

No. _____

HILTON KELLEY, Lydia Kelley, Shenetta	§	IN THE DISTRICT COURT OF
Alexander (aka Shenetta Davis), Edna L.	§	
Davis, Daniel Chavis, Danielle Chavis, Patricia	§	
Chavis, Diana Gail Chavis, Paula Chavis,	§	
Shaquore Chavis, Leonard Jowan Francis Ruby	§	JEFFERSON COUNTY, TEXAS
Francois, Betty Davis McCarver, Johnny Craig	§	
Hatton, Kirk James, Carolyn Johnson,	§	
Mellouise Johnson, Robert Lee Johnson, Mary	§	
E. Lathan, Freda Delice Love, Jane C. Moore,	§	___ JUDICIAL DISTRICT COURT
James Clark, Jessica Ned, Kenneth Ray	§	
Newton, Mary A. Polk, Roland R. Polk Jr.,	§	
Roland R. Polk Sr., Gwendolyn Delahoussaye,	§	
Jessie Victoria Vanwright, Vera Lee Rogers,	§	
Michelle Smith, Betty A. Williams,	§	
	§	
<i>Plaintiffs,</i>	§	
v.	§	
	§	
GERMAN PELLETS TEXAS LLC; Texas	§	
Pellets, Inc.; and Cotton Commercial USA,	§	
Inc.;	§	
	§	
<i>Defendants.</i>	§	

PLAINTIFFS’ ORIGINAL PETITION

Plaintiffs Hilton Kelley, Lydia Kelley, Shenetta Alexander (also known as Shenetta Davis), Edna L. Davis, Daniel Chavis, Danielle Chavis, Patricia Chavis, Diana Gail Chavis, Paula Chavis, Shaquore Chavis, Leonard Jowan Francis, Ruby Francois, Betty Davis McCarver, Johnny Craig Hatton, Kirk James, Carolyn Johnson, Mellouise Johnson, Robert Lee Johnson, Mary E. Lathan, Freda Delice Love, Jane C. Moore, James Clark, Jessica Ned, Kenneth Ray Newton, Mary A. Polk, Roland R. Polk Jr., Roland R. Polk Sr., Gwendolyn Delahoussaye, Vera Lee Rogers, Jessie Victoria Vanwright, Michelle Smith, and Betty A. Williams (collectively, “Plaintiffs”) file this Original Petition against Defendants German Pellets Texas LLC; Texas Pellets, Inc.; and Cotton Commercial USA, Inc. In support, Plaintiffs allege:

I. Discovery Control Plan

1. Pursuant to Texas Rule of Civil Procedure 190.3, Plaintiffs intend to conduct discovery under Level 2.

II. Parties

2. Plaintiffs are residents and citizens of Jefferson County, Texas. At all times material to the allegations in this petition and as further described below, Plaintiffs owned, operated, or rented property in the West Side neighborhood of Port Arthur, Texas:

3. Plaintiff Hilton Kelley owns real property at 600 Austin Avenue in Port Arthur, Texas, out of which he and plaintiff Lydia Kelley operate a business.

4. Plaintiff Shenetta Alexander (also known as Shenetta Davis) owns real property at 1545 W. Procter in Port Arthur, Texas. Ms. Shenetta Alexander (also known as Shenetta Davis) and Plaintiff Edna L. Davis reside at this address.

5. Plaintiffs Daniel Chavis, Danielle Chavis, Patricia Chavis, and Shaquore Chavis reside at 1044 W. 6th Street in Port Arthur, Texas.

6. Plaintiff Diana Gail Chavis owns real property at 1500 Rev. Raymond Scott Avenue in Port Arthur, Texas.

7. Plaintiff Paula Chavis owns real property and/or resides at 937 W. 5th Street in Port Arthur, Texas.

8. Plaintiff Leonard Jowan Francis owns real property at 510 W. 12th Street in Port Arthur, Texas.

9. Plaintiffs Ruby Francois and Betty Davis McCarver own real property and/or reside at 1532 W. 5th Street in Port Arthur, Texas.

10. Plaintiff Johnny Craig Hatton resides at 1232 W. 6th in Port Arthur, Texas.

11. Plaintiff Kirk James resides at 933 Abe Lincoln Avenue in Port Arthur, Texas.
12. Plaintiff Carolyn Johnson resides at 1325 11th Street in Port Arthur, Texas.
13. Plaintiff Mellouise Johnson resides at 809 W. 5th Street in Port Arthur, Texas.
14. Plaintiff Robert Lee Johnson and Carolyn Johnson reside at 1209 W. Procter and 1215 W. Procter in Port Arthur, Texas.
15. Plaintiff Mary Lathan owns real property at 1131 W. 5th Street in Port Arthur, Texas.
16. Plaintiff Freda Delice Love resides at 809 Booker T. Washington in Port Arthur, Texas.
17. Plaintiffs Jane C. Moore and James Clark own real property and/or reside at 810 West Sixth Street in Port Arthur, Texas.
18. Plaintiff Jessica Ned resides at 1519 W. 5th Street in Port Arthur, Texas.
19. Plaintiff Kenneth Ray Newton resides at 748 Harding Avenue in Port Arthur, Texas.
20. Plaintiffs Mary A. Polk, Roland R. Polk Sr., Roland R. Polk Jr., and Gwendolyn Delahoussaye own real property and/or reside at 1530 W. 6th Street in Port Arthur, Texas.
21. Plaintiffs Jessie Victoria Vanwright (also known as Jessie Edwards) and Vera Lee Rogers own real property and/or reside at 1427 W. Procter Street in Port Arthur, Texas.
22. Plaintiff Michelle Smith resides at 831 Marian Anderson Avenue in Port Arthur, Texas.
23. Plaintiff Betty A. Williams owns real property and/or resides at 1537 W. 6th Street in Port Arthur, Texas.

24. Defendant Texas Pellets, Inc. is the owner and developer of a solid waste disposal and wood biomass pellet manufacturing facility located in Woodville, Texas and a five-silo pellet storage facility located at Port Arthur, Texas. Texas Pellets, Inc. is a Delaware limited liability corporation with its principal place of business in Woodville, Texas in Tyler County. It also does business in Jefferson County, Texas at 498-A West Lakeshore Drive, Port Arthur, TX 77640.

25. Defendant German Pellets Texas LLC operates and leases TPI's Woodville and Port Arthur facilities. German Pellets Texas LLC is a Delaware limited liability corporation with its principal place of business in Woodville, Texas in Tyler County. It also does business in Jefferson County, Texas at 498-A West Lakeshore Drive, Port Arthur, TX 77640.

26. Defendants Texas Pellets, Inc. and German Pellets Texas LLC collectively are referred to as German Pellets throughout this petition. Both German Pellets defendants may be served with process through their registered agent Corporation Service Company d/b/a CSC-Lawyers, Inc., at 211 East 7th Street, Suite 620, Austin, Texas 78701.

27. Defendant Cotton Commercial USA, Inc., is a Texas corporation located at 5443 Katy Hockley Cut-Off Road, Katy, TX 77493, and may be served through its registered agent Capitol Corporate Services, Inc. at 206 E. 9th Street, Suite 1300, Austin, Texas 78701-4411.

III. Jurisdiction and Venue

28. Jurisdiction is proper in this Court because the amount in controversy exceeds the minimal jurisdictional requirements of this Court. Plaintiffs seek non-monetary relief and monetary relief over \$1,000,000.

29. Pursuant to TCPRC § 15.002, venue is proper. All or substantially all the events or omissions giving rise to the claims set forth in this action occurred in Jefferson County.

IV. Factual Allegations

30. The production of wood pellets for biofuels presents well-known hazards. Wood pellets give off a fine dust. Without proper handling and disposal of this dust, serious dust explosions may occur. This case arises out of the improper manufacture and handling of wood pellets at a facility owned by German Pellets in Port Arthur, Texas, and the fire, explosion, and months of smoke that resulted.

31. Wood pellets are used as biofuels, which typically are made from industrial wood waste, such as bark, wood chips, soft fiber, and sawdust from the logging and wood processing industries. Wood pellets may be used in place of coal as fuel for power generation, commercial or residential heating, or cooking.

32. German Pellets GmbH, the parent company of the two German Pellets defendants, is a multinational corporation based in Wismar, Germany that produces wood pellets at plants across the world. The companies under the German Pellets umbrella, including the German Pellets defendants, serve a predominantly European market and collectively represent one of the largest producers and suppliers of wood pellets worldwide.

33. In 2011, German Pellets GmbH announced plans to expand its operations to Texas. By 2013, it completed construction on a wood pellet plant in Woodville, Texas, and a shipping facility at the port in Port Arthur, Texas.¹ These facilities are operated by the German Pellets defendants.

¹ German Pellets is party to a ground lease with the Port of Port Arthur Navigation District of Jefferson County, Texas, as lessor, and Texas Pellets, Inc. as lessee, dated February 28, 2012. Under the lease, German Pellets leases real and personal property located at Port Arthur for use as a wood pellet warehouse, storage, and loading facility. The lease contemplates an initial 20-year term and grants to German Pellets a right of first refusal to purchase the property subject to the lease.

34. The Port Arthur facility can store up to 75,000 tons of wood pellets at any given time and loads approximately 100 trucks with wooden pellets every 24 hours. From Port Arthur, German Pellets sends more than 578,000 tons of wood pellets to European customers each year.

35. The shipping facility in Port Arthur, Texas comprises five 17,000 metric ton metal panel silos that are 115 feet high and 105 feet in diameter. All five silos have concrete foundations that are approximately 4,500 cubic yards and more than 6 feet thick.

36. Inside the silos, the pellets are moved around on a 4,000 linear foot enclosed pneumatic conveyor system, and an air filtration system was installed to remove extra wood dust commonly produced by wood pellets.

37. Through its subsidiary German Pellets Louisiana LLC, German Pellets GmbH also has a pellet plant in Urania, Louisiana.

OSHA Finds “Serious,” “Repeat,” and “Willful” Violations by German Pellets

38. Despite being open for only a short time period, German Pellets’ Port Arthur and Louisiana facilities have been slapped with several “serious” and “repeat,” and “willful” citations from the U.S. Department of Labor’s Occupational Safety and Health Administration.

39. In April 2014, OSHA cited German Pellets’ Port Arthur facility for violations ranging from “failure to use appropriate respiratory protection” to improper “control of hazardous energy.”

40. In September 2015, OSHA again assessed German Pellets’ Port Arthur facility with penalties for “serious” and “repeat” violations.

41. In late 2016, OSHA cited German Pellets’ Louisiana facility for improper safety procedures that resulted in a worker’s death.

42. As of April 28, 2017, another complaint was filed with OSHA to address potential violations at the Port Arthur facility. On August 24, 2017, OSHA identified several serious, willful, and repeat violations at the Port Arthur facility relating to inadequate respiratory protection and other safety issues and issued \$267,699 fines, one of the highest penalties issued by OSHA in Texas in the 2015-2017 time period.

43. On October 20, 2017, a worker died at German Pellets' Port Arthur facility. As of the date of this petition, OSHA's investigation into the complaint is ongoing.

44. On information and belief, after a maintenance person complained to OSHA about improper safety procedures at the Port Arthur facility, he was fired. The maintenance worker publicly noted that German Pellets did not properly maintain its machinery at the Port Arthur facility, resulting in dust often escaping from cracks and crevices in the machinery.

Repeated Investigations by the TCEQ

45. The Texas Commission on Environmental Quality has investigated compliance issues at German Pellets' Port Arthur facility multiple times since the facility opened in 2013.

46. The TCEQ's central registry lists investigations taking place on December 4, 2013; May 21, 2014; July 7, 2015; September 29, 2015; December 28, 2015; March 17, 2016; February 28, 2017; March 1, 2017; and April 17, 2017.

47. On or about September 17, 2015, the TCEQ received an air quality complaint about German Pellets' Port Arthur facility. The complainant allegedly "saw dust on vehicle from pellet silos." The complaint was marked as closed by October 22, 2015.

48. On February 27 and April 17 through May 4, 2017, the TCEQ took emergency action at German Pellets' Port Arthur facility. Those events relate to the explosions and fires described below and forming the basis of this petition.

49. On February 17 and April 15, 16, and 17, 2017 the TCEQ recorded air quality emission events at German Pellets' Port Arthur facility. Those events relate to the explosions and fires described below and forming the basis of this petition.

Previous Explosions, Fires, and Other Problems at German Pellets' Facilities

50. The production of wood pellets poses a serious safety risk in the form of fine dust. Without proper air filtration and other measures to account for this fine dust, serious dust explosions may occur.

51. Since at least 2014, explosions and fires have occurred at German Pellets' facilities as a result of the improper handling of the fine dust associated with wood production.

52. In April 2014, an explosion at the Woodville plant caused a fire to break out and spread across two of the plant's silos. The Tyler County Emergency Manager publicly stated at the time that the fire was difficult to extinguish because it was a smoldering fire existing beneath the surface of the wood pellets pile, which could lead to the creation of an impermeable crust, which in turn potentially prevented water from reaching the fire below.

53. On or about September 17, 2015, the Texas Commission on Environmental Quality received an air quality complaint about German Pellets' Port Arthur facility. The complainant allegedly "saw dust on vehicle from pellet silos." The complaint was marked as closed by October 22, 2015. No fire was reported as a result of the excess dust.

54. German Pellets' Louisiana facility fully opened in 2016 after delays associated with defective and substandard electrical work.

55. On February 27, 2017, a fire broke out at a silo at the Port Arthur facility. The fire started at a conveyor belt that was loading wooden pellets onto a ship. This event produced

fugitive emissions of carbon monoxide, nitrogen oxides, PM10, PM2.5, particulate matter, sulfur dioxide, and volatile organic compounds that far exceeded authorized limits.

Fire at Port Arthur Facility in April 2017

56. On April 15, 2017, a hotspot developed on silo number 2 at German Pellets' Port Arthur facility, and on Sunday April 16, a fire erupted.

57. On April 15, the TCEQ recorded an emissions event at the Port Arthur facility and reported smoke with opacity of 60.0% was released, far exceeding the opacity limit of 5.0%. TCEQ's report noted that "Currently the Fire Department is administering water on to the top of the Silo to keep the structure cool and attempt to extinguish."

58. On April 16, the TCEQ recorded an emissions event at the Port Arthur facility and reported with opacity of 60.0% of PM10 Wood dust (non-allergenic) was released, far exceeding the opacity limit of 5.0%. TCEQ's report noted that "the Fire Department is administering water on to the Silo in a[n] attempt to extinguish. The Fire is still burning."

59. The smoldering fire lasted 52 days. While it burned, smoke and dust blew from the plant to the West Side neighborhood just to the north, where Plaintiffs live and work. Following the fire, smoke and dust continued to be emitted from the silo.

60. Port Arthur residents, including Plaintiffs, have protested as the smoke continued to pour out of the silos. The residents complain about the smell and health concerns with the air quality.

61. The Texas Commission on Environmental Quality was involved at the scene. The agency has conducted visible emissions and odor surveys in the adjacent neighborhoods. The TCEQ advised that children, older adults, and people with pre-existing heart or lung disease limit

their exposure to the smoke, stay indoors with windows and doors shut, and use air conditioning when possible.

Cotton Commercial Worsens the Disaster

62. German Pellets hired defendant Cotton Commercial USA, Inc. to assist with its response to the April 2017 fire and explosion described above.

63. Like German Pellets, Cotton Commercial had established a record of safety violations even before German Pellets hired them. In 2015, Cotton Commercial received the maximum penalty from OSHA after failing to provide safety equipment requested by a temporary worker who then fell 12 feet through a roof and was hospitalized. Cotton Commercial waited three days to report the incident. OSHA identified seven violations, some of which it deemed “willful” and “egregious.” OSHA imposed \$362,500 in fines on Cotton Commercial.

64. In April 2017, Cotton Commercial took the lead on extinguishing the fire at German Pellets’ Port Arthur facility.

65. On information and belief, Cotton Commercial did not: (i) act promptly to extinguish the fire; (ii) act promptly to extract wood pellets; (iii) implement proper ventilation measures; (iv) take necessary steps to reduce moisture at the site; and/or (v) implement industry standard practices for quickly resolving the fire at the site. As a result, an explosion occurred, and the fire and smoke persisted much longer than necessary and caused damages to the Plaintiffs.

66. Cotton Commercial prioritized protecting German Pellets’ property over preventing harm to adjacent neighborhoods, including Plaintiffs’.

67. On June 4 in the early morning hours, after smoldering for more than 52 days, the silo collapsed.

This Court Enters a TRO Against German Pellets

68. On June 30, 2017, the City of Port Arthur sued German Pellets to require it to take rapid action to stop the fire at the Port Arthur facility and remove all remaining wood pellets.

69. On July 14, 2017, the Court entered a temporary restraining order requiring German Pellets to cease all operations at the Port Arthur facility and focus instead on implementing proper safety measures by October 12, 2017.

70. By October 12, 2017, German Pellets and/or Cotton Commercial still had not completed necessary work, so the Court extended the temporary restraining order.

71. As of October 19, 2017, wood pellets remained at the Port Arthur facility.

Impacts on Plaintiffs and their Neighborhood

72. Plaintiffs reside in the West Side neighborhood adjacent to the German Pellets' facility. For more than two months, Plaintiffs could see, smell, and breathe in the smoldering air from the fire.

73. The smoke filled Plaintiffs' homes. The smoke saturated not only the homes, but also their cars, clothing, and other personal belongings.

74. Plaintiffs could not sleep due to smoke and its smell entering their bedrooms.

75. Plaintiffs include sensitive groups, such as the elderly and children, for which PM 2.5 and PM 10 is a higher health concern.

76. Plaintiffs complain about respiratory problems ranging from asthma and sinus infections treated through inhalers, nebulizers, or prescription medications to serious, pervasive conditions such as pneumonia and chronic obstructive pulmonary disease requiring hospitalization.

77. The conditions caused by German Pellets make even simple, everyday tasks difficult. Plaintiffs and other residents could not comfortably walk the streets of their neighborhoods.

78. German Pellets' conditions exacerbated illnesses and drove up expenses for doctors' visits, prescriptions, and over-the-counter medications.

V. Causes of Action

Count 1: Intentional Nuisance by All Defendants

79. All allegations in this petition are realleged here by reference.

80. German Pellets own property adjacent to or near the Plaintiffs' properties in the West Side neighborhood.

81. Cotton Commercial took actions on German Pellets' property that is adjacent to or near Plaintiffs' neighborhood.

82. Defendants caused emissions of smoke, odor, and debris from the German Pellets facility, which constitute an intentional, substantial, and unreasonable invasion of Plaintiffs' interests in their real property.

83. German Pellets' facility, by frequently catching fire and emitting smoke and fumes, is incompatible with Plaintiffs' residential neighborhood, making it out of place with its surroundings.

84. Defendants substantially interfered with Plaintiffs' use and enjoyment of their properties by causing substantial amounts of smoke, odor, and debris from the German Pellets facility to fall onto Plaintiffs' real and personal property and damage Plaintiffs.

85. Defendants' acts constitute an intentional and unreasonable invasion of Plaintiffs' interest in real property.

86. Defendants knew the substantial interference would result.

87. Defendants continued to act with full knowledge that the harm to the Plaintiff's interests are occurring and are substantially certain to continue to occur.

Count 2: Negligent Nuisance by All Defendants

88. All allegations in this petition are realleged here by reference.

89. German Pellets' property is adjacent to or near Plaintiffs' neighborhood.

90. Cotton Commercial took actions on German Pellets' property that is adjacent to or near Plaintiffs' neighborhood.

91. Defendants owe a duty of care not to create conditions that substantially interfere with the use and enjoyment of Plaintiffs' properties by causing unreasonable discomfort or annoyance.

92. Defendants breached this duty.

93. Defendants failed to do what a person or business of ordinary prudence would do in the same or similar circumstances.

94. Specifically, Defendants continued to operate their facility in a manner that causes accidents, air emissions, foul odors, and other nuisance conditions.

95. Defendants failed to take precautions against risks that are apparent to a reasonable person or business.

96. Defendants' negligent conduct has caused a nuisance that has resulted in damages to the Plaintiffs.

Count 3: Nuisance Per Se by All Defendants

97. All allegations in this petition are realleged here by reference.

98. Defendants are not authorized under the Texas Clean Air Act to discharge air contaminants. The TCEQ rules enacted under the Texas Clean Air Act state “[n]o person shall discharge from any source whatsoever one or more air contaminants or combinations thereof, in such concentration and of such duration as are or may tend to be injurious to or to adversely affect human health or welfare, animal life, vegetation, or property, or as to interfere with the normal use and enjoyment of animal life, vegetation, or property.” 30 Tex. Admin Code § 101.4.

99. Defendants’ acts described in this petition violate the law and rules therefore constitute a nuisance per se.

Count 4: Trespass by All Defendants

100. All allegations in this petition are realleged here by reference.

101. Plaintiffs own or rent their properties in the West Side neighborhood adjacent to German Pellets facility.

102. Defendants caused excessive smoke and odors at the German Pellets facility to fall upon Plaintiffs’ properties and into their homes.

103. Such smoke and foul odors are a physical, intentional, and voluntary entry upon Plaintiffs’ land by Defendants.

104. Defendants’ trespass onto Plaintiffs’ property caused, and will continue to cause, injury to Plaintiffs’ right of possession and monetary damages.

Count 5: Negligence by All Defendants

105. All allegations in this petition are realleged here by reference.

106. Defendants owe Plaintiffs a duty of care.

107. Defendants breached this duty.

108. Defendants failed to do what a person or business of ordinary prudence would do in the same or similar circumstances.

109. German Pellets operated their facility in a manner that causes accidents, air emissions, foul odors, and other negligent conditions.

110. Cotton Commercial conducted its business at and near the German Pellets facility in a manner that caused accidents, air emissions, foul odors, and other negligent conditions.

111. Defendants failed to take precautions against risks that are apparent to a reasonable person or business.

112. Defendants' negligent conduct resulted in damages to the Plaintiffs.

Count 6: Gross Negligence by All Defendants

113. All allegations in this petition are realleged here by reference.

114. Defendants' actions described in Count 5 also amount to gross negligence because when viewed from Defendants' standpoint at the time of its occurrence, the alleged acts or omissions involve an extreme degree of risk, considering the probability and magnitude of the potential harm to others. Further, Defendants had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others.

115. Defendants' gross negligence entitles Plaintiffs to exemplary damages.

VI. Jury Demand

116. Plaintiffs request a jury trial and tender the appropriate fee.

VII. Request for Disclosure

117. Plaintiffs request that all Defendants disclose the information or material described in Texas Rules of Civil Procedure 194.2 within 50 days of service of this petition.

VII. Relief Requested

As a result of the foregoing, Plaintiffs respectfully prays for each of the following, collectively or in the alternative:

- a) After a trial on the merits, the Court issue a permanent injunction prohibiting Defendants from further actions that cause excessive smoke and odors at the German Pellets facility to fall upon Plaintiffs' properties.
- b) Actual damages, both direct and consequential, including lost profits and loss in property value;
- b) Under Texas Rule of Civil Procedure 47, Plaintiffs' damages exceed \$1 million.
- c) Attorney's fees and costs of court;
- d) Pre-judgment and post-judgment interest; and
- e) Any other relief to which Plaintiffs may be entitled.

Respectfully submitted,
IRVINE & CONNER, PLLC

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