UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
Case No. 7:14-cv-00180-BR

JOYCE MCKIVER, et al.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
MURPHY-BROWN, LLC,	)
	)
Defendant.	)

PLAINTIFFS' NOTICE OF WITHDRAWAL OF OPPOSITION TO IMMEDIATE CERTIFICATION OF INTERLOCUTORY APPEAL UNDER RULE 54(b)

Plaintiffs respectfully show the Court as follows:

1. Defendant on May 11, 2018 filed a motion requesting the entry of judgment under Rule 54(b). (Doc. 281). Plaintiffs initially opposed the motion and the issues were extensively briefed. *See* Docs. 299, 302, 304-308, 310, 312. The motion remains pending.

2. Since the date of Plaintiffs' original response to the motion (Doc. 299, dated June 1, 2018), there have been significant new developments in these cases. Among other things, the jury returned a verdict in the second trial on June 29, 2018 (*McGowan* Doc. 279), and the jury returned a verdict in the third trial on August 3, 2018 (*Artis* Doc. 221).

3. Further, on August 19, 2018, the parties filed a joint motion in the master case at Doc. 513 to continue certain trial dates and discovery deadlines and among other things stated: "The parties and this Court have already conducted three trials, one each in [*McKiver*, *McGowan* and *Artis*]. To this end, the parties desire finality as to certain rulings in these three cases and will separately request that this Court direct entry of final judgment in those matters." Master case

Doc. 513, ¶ 4. The Court granted the joint motion by its Order dated August 23, 2018 and filed at master case Doc. 517.

4. Based on these developments, the Plaintiffs respectfully show the Court that certification for appeal should now occur. While not agreeing with some of Defendant's contentions made in its briefing in support of its Rule 54(b) motion, the Plaintiffs do agree that in light of recent developments, it is now appropriate for there to be certification of the first trial verdict for appeal, with certification of the second and third verdicts also to be sought, and if allowed, coordinated, in due course. Accordingly, Plaintiffs withdraw their prior opposition to the certification of the first trial verdict for immediate appeal under Rule 54(b).

5. The parties have met and conferred to revise the proposed order filed by the Defendant with its motion (Doc. 281-1) in order to account for current circumstances. Plaintiffs are authorized to represent that the parties agree on the content of the proposed order granting Rule 54(b) certification attached as **Exhibit 1**, and the form of the proposed judgment attached as **Exhibit 2**. In so doing, obviously all parties reserve any grounds for appeal on the merits.

Wherefore, the Plaintiffs respectfully request that the Court allow the certification of the judgment on the verdict in the first trial for immediate appeal under Rule 54(b).

This the 28th day of August, 2018.

s/John Hughes
Mona Lisa Wallace, N.C. State Bar No. 9021
John Hughes, N.C. State Bar No. 22126
Wallace & Graham, P.A.
525 North Main Street
Salisbury, NC 28144
Phone: 704-633-5244
Fax: 704-633-9434
mwallace@wallacegraham.com
jhughes@wallacegraham.com

Michael Kaeske, Texas State Bar No. 00794061
Lynn Bradshaw, Texas State Bar No. 02834500
Eric Manchin, Texas State Bar No. 24013094
(*All By Special Appearance*)
Kaeske Law Firm
1301 W. 25th Street, Suite 406
Austin, Texas 78705
Telephone: (512) 366-7300
Facsimile: 1(877) 826-1221
Email: mkaeske@kaeskelaw.com
lbradshaw@kaeskelaw.com
emanchin@kaeskelaw.com

CERTIFICATE OF SERVICE

I do hereby certify that on the 28th day of August, 2018, I filed this document by the ECF system which will electronically serve and notify all counsel of record.

This the 28th day of August, 2018.

By: s/John Hughes
Mona Lisa Wallace
NCSB #9021
John Hughes
NCSB #22126
Wallace & Graham, P.A.
525 North Main Street
Salisbury, NC 28144
Phone: 704-633-5244
Fax: 704-633-9434
mwallace@wallacegraham.com
jhughes@wallacegraham.com

EXHIBITS:

1. Proposed order.
2. Proposed judgment.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
Case No. 7:14-CV-00180-BR

JOYCE MCKIVER, et al. **Plaintiffs,** **v.** **MURPHY-BROWN, LLC,** **Defendant.**	)	**[REVISED PROPOSED] ORDER GRANTING DEFENDANT'S MOTION TO DIRECT ENTRY OF FINAL JUDGMENT**

This matter comes before the Court on Defendant Smithfield Hog Production Division d/b/a Murphy-Brown LLC's Motion to Direct Entry of Final Judgment pursuant to Federal Rule of Civil Procedure 54(b) filed on May 11, 2018 at Doc. 281.

The Plaintiffs originally opposed the motion, and multiple submissions were thereafter filed by the parties on the subject. *See* Docs. 299, 302, 304-308, 310, 312.

However, after further developments in the litigation, on August 19, 2018, the parties filed a joint motion in the master case at Doc. 513 in which they sought to continue certain trial and discovery dates and stated: "The parties and this Court have already conducted three trials, one each in [*McKiver, McGowan* and *Artis*]. To this end, the parties desire finality as to certain rulings in these three cases and will separately request that this Court direct entry of final judgment in those matters." *In re: NC Swine Farm Nuisance Litig.*, Master Case No. 5:15-CV-00013-BR, Doc. 513, ¶ 4. The Court granted the joint motion by its Order dated August 23, 2018 and filed at Master Case Doc. 517.

Subsequently, the Plaintiffs made a supplemental filing in which they withdrew their prior opposition and—subject to their disagreement with some of Defendant's contentions made

in briefing on its Rule 54(b) motion—joined in the request for entry of an order under Rule 54(b), based on the changed circumstances. Attached to the Plaintiffs' supplemental filing was a new proposed Order which the Plaintiffs represented as agreed to by all parties. In addition, the Plaintiffs also attached a proposed form of Judgment agreed to by all parties.

The motion under Rule 54(b) is brought with regard to entering judgment on a jury verdict in favor of Joyce McKiver, Delois Lewis, Daphne McKoy, individually and as guardian of her two minor children, Archie Wright, Jr., Tammy Lloyd, Deborah Johnson, Ethel Davis, and Priscilla Dunham (the "First Trial Plaintiffs") on their individual private nuisance claims. Doc. 267. For the reasons explained below, the Court, having considered the parties' arguments, hereby GRANTS the Motion to Direct Entry of Final Judgment.

Rule 54(b) states in relevant part that

> [w]hen an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay.

Fed. R. Civ. P. 54(b). The Supreme Court has held that, "in deciding whether there are no just reasons to delay the appeal of individual final judgments in a setting such as this, a district court must take into account judicial administrative interests as well as the equities involved." *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8 (1980).

"The tack which the district court must follow to effectuate a Rule 54(b) certification involves two steps." *Braswell Shipyards, Inc.*, 2 F.3d at 1335 (citing *Curtiss-Wright*, 446 U.S. at 7-8). First, the Court "must determine whether the judgment is final." *Id.* A judgment can be "final" if "it is 'an ultimate disposition of an individual claim entered in the course of a multiple claims action.'" *Id.* (quoting *Curtiss-Wright*, 446 U.S. at 7). It can be "final" when an action

presents multiple claims and multiple parties. *E.g.*, *Carolina Power & Light Co. v. 3M Co.*, No. 5:08-cv-00460-FL, 2013 U.S. Dist. LEXIS 61139, at *157, 2013 WL 1828951 (E.D.N.C. Apr. 30, 2013) (allowing unopposed Rule 54(b) motion after "test case" resolved claims as to one of multiple parties in a CERCLA matter).

Second, the Court "must determine whether there is no just reason for the delay in the entry of judgment." *Braswell Shipyards, Inc.*, 2 F.3d at 1335 (citing *Curtiss-Wright*, 446 U.S. at 8). This inquiry "'is necessarily case-specific.'" *Id.* (quoting *Spiegel v. Trustees of Tufts College*, 843 F.2d 38, 43 (1st Cir. 1988)). Factors to consider include:

> (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in a set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.

MCI Constructors, Inc. v. City of Greensboro, 610 F.3d 849, 855 (4th Cir. 2010) (quotation and citation omitted).

This Court FINDS that judgment as to the First Trial Plaintiffs is an ultimate disposition of their individual claims entered in the course of a multiple claim and multiple party action. In this regard, the ten First Trial Plaintiffs brought ten individual private nuisance claims. Doc. 267. They have been tried to verdict. *See id*. Accordingly, for the First Trial Plaintiffs, there is a final judgment satisfying the first step of the Rule 54(b) analysis. *See Carolina Power & Light Co.*, 2013 U.S. Dist. LEXIS 61139, at *157 (certifying appeal as to one of multiple parties); *Fox*, 201 F.3d at 530-31 (certifying as to 11 of 28 plaintiff police officers).

This Court also FINDS that there is no just reason to delay entry of final judgment. By the Court's January 9, 2015 Order, this case was coordinated with 25 other cases for pretrial

discovery. Master Case Doc. 31. The parties then selected five Discovery Pool Cases in which to proceed with detailed discovery. Master Case Docs. 93, 94, 96. The parties selected these test cases because they contained "a significant number of the Plaintiffs and present[] claims that will permit the Parties to explore relevant and representative legal and factual issues." Master Case Doc. 93 at 1. On April 14, 2017, following the conclusion of discovery, Defendant filed an Omnibus Motion to Sever and for Separate Trials. Master Case Doc. 312. On December 6, 2017, the Court entered an order granting that motion in part and denying it in part. Doc. 47. The Court gave Plaintiffs until December 18, 2017, to select a group of eight to twelve Plaintiffs for the first trial. *Id.* Plaintiffs selected the First Trial Plaintiffs from the above-captioned case for trial. Doc. 48. Accordingly, the Plaintiffs' claims have gone to verdict in a structured series of trials. Further, the parties are in agreement that Rule 54(b) certification is warranted. *See Carolina Power & Light Co.*, 2013 U.S. Dist. LEXIS 61139, at *157 ("test case," granting unopposed motion); *City of New York v. ExxonMobil Corp. (In re MTBE Prods. Liab. Litig.)*, 2010 U.S. Dist. LEXIS 34471, 2010 WL 1328249 (S.D.N.Y. Apr. 5, 2010) (joint motion, bellwether process); *In re: FEMA Trailer Formaldehyde Product Liability Litig.*, MDL No. 07-187, 2012 U.S. Dist. LEXIS 50655, at *24-25 (E.D. La. April 11, 2012) (granting consent motion for entry of Fed. R. Civ. P. 54(b) judgment).

The Court finds that application of the factors listed above supports a finding under the circumstances that there is no just reason to delay entry of final judgment. Examining each one:

The Court FINDS that the first factor, concerning the relationship between the adjudicated and unadjudicated claims, does not merit delay here. In this regard, the guidance provided by this Court in *Carolina Power & Light Co. v. 3M Co*. is applicable, as that matter

involved a "test case" and the present matter involves a structured arrangement of "Discovery Pool" cases and trials drawn from those cases:

> [T]he purpose of the "test case" process involving Georgia Power was to enable other sales parties and Plaintiffs to achieve final judicial determination of the legal issues pertinent to all sales parties, so as to streamline the litigation and conserve judicial and party resources. Immediate appellate review of these legal issues, and the finality it would bring, would enhance this efficiency

2013 U.S. Dist. LEXIS 61139, at *160-61.

It would benefit all parties to allow the appeal process to be commenced for the First Trial Plaintiffs, because the many Plaintiffs out of the over 500 total whose claims are yet to be tried would benefit from earlier rather than later resolution at the appellate level of any issues arising out of rulings made in prior cases. The five Discovery Pool cases only represent about one-fifth of the total number of Plaintiffs. Thus, allowing an immediate appeal would serve the purpose of the "test case" process, *i.e.*, to enable the parties to achieve final judicial determination of the legal issues pertinent to the individual nuisance claims, which in turn will streamline the litigation and conserve judicial and party resources. *See Carolina Power & Light*, 2013 U.S. Dist. LEXIS 61139, at *161 (citing *Fox*, 201 F.3d at 532).

With regard to the second factor, the Court FINDS that appellate review will not be mooted by future developments before the Court. The First Trial Plaintiffs' claims have been fully litigated to a jury verdict. (Doc. 267.) Nothing that occurs in the Seventh Trial Plaintiffs' case, or any other Discovery Pool Case currently scheduled for trial, will affect this verdict.

With regard to the third factor, the Court FINDS that allowing the appeal format the parties propose will reduce the likelihood that the appellate court would be obliged to consider the same issues repeatedly. The parties have agreed to work together to facilitate the immediate

interlocutory appeal of the first verdicts in a coordinated manner. *See* Master Case, Doc. 513, ¶ 4. *See Fox*, 201 F.3d at 531-32; *Carolina Power & Light*, 2013 WL 1828951, at *3.

The Court FINDS that the fourth factor is inapplicable. There are no counterclaims, cross claims, or concerns regarding a set-off of the judgment to be imposed.

Lastly, the Court FINDS that miscellaneous factors support an immediate appeal. The Discovery Pool Cases were selected to foster judicial efficiency, develop finality and certainty with regard to key issues, and allow the parties an economical means of obtaining a meaningful sample of case results that may expedite resolution of the 26 combined cases encompassing more than 500 claims involved in this litigation. Permitting an immediate appeal furthers these principles and weighs in favor of certification.

WHEREFORE, the Court FINDS that entry of judgment as to the First Trial Plaintiffs' individual nuisance claims is final. The Court also FINDS that there is no just reason to delay entry of judgment. Accordingly, the Court GRANTS Murphy-Brown LLC's Motion to Direct Entry of Final Judgment.

SO ORDERED, the ___ day of _____, 2018.

_____
Judge W. Earl Britt

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
Case No. 7:14-CV-00180-BR

JOYCE MCKIVER, et al.	)	
Plaintiffs,	)	
v.	)	**[PROPOSED] FINAL JUDGMENT**
MURPHY-BROWN, LLC,	)	
Defendant.	)	

This action was tried by a jury with the Honorable W. Earl Britt, Senior United States District Judge, presiding, regarding the claims of Plaintiffs Joyce McKiver, Delois Lewis, Daphne McKoy, Alexandria McKoy, Antonio McKoy, Archie Wright, Jr., Tammy Lloyd, Deborah Johnson, Ethel Davis, and Priscilla Dunham (the "First Trial Plaintiffs"), and the jury rendered a verdict on April 26, 2018. Doc. 267. It appearing to the Court that:

With regard to the first issue on the verdict form ("Did the defendant substantially and unreasonably interfere with the plaintiff's use and enjoyment of his or her property?"), the jury found in favor of the First Trial Plaintiffs;

With regard to the second issue on the verdict form ("What amount of damages, if any, is the plaintiff entitled to recover from the defendant?"), the jury awarded each of the First Trial Plaintiffs compensatory damages in the amount of $75,000;

With regard to the third issue on the verdict form ("Is the defendant liable to the plaintiff for punitive damages?"), the jury found in favor of the First Trial Plaintiffs;

With regard to the fourth issue on the verdict form ("What amount of punitive damages, if any, does the jury in its discretion award to the plaintiff?"), the jury awarded each of the First Trial Plaintiffs punitive damages in the amount of $5,000,000;

On May 7, 2018, this Court entered an order (Doc. 277, the "May 7 Order") granting Defendant's Motion to Impose Statutory Cap on Punitive Damages, Doc. 275, and reducing the amount of punitive damages awarded to each of the First Trial Plaintiffs to $250,000;

On June 7, 2018, the Court ordered (Doc. 301, the "June 7 Order") that the award of compensatory damages shall bear interest at the rate set forth in N.C. Gen. Stat. § 24-1 from the date of the filing of the complaint, August 21, 2014, until the instant date of entry of judgment, per annum and without compounding and that the total money judgment (i.e. compensatory damages, punitive damages, pre-judgment interest, and costs, if any) shall bear interest at the legal rate at the rate set forth in 28 U.S.C. § 1961(a) from the entry of judgment until paid, computed daily and compounded annually; and

The Court has also entered an order (the "54(b) Order") granting Defendants' Motion to Direct Entry of Final Judgment (Doc. 281) pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

IT IS ORDERED, ADJUDGED, AND DECREED, in accordance with the May 7 Order, June 7 Order, and 54(b) Order, for the reasons set forth more specifically therein, that the amount of punitive damages awarded to each of the First Trial Plaintiffs is reduced to $250,000 and that interest is awarded as set forth in the June 7 Order.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, in accordance with the May 7 Order, June 7 Order, and 54(b) Order, for the reasons set forth more specifically therein, that the Clerk is DIRECTED to enter final judgment in favor of each of the First Trial Plaintiffs

in the amount of $75,000.00 in compensatory damages and $250,000.00 in punitive damages, with interest.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this Court shall retain jurisdiction of this matter for the purpose of adjudicating any post-trial motions and the claims of the 10 Plaintiffs remaining in the above-captioned case who are not First Trial Plaintiffs.

This Final Judgment Filed and Entered on _____, 2018.

_____
Judge W. Earl Britt