UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION
CIVIL ACTION NO. 5:09-CV-00121

TERRY POWELL, *et al.* Plaintiffs

v.

JIMMY TOSH, *et al.* Defendants

MEMORANDUM OPINION AND ORDER

This matter is before the Court upon the Tosh Defendants'[1] Motion for Class Decertification. (Docket No. 621.) Plaintiffs have responded, (Docket No. 622), and the Tosh Defendants have replied, (Docket No. 623). This matter is now ripe for adjudication. For the reasons that follow, the Tosh Defendants' Motion, (Docket No. 621), will be GRANTED, and the Court will decertify the Plaintiff class in this case.

BACKGROUND

The issues relative to class certification in this matter are now well known to the Court.[2] (*See* Docket Nos. 245; 276; 288; 326.) Plaintiffs, current and former residents and property owners in Marshall County, Kentucky, originally filed this action in 2009

[1] The "Tosh Defendants" include Jimmy Tosh; Tosh Farms, LLC; Tosh Farms General Partnership; Pig Palace, LLC; Shiloh Hills, LLC; Tosh Pork, LLC; and Bacon By Gosh, Inc.

[2] The pertinent factual background of this case has been recited by the Court on several prior occasions, including in the Court's March 2, 2012, Order certifying the Plaintiff class, (Docket No. 288, at 1-3), and, more recently, in the Court's March 8, 2013, Order addressing the various Defendants' motions for summary judgment, (Docket No. 536, at 3-7). In the interest of brevity, the Court will limit its recitation here to the procedural background relevant to the class certification issues that are presently before the Court.

against the Tosh Defendants and Howell and Davis Defendants.[3] By Order of March 2, 2012, the Court certified a Rule 23(b)(3) plaintiff class consisting of current and former residents and property owners within a 1.25-mile radius of Defendant Ron Davis's hog barns. (Docket No. 288, at 26.) That class was certified against the Tosh Defendants for the Plaintiffs' claims of temporary nuisance, permanent nuisance, trespass, negligence, negligence *per se*, punitive damages, products liability, and civil conspiracy. (Docket No. 288, at 25.) Plaintiffs did not seek class certification against the Howell and Davis Defendants. Then by Order of July 5, 2012, the Court granted the Plaintiffs' motion to include their battery claim in the class certification against the Tosh Defendants. (Docket No. 326, at 4.)

Thereafter, by Order of March 8, 2013, the Court granted summary judgment in favor of the Tosh Defendants and Howell and Davis Defendants on each of the Plaintiffs' claims except permanent nuisance. (Docket No. 536.) Thus, the present posture of this litigation may be summarized as follows: the 23 named Plaintiffs are proceeding on individual claims of permanent nuisance against the Howell and Davis Defendants; the class Plaintiffs, for whom the 23 named Plaintiffs are class representatives, simultaneously are proceeding on a class claim of permanent nuisance against the Tosh Defendants.

[3] The "Howell and Davis Defendants" include Eric Howell, Ron Davis, and Heather Davis. Although these Defendants are referred to elsewhere in this matter as the "Farmer Defendants," the "Defendant Farmers," the "Howell/Davis Defendants," the "Producer Defendants," the "Davis and Howell Defendants," and the "Davis/Howell Defendants," the Court will refer to these Defendants here as the "Howell and Davis Defendants."

DISCUSSION

The Tosh Defendants now move to decertify the class, arguing that several significant developments have occurred since certification that warrant decertification of the Plaintiff class.

I. Standard for Class Certification Under Rule 23

The Supreme Court twice recently has affirmed the notion that "[t]he class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp. v. Behrend*, ___ U.S.___, 133 S. Ct. 1426, 1432 (2013) (internal quotation marks and citation omitted); *Wal-Mart Stores, Inc. v. Dukes*, 562 U.S. ___, 131 S. Ct. 2541, 2550 (2011). To fall within that exception, a party seeking to maintain a class action "must affirmatively demonstrate his compliance" with Federal Rule of Civil Procedure 23. *Comcast*, 131 S. Ct. at 1432 (quoting *Dukes*, 131 S. Ct. at 2551-52). Rule 23 provides, in relevant part:

> (a) **Prerequisites.** One or more members of a class may sue . . . as representative parties on behalf of all members only if:
> (1) the class is so numerous that joinder of all members is impracticable;
> (2) there are questions of law or fact common to the class;
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
> (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) **Types of Class Actions.** A class action may be maintained if Rule 23(a) is satisfied and if:
> . . . .
> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. . . .

As the Supreme Court advised earlier this year, Rule 23 "does not set forth a mere pleading standard"; rather, a party seeking to maintain a class "must not only 'be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact,' typicality of claims or defenses, and adequacy of representation, as required by Rule 23(a) [but] must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b)." *Comcast*, 131 S. Ct. at 1432 (emphasis in original) (quoting *Dukes*, 131 S. Ct. at 2551-52).

First, a court must conduct "a rigorous analysis" to ensure that each of the four prerequisites of Rule 23(a) are satisfied. *Id.*; *Ball v. Union Carbide Corp.*, 385 F.3d 713, 727 (6th Cir. 2004). "Such an analysis," the Supreme Court counsels, "will frequently entail overlap with the merits of the plaintiff's underlying claim . . . because the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Comcast*, 133 S. Ct. at 1432 (internal quotation marks omitted) (quoting *Dukes*, 131 S. Ct. at 2558; *Gen. Tele. Co. of Sw. v. Falcon*, 458 U.S. 147, 160 (1982)). Second, for Rule 23(b)(3, a court must "find that 'the questions of law or fact common to class members predominate over any questions affecting only individual members.'" *Id.* (quoting *Dukes*, 131 S. Ct. at 2551-52). The Supreme Court advises that "[i]f anything, Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)," given that Rule 23(b)(3) "is designed for situations in which class-action treatment is not as clearly called for." *Id.* (internal quotation marks omitted) (quoting *Dukes*, 131 S. Ct. at 2558; *Amchen Prods., Inc. v. Windsor*, 521 U.S. 591, 614-15 (1997)).

Rule 23(c) permits a court to alter or amend an order granting or denying class certification any time before final judgment. Fed. R. Civ. P. 23(c)(1)(C). The Sixth Circuit recognizes that district courts have a "continuing obligation to ensure that the class certification requirements are met, and [may] alter or amend the certification order as circumstances change." *Randleman v. Fidelity Nat'l Title Ins. Co.*, 646 F.3d 347, 352 (2011). Thus, a court's duty to assess the propriety of class certification is ongoing, and a court must be prepared under Rule 23(c) to alter or amend the class certification if necessary. *See, e.g.*, *Binta B. ex rel. S.A. v. Gordon*, 710 F.3d 608, 618 (6th Cir. 2013) ("[A] district court's responsibilities with respect to Rule 23(a) do not end once the class is certified."); *Barney v. Holzer Clinic, Ltd.*, 110 F.3d 1207, 1214 (6th Cir. 1997) (holding that the district court's duty to ensure that the prerequisites of Rule 23(a) are met does not end with the initial certification); *Sutton v. Hopkins Cnty., Ky.*, 2007 WL 119892, at *2 (W.D. Ky. Jan. 11, 2007) ("Pursuant to Fed. R. Civ. P. 23, the district court is charged with the duty of monitoring its class decisions in light of the evidentiary development of the case [and] must define, redefine, subclass, and decertify as appropriate in response to the progression of the case from assertion to facts." (internal quotation marks and citations omitted)); *accord Burns v. U.S. R.R. Ret. Bd.*, 701 F.2d 189, 191-92 (D.C. Cir. 1983) (Ruth Bader Ginsburg, J.) ("The original definition and certification . . . may require alteration or amendment as the case unfolds."). Therefore, as this Court has noted, "the district court may decertify a class if there is a subsequent showing that the grounds for granting certification no longer exist or never existed." *Sutton*, 2007 WL 119892, at *2 (internal quotation marks omitted) (quoting *McGee v. E. Ohio Gas Co.*, 200 F.R.D. 382, 387 (S.D. Ohio 2001)).

II. Rule 23(a) Prerequisites

In its prior Opinion certifying the Plaintiff class, the Court conducted a detailed analysis of each of the four prerequisites under Rule 23(a). (*See* Docket No. 288, at 7-18.) The first prerequisite, "numerosity," is not at issue here,[4] and the Court finds no reason to disturb its previous conclusion that "the numerosity requirement is clearly met." (Docket No. 288, at 12.) The principal Rule 23(a) prerequisite presently at issue is "commonality," and, as such, deserves the most thorough consideration. Nevertheless, upon further review, the Court also has concerns with "typicality" and the "adequacy of representation" and, thus, will address briefly those prerequisites as well.

A. Commonality

In its prior Opinion certifying the Plaintiff class, the Court concluded that the commonality requirement was met among the potential class members insofar as each of those potential class members asserted a common contention that the operation of the Ron Davis barns caused noxious odors and decreased their property values. (Docket No. 288, at 13.) The Court reasoned that commonality existed because the potential plaintiffs had all asserted that the Tosh Defendants' conduct at a single hog barn had caused all potential plaintiffs the same injury. (Docket No. 288, at 14.) The Court explained:

> While the frequency and intensity of the effects suffered by those within the proposed class may differ, there are common questions of law and fact capable of class-wide resolution in regards to liability. For example, Plaintiffs have asserted a claim against Defendants for negligence per se. To support this claim, Plaintiffs would have to show that Defendants violated a statute,

[4] Although the Tosh Defendants twice mention the numerosity prerequisite in their Memorandum, they do not appear to focus their argument on this criterion.

> that they are within a class of persons for whose benefit the statute was enacted, and that the harm to the plaintiffs is the type of harm the statute was designed to prevent. These are questions that can be determined on a class-wide basis. Additionally, Plaintiffs have asserted a products liability claim against Defendant. To support this claim, Plaintiffs would have to show that the Ron Davis Hog Barn is a defective product. This question is also capable of determination on a class-wide basis. Accordingly, the Court finds that there is commonality between Plaintiffs situated around the Ron Davis Hog Barn.

(Docket No. 288, at 15.) For several reasons, the Court cannot reach the same conclusion today.

The narrowing of the Plaintiffs' causes of action brings focus to the particular questions of law and fact necessary to resolve their sole remaining claim for permanent nuisance. Specifically, the Court's review of Kentucky nuisance law compels the conclusion that the question whether the Tosh Defendants' conduct amounts to a permanent nuisance requires an individualized inquiry and is not capable of determination on a classwide basis. That is, the common question of whether the Tosh Defendants' conduct amounts to a permanent nuisance—and, thus, are liable to a given Plaintiff—cannot adequately be resolved by a common answer.

1. Under Kentucky law, a permanent nuisance claim has both a subjective and objective component.

Kentucky statutory law sets out the requirements for establishing a claim of permanent nuisance as follows:

> A permanent nuisance shall exist if and only if a defendant's use of property causes unreasonable and substantial annoyance to the occupants of the claimant's property or unreasonably interferes with the use and enjoyment of such property, and thereby causes the fair market value of the claimant's property to be materially reduced.

Ky. Rev. Stat. § 511.530(2). The parties disagree as to the proper reading of this statute and what, precisely, must be proven to establish a permanent nuisance. Plaintiffs acknowledge that "'substantial annoyance' is clearly a subjective standard," but seem to argue that "Kentucky law bounds that subjectivity with an objective standard of the ordinary person." (Docket No. 622, at 7.) Plaintiffs argue that the second part of the statute—whether "a defendant's use of property . . . unreasonably interferes with the use and enjoyment of [the claimant's] property"—presents an even "more objective standard." (Docket No. 622, at 10.) In essence, the Court reads Plaintiffs' position as arguing that to the extent "substantial annoyance" or "interference with use and enjoyment" has a subjective basis, the inquiry on the whole somehow is rendered objective by the inclusion of a "reasonableness" element and, thus, can be readily answered on a classwide basis. Though well taken, the Court cannot agree with the Plaintiffs' rationale.

The Kentucky nuisance statute can be broken down into several parts. First, it lays out what a claimant must experience: a defendant's use of property must either (1) cause unreasonable and substantial annoyance to the claimant, or (2) unreasonably interfere with the claimant's use and enjoyment of his own property. Each of these possible showings has both a subjective and an objective component. In the former, the subjective component asks whether the claimant was in fact "substantially annoyed," and the objective component asks whether that substantial annoyance was unreasonable. In the latter, the subjective component asks whether there was in fact an "interference with the claimant's use and enjoyment of his property," and the objective component asks whether that interference was unreasonable. The final part of the nuisance statute

then requires a showing that the annoyance or interference caused the claimant to suffer a material reduction in the fair market value of his property.

This reading of the nuisance statute is consistent with Kentucky common law and the approach taken by Kentucky courts. For example, in *Southeast Coal Co. v. Combs*, the Kentucky Supreme Court addressed a challenge to the following liability and causation instruction for permanent nuisance:

> If you believe from the evidence that in the [defendant's use of its property] the defendant company, through the release or discharge of impurities into the atmosphere, caused unreasonable or substantial annoyance to the occupants of any of the plaintiff's properties, and that such impurities would cause substantial annoyance to a person of ordinary health and normal sensitivity, and if you further believe from the evidence that solely by reason of that condition the market value of his property . . . has been materially reduced, then you will find in his favor. But unless you so believe you will find for the defendant company.

760 S.W.2d 83, 83-84 (1988). With the exception of the word "solely," the Kentucky Court approved this instruction. *Id.* at 84. Breaking that instruction down, it is apparent that under Kentucky law a plaintiff must prove three elements to establish liability. First, he must prove *subjective* annoyance (or interference): "unreasonable or substantial annoyance to the occupants of any of the plaintiff's properties." Second, he must prove *objective* annoyance (or interference): "that such impurities would cause substantial annoyance to a person of ordinary health and normal sensitivity." *See generally Rockwell Int'l Corp. v. Wilhite*, 143 S.W.3d 604, 627 (Ky. Ct. App. 2003) (equating the nuisance standard of "a person of ordinary health and sensitivities" to the standard of "a reasonable person"). Third, he must prove a material reduction in the fair market value of his property that was caused by the annoyance or interference. By the

use of the conjunctive "and" in the *Southeast Coal* instruction, it is clear that Kentucky law requires that each of these elements be proven to establish a permanent nuisance.

A review of Palmore's *Kentucky Instructions to Juries* further supports this reading of the Kentucky nuisance statute. Section 48.02, which addresses industrial air pollution, lays out the liability elements for a permanent nuisance claim as follows:

> 1. You will find for each of the plaintiffs with respect to whom you are satisfied from the evidence as follows:
>
> (a) that in the operation of its slag plant D, through the release or discharge of impurities into the atmosphere, causes unreasonable and substantial annoyance to the occupants of said plaintiff's property;
>
> (b) that such impurities in the atmosphere at the location of said plaintiff's property would cause substantial annoyance to a person of ordinary health and normal sensitivities;
>
> AND
>
> (c) that by reason of that condition the fair market value of said plaintiff's property has been materially reduced.
>
> Otherwise you will find for D.

2 Palmore & Cetrulo, *Kentucky Instructions to Juries* § 48.02 (5th ed. rev. 2010). Thus, the Palmore model instruction similarly breaks down the permanent nuisance tort into three distinct parts, each of which must be proven to establish liability.

Turning back to the issue of commonality, at least two of these liability elements cannot be resolved by a common answer.

2. The subjective component of the Plaintiff class's permanent nuisance claim is not capable of resolution by a common, classwide answer.

First, in regard to the subjective component, the evidentiary development of this case since the class was certified raises concerns whether a number of the unnamed class members do in fact claim substantial annoyance or interference with the use and enjoyment of their properties. The Tosh Defendants point to the deposition testimony of a number of these unnamed class Plaintiffs to argue that, "during class discovery, most of the deposed witnesses (who were not the named Plaintiffs) living within the class radius admitted that they either do not smell the hog odors emanating from Ron Davis's hog barns or that the odors are minimal and not substantially annoying." (Docket No. 621-1, at 2.) Having reviewed the deposition transcripts submitted by the Tosh Defendants, it appears to the Court that this contention has merit. For example, absent class member Judy Devine, who says she "can see the hog farm from [her] house" and lives "probably about a quarter of a mile" from it, testified:

> Q. And do you smell the hog odors at your house?
>
> A. I don't now, very seldom.
>
> Q. When you say "very seldom"--
>
> A. Oh, I don't remember when I have smelled them. It may have been three months or it may have been -- I mean, they're just so seldom that I don't even pay any attention to them.
>
> . . . .
>
> Q. When you smelled the hog odors, is the smell offensive to you?

A. No.

(Docket No. 621-4, at 2-3.)

Absent class member Judy Reeves, who says she lives roughly 0.5 mile south of the Ron Davis barns, testified:

> Q. And what did you tell [defense counsel] about the odors?
>
> A. I have not found it to be a problem, especially recently. It's rare that I'm even aware that the hog barn is there.
> . . . .
> I could go a month, I'm sure, and not smell it at all.
>
> Q. That's today?
>
> A. Uh-huh. Or maybe three months. It's rare that I am aware that it's there.
>
> Q. Is there any time of year that you smell the barns more often than another time of the year?
>
> A. No. I'm out a lot in the summer, and I don't -- you know, it is not a problem then. I'm not out as much now, of course. [Reeves' deposition was taken in December.] It's not a problem.

(Docket No. 621-2, at 3.)

Absent class member Jerry Daniels, when asked how often he had smelled hog odors at his residence after June 2010, testified: "Occasionally. The last time I noticed an odor, and which I didn't write it down, probably three weeks ago, and it was a light -- a light odor. I mean, when I walked out the garage door, I got a whiff of it, and you know, walked back in. Then when I came out a couple of hours later to leave or go somewhere, it wasn't there." (Docket No. 621-5, at 4.)

Absent class member David Gardner, who lives in the former home of named Plaintiffs Bradley and Karen Hall, and who uses his home for both residential and commercial purposes, testified:

> Q. How often have you smelled hog odors since you've moved in?
>
> A. On an average, once a month, maybe once every two months. It kind of depends on, you know, how the humidity is laying that day. You know, it may get a little bit -- a little brief of an odor, but nothing, you know, outrageous.
>
> . . . .
>
> Q. And in your opinion -- well, first, when you do smell the hog odors, is that a smell that's offensive to you?
>
> A. No.
>
> . . . .
>
> Q. When you have smelled the hog odor, how long does it typically persist?
>
> A. Once in a while, if I step outside -- I step outside to smoke -- I may get a whiff of it, but it's just a quick smell, and it -- you know, it's not offensive or nothing else.
>
> Q. Does your wife ever complain about it?
>
> A. No.

(Docket No. 621-8, at 2-3.) Mr. Gardner then went on to comment, "You know, if I didn't want to smell any type of an odor that smelled like the country, I wouldn't live in the country." (Docket No. 621-8, at 4.)

Absent class member Don Willoughby, who lives approximately 1.25 miles northeast from the barns, testified:

> Q. What did you tell Mr. Sims [about the hog barns]?
>
> A. That they wasn't bothering me, because I sit out in my yard through the summer and I don't smell them. I'm all the time outside.

(Docket No. 621-9, at 2.) Similarly, absent class member Jeff Walston testified:

> Q. Have you -- since April of 2011, have you smelled any hog odors on your -- at your home?
>
> A. Not at my house, no.
>
> Q. Never?
>
> A. Never.

(Docket No. 621-10, at 3.) And absent class member Shane Jones testified:

> Q. Have you ever had any events [like cookouts] that have been affected by hog odors?
>
> A. No, sir.
>
> Q. Have the hog odors ever been to a level that bothers you or makes you go inside?
>
> A. No, sir.
>
> Q. Have you ever complained to anyone about the hog odors?
>
> A. No.

(Docket No. 621-20, at 2.)

Having reviewed this testimony, the Court has serious concerns whether these and other unnamed class members' claims would satisfy the subjective element necessary to state a permanent nuisance claim under Kentucky law. *See Reynolds v. Community Fuel Co.*, 218 S.W.2d 950, 952 (Ky. 1949) ("[A] trifling annoyance of inconvenience does not constitute an actionable nuisance . . . ."); *cf. Bell v. DuPont Dow Elastomers, LLC*, 640 F. Supp. 2d 890, 894 (W.D. Ky. 2009) (finding the commonality requirement met because: "[T]he class members present complaints with many similarities and no material differences. All have claimed some level of nuisance, discomfort, or irritation."). In fact, it appears from this testimony that these unnamed class members actually disclaim any substantial annoyance or interference with their use and enjoyment of their properties.[5] Thus, in light of these evidentiary developments, the Court is no longer satisfied that a necessary component of the Plaintiff class's nuisance claim can be answered on a classwide basis. While some Plaintiffs do claim to have experienced substantial annoyance and/or an interference, some clearly do not, making this element of liability incapable of being resolved by a common answer. For this reason, the Court finds that the commonality prerequisite of Rule 23(a)(2) is lacking.

[5] In a typical case, it likely could be assumed that a nuisance claimant satisfies this subjective component—why else would he bring a nuisance action if he were not substantially annoyed or his use and enjoyment of his property not interfered with? What makes this case atypical is its status as a Rule 23(b)(3) class action, which does not allow for class members to opt in but instead requires that they affirmatively opt out. As the Supreme Court recently stated, "Rule 23(b)(3), as an adventuresome innovation, is designed for situations in which class-action treatment is not as clearly called for." *Comcast*, 133 S. Ct. at 1432 (internal quotation marks and citations omitted). That a number of the unnamed class members potentially would not satisfy the subjective component of actually experiencing a substantial annoyance or interference, yet did not opt out, simply underscores the Court's ultimate conclusion that certification under Rule 23(b)(3) is no longer appropriate in this case.

3. The objective component of the Plaintiff class's permanent nuisance claim is not capable of resolution by a common, classwide answer.

But this is not the only commonality shortcoming present here. As noted above, the narrowing of the Plaintiffs' causes of action brings focus to the particular questions of law and fact necessary to resolve their remaining claim for permanent nuisance. In regard to the second element necessary to prove a nuisance claim—the objective component—the Court's review of applicable Kentucky law compels the conclusion that any reasonableness determination also requires an individualized inquiry and, therefore, is not capable of determination on a classwide basis.

Kentucky statutory law sets forth a number of factors that must be considered by the trier of fact in determining whether a particular use of property constitutes a nuisance. That provision mandates that the trier of fact "shall consider all relevant facts and circumstances," including seven specific factors:

> (a) The lawful nature of the defendant's use of the property;
> (b) The manner in which the defendant has used the property;
> (c) The importance of the defendant's use of the property to the community;
> (d) The influence of the defendant's use of property to the growth and prosperity of the community;
> (e) The kind, volume, and duration of the annoyance or interference with the use and enjoyment of claimant's property caused by the defendant's use of property;
> (f) The respective situations of the defendant and claimant; and
> (g) The character of the area in which the defendant's property is located, including, but not limited to, all applicable statutes, laws, or regulations.

Ky. Rev. Stat. § 411.550(1).

Two of these factors focus specifically on the circumstances of the individual claimant and, thus, necessarily require individualized proof. Subsection (e) requires

consideration of "[t]he kind, volume, and duration of the annoyance or interference." Subsection (f) requires consideration of "[t]he respective situations of the defendant and claimant." As shown by the divergent testimony among the named Plaintiffs and many of the unnamed class members, each Plaintiff's experience as to the intensity and duration (or lack thereof) of the hog odor is susceptible to marked variation. Further, each named Plaintiff's and unnamed class member's property is situated uniquely with respect to the barns in question. Despite that Plaintiffs' odor experts have taken into account wind speed and direction, topography, and other such variables, the question of reasonableness cannot be answered objectively for the class as a whole when Kentucky law and the facts of this case necessarily require a highly individualized inquiry into the experience of each Plaintiff and his situation relative to the Defendants. Thus, the objective inquiry whether a claimant has been unreasonably annoyed or has had the use of his property unreasonably interfered with requires inquiry into specific facts unique to each class member and to his property. Because it would be impossible for a jury to consider these factors on a classwide basis, a jury could not resolve the objective component of the Plaintiffs' nuisance claim with a common answer. For this reason as well, the Court finds that the commonality prerequisite of Rule 23(a)(2) is lacking.

4. Plaintiffs' arguments in support of commonality are unpersuasive.

Plaintiffs argue that the pattern jury instructions on permanent nuisance "contemplate that a nuisance case could be tried with multiple plaintiffs, and that a jury could find collectively for the plaintiffs on liability, but still determine at the damages phase that one or more particular Plaintiffs have incurred no damages, resulting in a *de facto* defense verdict as to that Plaintiff." (Docket No. 622, at 11.) But Plaintiffs

misconstrue the relevant portion of those instructions. The pattern instructions do contemplate that a nuisance case could be tried with multiple plaintiffs, but they do not contemplate that a jury could find collectively for all (or even a group of) plaintiffs on liability. Moreover, they do not address the scenario of a *class* of plaintiffs. What the pattern instructions say is: "If you find for any one or more of the plaintiffs you will render a separate verdict for each . . . and award to each a sum of money equal to the amount by which the fair market value [has been reduced]." Palmore, *Kentucky Instructions to Juries* § 48.02, ¶ 3. These instructions simply do not contemplate a single, collective answer to liability; instead, they expressly state that a jury must "render a separate verdict for each [plaintiff]" and "award to each" a particular damage award.

Furthermore, Plaintiffs' argument that a jury could find the Tosh Defendants liable to the class but go on to find that some class members had suffered no damages disregards the final element of a permanent nuisance claim—*i.e.*, that "the fair market value of the claimant's property . . . be materially reduced." Ky. Rev. Stat. § 411.530(2). While the reduction in fair market value is the measure of damages in a permanent nuisance case, *see* Ky. Rev. Stat. § 422.560, proof that "the defendant's use of property . . . causes the fair market value of the claimant's property to be materially reduced" is also an element of liability, *id.* § 411.530(2). Thus, there can be no liability for permanent nuisance where a claimant has not suffered a material reduction in the fair market value of his property, let alone suffered no reduction whatsoever. Accordingly, this argument does not compel a finding that the question of liability may

be resolved by a common answer and, therefore, does nothing to shore up the commonality prerequisite of Rule 23(a)(2).

* * *

In conclusion, as the Supreme Court recently held in *Dukes*, commonality requires that a class's claims be based on a common contention "that is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." 131 S. Ct. at 2551. Here, neither the question whether the class members subjectively claim to have suffered a substantial annoyance or interference, nor the question whether that annoyance or interference was objectively unreasonable can be resolved "in one stroke." Stated differently, the common question of whether the Tosh Defendants' conduct amounts to a permanent nuisance—and, thus, are liable to a given Plaintiff—cannot be resolved by a common answer. For these reasons, based on its review of relevant Kentucky nuisance law in light of the evidentiary developments in this case since class certification, the Court finds that Rule 23(a)(2)'s commonality prerequisite is no longer satisfied, if it ever was, and so will decertify the Plaintiff class.

B. Typicality

In its prior Opinion certifying the Plaintiff class, the Court found that Rule 23(a)(3)'s typicality requirement was met because (1) the named Plaintiffs and all class members within 1.25 miles of the Ron Davis barns "have allegedly suffered similar effects, albeit with varying frequency and degree," (2) the "same course of conduct . . . gives rise to the claims of all other class members," and (3) "for many of the alleged legal theories, the claims of the class members are the same." (Docket No. 288, at 17.)

Thus, the Court was satisfied that the claims of the named Plaintiffs were typical of the claims that might be brought by potential plaintiffs within the 1.25-mile class area. (Docket No. 288, at 17.) For many of the same reasons discussed above relative to the commonality requirement, the Court has serious concerns whether the typicality prerequisite of Rule 23(a)(3) remains satisfied at this juncture. *See In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, No. 10-4188, slip op. at 15, ___ F.3d ___, 2013 WL 3746205, at *10 (6th Cir. July 18, 2013) (noting that the "two concepts of commonality and typicality 'tend to merge' in practice (quoting *Dukes*, 131 S. Ct. at 2551 n.5)).

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The typicality prerequisite "determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct." *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998) (en banc) (citing *In re Am. Med. Sys.*, 75 F.3d 1069, 1082 (6th Cir. 1996)). "A claim is typical if 'it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory.'" *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 561 (6th Cir. 2007) (quoting *Am. Med. Sys.*, 75 F.3d at 1082). "[F]or the district court to conclude that the typicality requirement is satisfied, 'a representative's claim need not always involve the same facts or law, provided there is a common element of fact or law.'" *Id.* (quoting *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 525 n.

31 (6th Cir. 1976)). On the other hand, a claim, if proven, is not typical if it would prove only the named plaintiff's claim. *See Sprague*, 133 F.3d at 399.

Here, as the Court noted above, each named Plaintiff's and unnamed class member's property is situated uniquely with respect to the barns in question. And although the Plaintiffs' odor experts have taken into account many (or even assuming all) of the multitude of variables relative to the respective locations of those properties and the Ron Davis barns, under Kentucky law, the resolution of whether the Defendants' barns constitute a permanent nuisance necessarily still requires a highly individualized inquiry. *Cf. Cochran v. Oxy Vinyls LP*, 2008 WL 4146383, at*9 (W.D. Ky. Sept. 2, 2008) (finding the typicality requirement not met where "each proposed class member's relative proximity to Defendant's facility or one of the other facilities . . . may eliminate Defendant's liability for the alleged harm"). That is, even assuming any or all of the named Plaintiffs were to prove their claims, they would not, by virtue of the necessarily individualized inquiry required, prove the claim of any other named Plaintiff or class member. *See Sprague*, 133 F.3d at 399 (finding typicality "lacking" because "[a] named plaintiff who proved his own claim would not necessarily have proved anybody else's claim."). Therefore, based on its review of applicable Kentucky nuisance law in light of the evidentiary developments in this case since class certification, the Court finds that Rule 23(a)(3)'s typicality prerequisite is no longer satisfied and, for this reason as well, will decertify the Plaintiff class in this case.

C. Adequacy of Representation

In the Court's March 2, 2012, Order certifying the Plaintiff class, the Court found Rule 23(a)(4)'s adequacy-of-representation prerequisite was satisfied because

"[t]he various named Plaintiffs in the vicinity of the Ron Davis Hog Barn have common interests with others in the vicinity of the barn and appear to be willing to vigorously prosecute the interests of the class." (Docket No. 288, at 18.) The Court did not question the qualifications of Plaintiffs' counsel or their ability to adequately represent the class, nor does it today. Plaintiffs' counsel clearly are well qualified. However, the evidence that has developed since certification raises concerns whether the named Plaintiffs do in fact "have common interests with the others in the vicinity of the barn."

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." The Sixth Circuit holds that "[t]here are two criteria for determining whether the representation of the class will be adequate: (1) The representative must have common interests with unnamed members of the class, and (2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel." *Senter*, 532 F.2d at 524–25. As discussed above, the deposition testimony of many of the unnamed class members appears to undercut, or in some instances outright contradict, the testimony and position taken by the named Plaintiffs. In responding to the Tosh Defendants' instant Motion for Class Decertification, Plaintiffs argue that the Court should base no decision on these unnamed class members' testimony because each unnamed class member has "an admitted bias." (Docket No. 622, at 26.) Several of these individuals, the Plaintiffs say, work or have worked for the Defendants, are long-time or life-long friends and acquaintances with the Defendants, or otherwise have "close personal relationships" with the Defendants. (Docket No. 622, at 26-28.) Plaintiffs seem to dismiss these individuals, stating, "if the absent class members do not want to be a part of this

lawsuit, they could have opted out." (Docket No. 622, at 28-29.) This may be so, but it raises concerns whether the interests of the named Plaintiffs and those of the unnamed class members are sufficiently aligned for purposes of Rule 23(a)(4). While the Court finds ample reasons to decertify the Plaintiff class under the other prerequisites of Rule 23(a), the potentially divergent interests among the named Plaintiffs and unnamed class members further supports the Court's ultimate conclusion that decertification is warranted.

III. Rule 23(b)(3)'s Predominance Requirement

As the Court recognized in its prior certification Order, a Rule 23(b)(3) class is appropriate only if "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only the individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). Thus, the Plaintiffs must show (1) that common questions of law and fact predominate, and (2) that a class action is superior to other methods of adjudication. Because the Court finds that individual questions overwhelm questions common to the class, the Court will address only the predominance prong of Rule 23(b)(3) and need not address whether class action would be superior to other methods of adjudication.

"Predominance is usually decided on the question of liability, and if the liability issue is common to the class, common issues are held to predominate over individual questions." *In re Revco Sec. Litig.*, 142 F.R.D. 659, 662 (N.D. Ohio 1992) (internal quotation marks and citations omitted). Based on the Court's foregoing analysis of the Rule 23(a) prerequisites and applicable Kentucky nuisance law, the Court finds that the

question of liability will require individualized proof and, thus, is not capable of resolution on a classwide basis. *See Comcast*, 133 S. Ct. at 1432 ("If anything, Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)."). As such, the individualized issues relative to liability clearly predominate over the common issues.

The Tosh Defendants raise an additional argument why the Plaintiff class should be decertified. Under the Supreme Court's March 2013 decision in *Comcast Corp. v. Behrend*, 133 S.Ct. 1426, the Defendants assert that class certification cannot be maintained because damages cannot be determined on a classwide basis, even if liability could. (Docket No. 621-1, at 5, 16-17.) The Plaintiffs disagree, arguing that *Comcast* is inapposite here where they have offered a model, which was developed by their recently retained damages expert, Dr. Roby Simons, for calculating damages on a classwide basis. (Docket No. 622, at 25-26.) In a decision issued less than a month ago, the Sixth Circuit, on remand from the Supreme Court, applied and interpreted *Comcast* in the context of Rule 23(b)(3). *See In re Whirlpool*, slip op. at 3, 23-29, 2013 WL 3746205, at *2, 15-19. There, the Sixth Circuit held that "[w]here determinations of liability and damages have been bifurcated, the decision in *Comcast*—to reject certification of a liability and damages class because plaintiffs failed to establish that damages could be measured on a classwide basis—has limited application." *Id.*, slip op. at 27, 2013 WL 3746205, at *17.

In the present case, the Court certified both a liability and damages class, but the issue whether to bifurcate the liability and damages phases of trial has not been decided. (*See* Docket No. 288.) But regardless of *Comcast* and *In re Whirlpool*, and even

assuming Plaintiffs put forward a viable method for calculating *damages* on a classwide basis, the Court finds that the individualized *liability* issues will nevertheless predominate over questions common to the class.

For these reasons, the Court finds that the predominance requirement of Rule 23(b)(3) is not satisfied and, for this reason also, will decertify the Plaintiff class in this case.

CONCLUSION

The Court has always been concerned with the initial class certification. Throughout this lengthy process, the Court, at various times, has expressed to counsel its uneasiness or lack of certainty regarding class certification. In hindsight, the Court possibly could have reexamined these issues at an earlier stage. The Court is aware that its caution has resulted in Plaintiffs incurring additional costs. Needless to say, that has caused the Court to pause and attempt to address these issues clearly, comprehensively, and with finality. The Court is always reluctant to change a decision detrimentally relied upon by the parties. It does so today only with the examined confidence that it is the legally correct disposition of the issue of decertification. Therefore, having considered the parties' respective arguments and being otherwise sufficiently advised, for the foregoing reasons;

IT IS HEREBY ORDERED that the Tosh Defendants' Motion for Class Decertification, (Docket No. 621), is GRANTED, and the Court's certification Orders of March 2, 2012, (Docket No. 288), and July 5, 2012, (Docket No. 326), are VACATED consistent with the foregoing discussion.

IT IS HEREBY FURTHER ORDERED that notice shall be sent to the absent class members informing them that the class certified in the Court's certification Orders of March 2, 2012, (Docket No. 288), and July 5, 2012, (Docket No. 326), has been decertified and that the statute of limitations is no longer being tolled. Plaintiffs shall submit a proposed form of notice within 10 days of entry of this order.

IT IS SO ORDERED.

Date: August 2, 2013

cc: Counsel

Thomas B. Russell

Thomas B. Russell, Senior Judge
United States District Court