personal complaints from its neighbors, although they had installed standard filters; and where the Plaintiffs have lived in its residential area, before Sazonado has started its business, although the factory is located in an industrial zone in rural Huntley, and its hot sauce is popularly used as a condiment.

BRIEF ANSWER

No, a motion to dismiss would not likely succeed. The Plaintiffs properly pleaded that the invasion was substantial because they have to keep their windows closed, have to cease outside activities, and suffer an impairment of their property. They properly pleaded that the invasion was intentional because the Plaintiffs contacted Sazonado to discuss their issues and although Sazonado uses standard filters, the complaints have not stopped. Lastly, the Plaintiffs properly pleaded that the invasion was unreasonable because they lived first in this neighborhood, and the invasion could not be reduced, although Sazonado uses filters and its factory is appropriately located.

FACTS

The Plaintiffs, Maria Rivera, Corrado Rivera, Madeline Thompson, Samuel Thompson, Doris Davis-Jacobs, and Michael Jacobs, have filed a complaint against Sazonado, Inc. (Sazonado). The nature of this action is a private nuisance claim.

All of the Plaintiffs are located on the same block in Huntley, Illinois. The subdivision, where the Plaintiffs live, is zoned residential, and it includes approximately 35 houses. Sazonado’s property, with its operating factory, is zoned industrial, and it is located across the street from Plaintiffs’ subdivision. Prior Sazonado’s purchase of the property in early 2018, a farm equipment manufacturer had been located on the property. The property had been vacant for the last 10 years though. After finishing constructions of its factory in May 2018, Sazonado had begun operation in June 2018. The factory covers an area of approximately 75.000 square feet; the property has a parking lot as well.

Sazonado manufactures a hot sauce that people use as a condiment on various foods. The factory operates from 7AM to 11PM, seven days per week. It generates a chili odor during that time, which is the reason for the present complaint.

The Plaintiffs allege that the factory generates a significant odor that unreasonably interferes with the Plaintiffs’ use of their property. Regarding the Plaintiffs’ statements, the odor is supposedly strong and makes it difficult for them to be outside. It causes the Plaintiffs’ eyes to sting and water, and it causes their noses to feel inflamed. Furthermore, the Plaintiffs contend that they must keep their windows closed at all times regardless of the weather, and they must cease their outside activities, and stop inviting guests. An upcoming event has to be cancelled because of particularly strong odor. Additionally, one plaintiff, who suffers from asthma, has to use an inhaler more frequently and has to stay inside to avoid asthma attacks, when the odors are particularly strong. The supposedly strong odor was present for two months of the year—July to August 2018. The “less strong” odor is present for the rest of the year. Lastly, the contended odor diminished the values of the Plaintiffs’ properties.

The Plaintiffs contacted Sazonado to discuss the problems created by their factory. Sazonado responded that it had installed standard filters and no further complaints had been received. The alleged odor has not stopped and other complaints by the Plaintiffs remained unanswered.

Therefore, the Plaintiffs brought suit in September 10, 2018, in order to request the following relief: (1) an order permanently enjoining Sazonado from further operation of its factory, (2) compensatory damages of at least $75,000, (3) punitive damages, (4) costs of suit, and, (5) any other relief that this Court deems equitable and just.

DISCUSSION

The court would likely not grant a motion to dismiss the Plaintiffs’ nuisance complaint, if Sazonado filed one. When evaluating a motion to dismiss, the court assumes that the alleged facts, presented by the plaintiff, are true, and it will “[draw] all reasonable inferences in the plaintiff’s favor.” *Sturdy v. Medtrak Educ. Services LLC*, 13-CV-3350, 2014 WL 2727200, at \*1-2 (C.D. Ill. June 16, 2014). Therefore, the court construes the facts in the “light most favorable to the plaintiff.” *In re Chi. Flood Litig*., 680 N.E.2d 265 (Ill. 1997*.*)

For a private nuisance to be actionable, “an invasion of another’s interest in the use and enjoyment of his land must exist.” *Woods v. Khan*, 420 N.E.2d 1028, 1030 (Ill. App. Ct. 5th Dist. 1981). Therefore, a plaintiff must allege three elements: (1) the invasion must be “substantial,” (2) it must be either “negligent” or “intentional,” and (3) it must be “unreasonable.” *Id*. Additionally, a nuisance “must be physically offensive to the senses to the extent that it makes life uncomfortable.” *In re Chi. Flood Litig*., 680 N.E.2d 265 (Ill. 1997).

Here, Sazonado’s strong chili odor is a substantial invasion, because it constitutes a material annoyance to the Plaintiffs and makes their lives uncomfortable. The invasion is intentional, because Sazonado knows about its emission, it installed standard filters, but nevertheless received complaints by its neighbors. Sazonado’s invasion is unreasonable because the gravity of the harm done to the Plaintiffs and their property outweighs the utility of Sazonado’s business and the suitability of the location of that business.

1. **Substantial**

Sazonado’s chili sauce factory is a substantial invasion to the Plaintiffs’ use and enjoyment of their land. An invasion is substantial when it “[is] severe enough to constitute a material annoyance to the adjoining landowners.” *Woods*, 420 N.E.2d at 1030. The court is looking at “its effect upon an ordinarily reasonable [person], that is, a normal person of ordinary habits and sensibilities.” *Belmar Drive-In Theatre Co. v. Ill. St. Toll Hwy. Commn*., 216 N.E.2d 788, 790 (Ill. 1966). The person must not be “unduly sensitive, delicate, fastidious, or pursuing a dainty way of life.” *Id*. The following invasions can be actionable as a nuisance: “noise, smoke, vibration, dust, fumes, and odors produced on a defendant’s land and impairing the use of enjoyment of neighboring land.” *In re Chi. Flood Litig*., 680 N.E.2d at 278 (Ill. 1997).

In *Dobbs v. Wigging,* the defendant purchased his property next to plaintiffs’ property line, and built dog kennels, where he began raising, training, and kenneling bird dogs—a total of 69. 929 N.E.2d at 34 (Ill. App. Ct. 5th Dist. 2010). The barking dogs—additionally triggered by the wildlife in the area—could be heard by the plaintiffs at all hours of the day and night, even inside their house. *Id.* at 40. They had to keep their windows shut all the time and curtail their outdoor activities, like gardening and having friends over. *Id.* at 34. The court held that “the barking . . ., which occurred at all hours of the day and night,” was substantial. *Id*.

In *Woods v. Khan*, the plaintiffs were living within a mile of the defendant’s property, where he is operating an egg-production facility with over 50.000 chickens. 420 N.E.2 at 1029. Due to the odors produced by the defendant’s poultry business, the plaintiffs were required to seal their houses, curtailed their outdoor activities, and stopped inviting guests. *Id* at 1030. The plaintiffs were beset by big flies and suffered from physical ailments like breathing difficulties, sore throats, and feeling of nausea. *Id*. at 1029. The court stated that the odors and flies were sufficiently bothersome, and that the defendant’s poultry business “overwhelmingly interfere[s] with the rights of [the plaintiffs] to enjoy their property,” although both parties resided at an agricultural zoned area *Id*. at 1031. Thus, the court agreed that the invasion was substantial.

In a contrary case, the court ruled in favor of the defendants, the operators of a toll-road service center on their property, next to defendant’s outdoor movie theatre. *Belmar*, 216 N.E.2d at 790. The plaintiff contended that the “brilliant artificial lights employed on the oasis . . . dispel darkness on neighboring premises, making it impossible to properly exhibit outdoor movies.” *Id*. at 790. However, the court compared, whether “the intensity of light shining from adjoining land is strong enough to seriously disturb a person of ordinary sensibilities or interfere with an occupation which is no more than ordinarily susceptible to light.” It stated that “a person cannot increase the liability of his neighbor by applying his own property to special and delicate uses, whether for business or pleasure.” *Id*. at 791. Therefore, the light was not substantial.

In a similar case the court ruled in favor of the defendant, whose adjacent mushroom farm, with its odors, bothered the plaintiff’s outdoor movie theater. *Arbor Theatre Corp. v. Campbell Soup Co*., 296 N.E.2d 11 at 12 (Ill. App. Ct. 2d Dist. 1973). The odor and its smell were noticeable on the plaintiff’s property. *Id*. The court stated that the invasion was not substantial enough, and such occasional discomfort must be submitted; the plaintiff was aware of the condition on the adjacent farm and its odors, he nevertheless closed the deal and started his outdoor theatre. *Id*.

Like in *Woods* and *Dobbs*, where the plaintiffs had to seal their windows and curtail their outdoor activities as a result of the defendant’s invasion, here, the Plaintiffs suffer the same effects caused by Sazonado’s business; they must keep their windows closed at all times regardless of the weather, they must cease their outdoor activities, they cannot have friends over, and they suffer from severe physical complaints like stinging and watering eyes, feeling of an inflamed nose, and they can taste the hot sauce whenever they are outside all throughout the year. (Compl. ¶ 13.-21.). Like in *Dobbs*, where the barking dogs could be heard during all day and night, here, Sazonado’s manufactory operates seven days per week, from 7am to 11pm.

Unlike in *Arbor Theater*, where the plaintiff knew about the condition of its surrounding area with the odor, but nevertheless purchased the property, here, property was vacant for the last 10 years, and the Plaintiffs were just recently confronted with the newly constructed factory by Sazonado. Unlike in *Belmar*, where the defendant was hypersensitive due to its business, here, the plaintiffs suffer all in the same way from the chili sauce manufactory of Sazonado, except Doris Davis-Jacobs, who suffers from asthma, and therefore, can be considered as an abnormally sensitive person. (Compl. ¶ 20.). Sazonado business is a substantial invasion of the plaintiff’s property and life. They are not unduly sensitive, and it constitutes a material annoyance.

1. **Intentional**

Sazonado was aware of the odor being produced by its chili sauce manufactory, and its effect upon the plaintiffs. Thus, the invasion was intentional. An invasion is intentional, if “the defendant knows that an invasion of another’s interest in the use or enjoyment of his or her land is resulting or is substantially certain to result.” *Dobbs v. Wiggins*, 929 N.E.2d 30, 40. Thus, the defendant “need[s] not engage in the conduct for the purpose of creating the consequences.” *In re Bloomingdale Partners*, 160 B.R. 101 at 20 (Bankr. N.D. Ill. 1993).

In *Dobbs*, the defendant was kenneling a numerous amount of bird dogs on his property, which were barking during all day and night. 929 N.E.2d 30, 33. As a result of the constant noises, the plaintiffs had several conversations with the defendant. *Id*. at 35. The court found that the defendant “knew that he had a few problem dogs that barked frequently, knew that wildlife in the area could set off the dogs, and knew that a few dogs barking often caused a chain reaction.” *Id*. at 40. Furthermore, the court stated that the defendant knew that the barking noise was substantially certain to be invasive to his neighbors. *Id*. Thus, the defendant’s invasion was intentional.

In a similar way, a court ruled in favor of the plaintiffs, who were the adjoining neighbors of the defendants’ apartment complex, which contained 168 apartments. *Bloomingdale*, 160 B.R. 101 at 6. The plaintiffs contended that the “air conditioning units, generators, fans, and swimming pool dehumidifier located at the apartment complex emit excessive noise be beyond the boundaries of the complex.” *Id*. at 5. The plaintiffs in this case had several conversations with one of the general partners of the apartment complex, in order to resolve the problem. *Id*. at 7. The court stated that “although the Debtor did not emit the noise from its building for the purpose of invading the [Plaintiffs’] interest in the use and enjoyment of their land, [they] knew . . ., that noise from its building was substantially interfering with the [plaintiffs’] use and enjoyment of their townhome. *Id*. at 21. Thus, the invasion was intentional.

Like in *Dobbs*, where the Plaintiffs sought to resolve the barking issue by talking to the defendant, here, the Plaintiffs contacted individuals at Sazonado to discuss the problems created by the factory. (Compl. ¶ 24.). Sazonado knew about the invasion his business entails, that is why Sazonado told the Plaintiffs that it had installed standard filters. *Id*.

Like in *In re Bloomingdale*, where the defendant knew that noise from its building was substantially interfering with the plaintiffs’ use and enjoyment of their townhome, here, Sazonado does not produce its odors, with the intent and purpose of causing severe harm to the Plaintiffs, but they knew that its manufactory is producing odor. Sazonado’s invasion is intentional.

1. **Unreasonable**

Sazonado’s chili sauce manufactory causes an unreasonable invasion. An invasion is unreasonable, “[if] the gravity of the harm done to the plaintiffs outweighs the utility of the defendants’ business and the suitability of the location of that business.” *Woods v. Khan*, 1030. The court has to consider and balance several factors in each case. *Id*. Therefore, the court will ask the following questions in determining, whether a nuisance is unreasonable or not: (1) Is the defendant engaged in a useful enterprise/business? (2) Is this the appropriate area for this type of business? (3) Who was first located on their property? (4) Can the nuisance be reduced? (5) Is there a practical way to modify the nuisance other than completely closing the business? *Id*.

In *Dobbs*, the defendant was engaged in a useful business—raising bird dogs—, and although the defendant was located at an appropriate area, the court ruled against the defendant. *Id* at 41. The plaintiffs were located on their property before the defendant started his business. *Id*. Although the defendant bought devices to quiet the dogs, the barking could not be reduced to a non-substantial level, and there is no other practical way to modify it, then by decreasing the number of the dogs. *Id*. Thus, the court found that the invasion was unreasonable.

In *Woods*, the defendant’s poultry business produced a strong odor. 420 N.E.2d at 1028. Even though the business was located in an area zoned agricultural and its business was part of a vital industry, the court stated, that the facility like defendant’s must not be closer to residences than half a mile. *Id*. at 1031. The court agreed that the invasion was unreasonable and advised the defendant to use other disposal systems. *Id*.

In another case, the plaintiffs—owner of a townhome—filed a noise complaint about the defendant’s apartment complex and its emitting noises. *In re Bloomingdale Partners*, 160 B.R. 101 at 5. The defendants’ building “serves an economically useful purpose” in providing apartments and obtained all permits and licenses, the court ruled in favor of the plaintiff though. *Id*. It mostly considered the ease of abatement of the offensive conduct. *Id*. at 22. The defendant’s proposed plan for noise reduction was recognized by the court as an economically efficient manner *Id* at 25. As a result, the invasion was unreasonable.

In *Arbor Theatre*, the plaintiff sought to enjoin continuation of defendant’s compost producing operation, which supposedly interferes with the plaintiff’s outdoor-movie theater. 296 N.E.2d 11 at 12. The defendant purchased his land prior the plaintiff. *Id*. The plaintiff was fully aware of the occasional odors from his neighbor. *Id*. The defendant’s parcel was located at a rural area; thus, its composting operation is suitable to the locality. *Id*. at 14. Furthermore, the defendant altered and modified its compost operation (e.g. construction of a kiln building) to meet the performance standards, which were set by the county ordinance for its area. *Id*. at 13. *Id*. Thus, the court stated, that the plaintiff must accept the occasional discomfort from defendant’s business, because it is suitable to the locality and is reasonable under the circumstances. *Id* at 14.

Like in *Woods,* where defendant’s egg business was part of a vital industry and that they put a lot of investment in their business, here, Sazonado produces a popularly used condiment in its newly constructed factory, where it also employs many people. (Compl. ¶ 10.). This factor favors Sazonado. Like in *Woods* and *Dobbs*, where the defendants had their property in an appropriately zoned area, here, Sazonado is located at an industrial zoned area. Like in *Woods* and *Dobbs*, and unlike *Arbor Theatre,* where the plaintiffs have already lived on their property before the defendants started their businesses, here, Sazonado just recently purchased the property and began its chili sauce manufactory.

Unlike *Arbor Theatre*, where the plaintiff was aware of the occasional discomfort from its neighbor, here, the plaintiffs did not know about the upcoming chili odors, because the property had been vacant for the last 10 years. The previous owner of that property was a farm equipment manufacturer, who obviously did not produce odors. Unlike in *Arbor Theatre Corp. V. Campbell Soup Co.*, where the defendant took several steps to modify his operation, Sazonado had installed standard filters. These filters did not stop the continued odor. Unlike *Dobbs*, where a modification was not possible, here, Sazonado can try to install further filter systems.

Sazonado produces an unreasonable invasion to the Plaintiffs. The gravity of the harm done to the Plaintiffs outweighs the utility of Sazonado’s business and the suitability of its location.

**CONCLUSION**

Sazonado’s motion to dismiss would likely not succeed. The nuisance complain would be ruled in favor of the Plaintiffs. Especially under the circumstances of the standard of review, the court would assume that the alleged facts, presented by the Plaintiffs, are true, and would even draw all reasonable inferences in the Plaintiff’s favor.

The Plaintiffs properly pleaded that an invasion of their interest in the use and enjoyment of their land exists. Sazonado’s chili sauce manufactory, which produces a strong odor, constitutes most likely a private nuisance. The effects upon the Plaintiffs show a substantial invasion; it is sufficiently bothersome, and it makes the Plaintiffs’ life uncomfortable. Sazonado operates its business with the knowledge about its emission, and it knows that an invasion of its neighbors’ interest in the use and enjoyment of their land is resulting. Lastly, Sazonado’s invasion is unreasonable, because the gravity of the harm done to the Plaintiffs and their property outweighs the utility of Sazonado’s business.

Trying to settle this case would be a reasonable option, which I hardly recommend to Sazonado. Specially under the standard of review for a motion to dismiss, the plaintiffs’ complaint shows sufficient details and facts to survive a motion to dismiss. Eventually, I would recommend Sazonado, in order to stay away from further complaints, to make sure that carbon filters it has installed, like Anette Franklin stated, operate in an efficient way. Maybe Sazonado should consider about relocate the chili sauce production, or at least just relocate the main source, that produces the odor. The more rural area in Tennessee sounds like a suitable location for it.

**Reflection piece**

After reviewing the first draft of this memorandum, especially with the comments from our Professor, it was easier to determine the weak points in order to revise them. Reading the same cases again, with the background from the comments and the further knowledge about the structure of the memorandum, helped to filter the necessary information from the cases. This exercise was once again were useful to increase one’s ability to organize and summarize the gained information from the cases. Lastly, this exercise helped me to see that there is still a lot improvement left in my legal writing skills.

Nickolas Krys