CAUSE NO. 25-18363

VICTOR HOLLENDER, BRUCE NEITZKE, ESTHER SCHNEIDER, and SARAH RIVAS *Plaintiffs*, v. ROGERS DRAW ENERGY STORAGE, LLC, B&CWR, INC., d/b/a CACTUS CONSTRUCTION *Defendants*.	IN THE DISTRICT COURT OF GILLESPIE COUNTY, TEXAS 216TH JUDICIAL DISTRICT

DEFENDANT ROGERS DRAW ENERGY STORAGE, LLC'S REPLY IN SUPPORT OF ITS RULE 91a MOTION TO DISMISS AND REQUEST FOR ATTORNEYS' FEES

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INTRODUCTION

Nothing in Plaintiffs' Response (the "Response") to Defendant Rogers Draw Energy Storage LLC's ("Rogers Draw" or "Defendant") Motion to Dismiss ("Motion") under Texas Rule of Civil Procedure 91a ("Rule 91a") saves their claims. The same applies to Plaintiffs' First Amended Petition and Application for Temporary Injunction and Permanent Injunction (Plaintiffs' "First Amended Petition"). The Court should grant Roger Draw's Motion.

SUMMARY OF THE ARGUMENTS

The arguments asserted in Plaintiffs' Response are meritless, and Plaintiffs' claims should be dismissed with prejudice, for the following reasons:

- Texas law does not recognize Plaintiffs' claims, and their threadbare recitations and conclusory statements do not satisfy even Texas' fair notice pleading standards.
- The Response actively avoids the holding from the most analogous Texas case, and instead, relies on distinguishable cases that support Roger Draw's arguments.
- The Response contains two tacit and crippling admissions: (1) Plaintiffs do not assert a claim for an existing nuisance; and (2) Plaintiffs cannot demonstrate that a fire is "reasonably certain" to happen.
- Plaintiffs' new allegation that the Facility will reduce the market value of their Properties is meritless under Texas law and cannot support Plaintiffs' requested injunctive relief.
- Plaintiffs' new allegations regarding their alleged "apprehension" are meritless under Texas law because current nuisance precedence establishes that—where a landowner is lawfully using land—well founded "apprehension" must be created by effects of an active land "invasion."
- Plaintiffs' new strict liability claim should be dismissed because the Facility does not qualify as the type of "ultrahazardous" conduct that is required to assert such a claim.
- Plaintiffs' public nuisance claim should be dismissed because they do not allege that Rogers Draw is currently maintaining a building in a manner that creates a fire hazard.

ARGUMENTS AND AUTHORITIES

A. Texas law does not recognize the causes of action as pleaded by Plaintiffs.

Plaintiffs blanketly state that Texas law "recognizes" their asserted claims and then proceed to recite the threadbare elements of each asserted claim. *See* Resp. at 6. This is the same tack Plaintiffs use in their First Amended Petition—simply asserting claims supported by legal buzzwords. That, however, is *not* permitted under Texas law. Rather, Plaintiffs' Response and First Amended Petition are riddled with "threadbare recitation(s)" of their purported claims and allegations "supported by mere conclusory statements," which *cannot* "suffice to overcome a Rule 91a motion to dismiss." *See City of Houston v. State Farm Mut. Auto. Ins.*, 712 S.W.3d 707, 715 (Tex. App.—Houston [14th Dist.] 2025, no pet.). Additionally, Plaintiffs simply are incorrect that "nuisance" is a standalone claim under Texas law—it is a type of "legal injury," *not* a claim. *See Crosstex N. Tex. Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 591 (Tex. 2016) ("[N]uisance is merely a type of legal injury and not a cause of action in and of itself."). This is exactly why Plaintiffs' claims are unsupportable—the underlying type of damage—nuisance—requires the existence of a "condition" that, objectively, interferes with Plaintiffs' enjoyment of their properties. *Id.* at 600 ("[T]he term 'nuisance' refers to a '***condition*** that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use and enjoy it."). Such a condition does not exist here, and Plaintiffs have not alleged such a condition.

Given the foregoing, Plaintiffs' arguments regarding pleading standards are, at best, red herrings. Regardless of the terms used in the First Amended Petition, Plaintiffs' allegations are based on speculative fears, *not* an existing nuisance, meaning their claims cannot survive Rogers Draw's Motion regardless of Texas's fair notice pleading standard.

B. Plaintiffs' Response fails even to attempt to distinguish the most applicable Texas decision in which a court dismissed nearly identical claims to those asserted by Plaintiffs and, instead, relies on *Freedman* which supports Rogers Draw's arguments.

Plaintiffs' Response does not even address *Clements v. McBroom*, No. 24-cv-296 (155th Jud. Dist. Ct., Fayette Cnty. 2024) by name. *See* Ex. A, Rule 91a Motion. As outlined in Rogers Draw's Motion, *Clements* is an analogous Texas case in which the court denied an injunction to stop the development of a BESS facility in Warda, Texas, dismissed the case under Rule 91a, *and* the court awarded the defendant's attorneys' fees. That is because, like here, the claims asserted by those plaintiffs were baseless as they were premised on speculative fears and speculative fears alone. Rather than addressing or differentiating *Clements*, Plaintiffs' Response simply ignores it, likely because Plaintiffs realize they cannot assert a plausible argument to explain why this Court should not follow that compelling precedence. Plaintiffs only argue that the case is "on appeal" and relates to the circumstances of those individual plaintiffs. But, as explained in Rogers Draw's Motion to Dismiss, those plaintiffs assert virtually identical claims regarding the same type of facility at issue in this case. Plaintiffs failed to distinguish *Clements* because, frankly, they cannot—it is exactly on point, and this Court should follow its guidance.

Furthermore, unlike *Clements*, the cases cited by Plaintiffs do not support their arguments. If anything, the primary case cited by Plaintiffs—*Freedman v. Briarcroft Prop. Owners, Inc.*—illustrates that Plaintiffs claims cannot be supported under Texas law. 776 S.W.2d 212, 215–17 (Tex. App.—Houston [14th Dist] 1989, writ denied). In *Freedman*, the Court of Appeals affirmed a trial court's permanent injunction barring the construction of a parking lot. *Id.* The Court of Appeals found that, while the parking lot was not a nuisance per se, a jury found that the parking lot would create a nuisance due to the fact that it would substantially increase traffic in the area.

Id. at 217. In other words, the Court only issued an injunction for a non-per se nuisance *after* a jury found the structure would create an "imminent" nuisance, namely, more traffic.

The *Freedman* court found when an attempt is made to enjoin a prospective nuisance, the threatened injury must not be merely probable but **"reasonably certain"** before a court will exercise its equitable power to restrain it. *Id.* at 216; *see also Bruington v. Chesmar Homes, L.L.C.*, No. 08-23-00015-CV, 2023 WL 6972987, at *11 (Tex. App. – El Paso Oct. 20, 2023) (stating that "probable, imminent, and irreparable injury requires proof of an actual threatened injury, as opposed to a speculative or purely conjectural one"). Here, there is no "imminent" nuisance created by the Rogers Draw facility, because the anticipated nuisance is not "reasonably certain." Although Plaintiffs throw around those buzz terms, Plaintiffs fail to allege that the nuisance—namely, the possibility of a fire—is even "probable" or "more likely than not to occur." This pleading defect is fatal to Plaintiffs' claims. The supposed "nuisance" complained of by the Plaintiffs is purely speculative, and, as such, cannot by definition be "imminent" in that the Plaintiffs cannot say when the potential nuisance may occur.

Finally, in a footnote, Plaintiffs reference *Hicks v. Andrews*, No. 5:23CV81-RWS-JBB, 2024 WL 5274548, at *22 (E.D. Tex. Nov. 21, 2024). Plaintiffs, however, conveniently omit the history of this case. The plaintiffs in that case originally filed a lawsuit in June 2023 due to the development of a solar energy and BESS project next to the plaintiffs' land. *Hicks v. Andrews*, No. 5:23CV81-RWS-JBB, 2024 WL 1202922, at *13 (E.D. Tex. Feb. 28, 2024), *report and recommendation adopted*, 2024 WL 1198859 (E.D. Tex. Mar. 20, 2024). After the defendants filed a motion to dismiss, the court actually ordered the plaintiffs to file a second amended complaint, holding that their first amended complaint did not state plausible nuisance claims. *Hicks*, 2024 WL 1202922 at *11-13. The court made this finding because:

- The plaintiffs did not *and could not* argue that the solar farm/BESS facility was a nuisance per se because lawsuit use of property is not a nuisance per se.
- The plaintiffs did not allege that a threat was imminent.

Id. The plaintiffs then filed a Second Amended Complaint, in which the plaintiffs asserted claims for (1) negligent nuisance; (2) intentional nuisance; (3) strict-liability nuisance; (4) anticipatory nuisance. *Hicks*, 2024 WL 5274548 at *8-10. The court, in analyzing a second motion to dismiss, actually *dismissed with prejudice* the strict liability claim, finding that the plaintiffs "have not sufficiently alleged that the activities Defendants have done constitute 'abnormally dangerous activity.'" *Id.* In other words, the court found that the development of a BESS facility **is not an abnormally dangerous activity.**

Additionally, while the *Hicks* court did find that the Second Amended Complaint provided sufficient detail of imminent harm to survive dismissal, the court focused on the *solar panel* aspect of the project, *not* the BESS facility. *Id.* The following are the allegations cited by the court that supported its decision that the Second Amended Complaint provided sufficient allegations regarding imminent harm:

> The panels, in such great numbers, concentrated in one spot, will shed toxic waste residue from the manufacturing process with initial rainfall and continue to do so via deterioration over the life of the panels. (This is particularly true of Chinese panels that are constructed of cadmium telluride.) This toxic waste, mixed with rain groundwater, will run onto Plaintiff's Hicks land which is less than 100 feet down stream of the proposed installations. The toxic waste will also pollute the water table and all surrounding lakes, rivers and streams.
>
> Denuding the ground beneath the panels will require toxic herbicides and increase erosion on Plaintiff's land. Solar farms create islands of increased heat. The construction period will be prolonged and consists largely of the continual driving of piles which creates noise pollution and will destroy Plaintiff Hicks' ability to enjoy the Daphne Prairie Preserve.
>
> Upon completion, the panels and inverters will create a continuous humming sound which will have the same deleterious effect. All of this noise pollution is

> detrimental to surrounding wild life. The uninsulated transmission lines will emit an annoying hum and are dangerous to both human and animal life.

Id. In other words, the *Hicks* court focused *only on the imminent harm* of the solar panels. The Rogers Draw Facility does not include any solar panels, so *Clements* is much more applicable than *Hicks*.

C. The Response contains tactic admissions that disprove their arguments.

Plaintiffs argue that they do not have to plead "a current, existing interference with their land." *See* Resp. at 7. This is incorrect—a court generally only has the power to enjoin the continuance of an "existing nuisance," as opposed to a threatened or prospective nuisance. *See, e.g., Holubec v. Brandenberger*, 214 S.W.3d 650, 657 (Tex. App.—Austin 2006, no pet.) (recognizing that "an injunction will be granted only to restrain actually existing nuisances, and not to restrain an intended act on the ground that it may become a nuisance"); *Goose Creek Ice Co. v. Wood*, 223 S.W. 324, 327–28 (Tex. App.—Galveston 1920, no writ) (recognizing same). Importantly, **this argument is an implicit recognition that Plaintiffs *do not* assert that there is an existing nuisance.** The only limited exceptions to this general rule are that a court may enjoin a threatened injury in the narrow circumstances where: (1) an act or structure is a nuisance per se; or (2) where a nuisance is imminent. *O'Daniel v. Libal*, 196 S.W.2d 211, 213 (Tex. Civ. App.—Waco 1946, no writ). As explained later in this Reply, neither exception applies here.

Plaintiffs further argue that Rogers Draw's position that Plaintiffs must assert a fire is "reasonably certain" to happen "unfairly limits" the interference they seek to prevent. Resp. at 9. This, again, is another substantial tacit admission—Plaintiffs effectively acknowledge that they *cannot* assert that a fire is "reasonably certain" to happen, which undercuts the entirety of the allegations supporting their claims.

D. Plaintiffs' allegation that the Facility will reduce the market value of their Properties is meritless under Texas law.

Plaintiffs' allegation that the Facility will reduce the "market value" of their Properties is self-defeating. As noted in their First Amended Petition, Plaintiffs are only seeking "non-monetary relief." *See* Amend. Pet. at ¶ 6. But a claim related to a reduction in the market value of a property, inherently, requests *monetary* relief because the alleged damages—namely, the reduction in market value—can be monetarily resolved. As such, this exact claim *cannot* support a request for an injunction because reductions in property values are—by definition—not irreparable and can be remedied with money damages. *Bruington v. Chesmar Homes, LLC*, No. 08-23-00015-CV, 2023 WL 6972987, at *11 (Tex. App.—El Paso Oct. 20, 2023, no pet.) ("[Plaintiffs] themselves appear to recognize that they have an adequate remedy at law—in terms of being compensated for any property damages they might suffer from [defendants]' activities in the future—given that they requested as much in the pleadings.").

In any event, Plaintiffs' claims related to alleged reductions in property values are simply not applicable in situations involving a lawful use of land. For example, in *Dallas Land & Loan Co. v. Garrett*, 276 S.W. 471, 474 (Tex. Civ. App.—Dallas 1925, no writ), the court held a garage being built nearby was not a nuisance because "[m]atters that annoy by being disagreeable, unsightly, and undesirable are not nuisances simply because they may to some extent affect the value of property." *See also 1717 Bissonnet, LLC v. Loughhead*, 500 S.W.3d 488, 497 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (stating that it "is axiomatic there may be various circumstances that cause a home to lose market value that are not necessarily torts, including a nuisance" and holding that "[t]he Supreme Court of Texas has rejected the reasoning that loss in market value alone permits recovery of damages when no cause of action authorizing such recovery has been established"). Plaintiffs have not and cannot assert that the construction of a

BESS facility is "unlawful," meaning Rogers Draw cannot be liable for any potential reduction in value caused by its construction.

E. Plaintiffs' allegations regarding "psychological harm" and "apprehension" are meritless under Texas law.

Like their allegations regarding market value depreciation, Plaintiffs' claims regarding "psychological harms" stemming from the BESS Facility are equally meritless. Indeed, in support of their arguments on this point, Plaintiffs misrepresent the evolution of nuisance law, instead relying on holdings from cases far removed from modern precedent.

Under Texas law, a "probable, imminent, and irreparable injury requires proof of an actual threatened injury, as opposed to a speculative or purely conjectural one." *Tex. Dep't of Pub. Safety v. Salazar*, 304 S.W.3d 896, 908 (Tex. App.—Austin 2009, no pet.). Thus, injunctive relief to restrain or abate a prospective nuisance is not properly granted when "the party seeking the injunction has mere fear or apprehension of the possibility of injury." *Pauli v. Hayes*, No. 04-17-00026-CV, 2018 WL 3440767, at *11 (Tex. App.—San Antonio July 18, 2018, no pet.) (mem. op.) (citing *Vaughn v. Drennon*, 202 S.W.3d 308, 313 (Tex. App.—Tyler 2006, no pet.); *Holubec*, 214 S.W.3d at 657; *see also Frey v. DeCordova Bend Estates Owners Ass'n*, 647 S.W.2d 246, 248 (Tex. 1983) (recognizing that "fear or apprehension of the possibility of injury alone is not a basis for injunctive relief"); *Fuentes v. Union de Pasteurizadores de Juarez Sociedad Anonima de Capital Variable*, 527 S.W.3d 492, 501 (Tex. App.—El Paso 2017, no pet.) (a temporary injunction is not proper when the claimed injury is "merely speculative [and] based on [f]ear and apprehension of injury").

Plaintiffs cite several cases that appear to relax this exacting standard, but these cases are easily distinguishable and, in many ways, support Rogers Draw's Motion. For example, *Comminge v. Stevenson*, 13 S.W. 556, 557 (Tex. 1890)—a case decided one hundred and thirty five years

ago—concerned a gunpowder magazine, consisting of thousands of pounds of powder, located "between three and four hundred feet from plaintiff's residence, on the prairie, uninclosed [sic], and surrounded by a growth of weeds, grass, and other vegetation indigenous to such outlying lands." *Id.* The plaintiff testified that before the magazine was placed there, he had rented his property for $75 and $100 per month, but he had not been able to rent it at any price since. *Id.* Other witnesses testified "to the depreciation in value of the property, and of its use, because of the proximity of the magazine." *Id.* The plaintiff also argued that he was only able to sell a portion of his land due to the nuisance. *Id.* In other words, the case related to the calculation of *damages*. As noted by the Court: "The plaintiff's property having sustained no permanent injury, and the cause of the injury being subject to abatement, in view of another trial we deem it proper to say that we think the correct measure of damages is the difference between the value of the rent, or use of the property with the nuisance, and without it. The sale of the land . . . was neither a necessary nor a natural consequence of the nuisance, and plaintiff is not entitled to recover anything on account of that transaction." *Id.* In other words, the court found a plaintiff may only recover damages caused by the "natural consequence" of a nuisance. And here, Plaintiffs have disavowed seeking any monetary damages, so their claims fail as a matter of law even under *Comminge's* outdated holding

Indeed, subsequent case law confirms that *Comminge* has a very narrow holding. For example, in *Maranatha Temple v. Enterprise Products Company et al.*, 893 S.W.2d 92, 100 (Tex. App.—Hou. [1st Dist] 1994, writ denied), the court, in analyzing the *Comminge* holding, held the concept of a nuisance by "apprehension" only applies to nuisance per se claims, and "[n]either the lawful use of property nor the lawful conduct of a business is a nuisance per se." Here, there is no allegation that Rogers Draw is, somehow, unlawfully using its property.

Crosstex North Tex. Pipeline, L.P. v. Gardiner, 505 S.W.3d 580, 593 (Tex. 2016), further highlights why the *Comminge* decision does not apply to this case. In *Crosstex*, neighbors of the operator of a natural gas line filed suit against the operator for negligence and intentional and negligent nuisance arising from construction and operation of a compressor station that generated continuous loud noise and vibrations. *Id.* In analyzing the case, the Supreme Court of Texas went over the evolution of nuisance claims in Texas. It classified the *Comminge* holding as one of the "early" decisions that "reflected the Court's ongoing effort to balance a property owner's right to use his property as he desires against his duty not to use the property in a way that unreasonably injures a neighbor's rights to use her own property." *Id.* at 592-93. The Court noted that the "early" cases' approach to nuisance has been replaced: "Ultimately, although the Court made little effort in its early opinions to comprehensively delineate all of a nuisance claim's elements and requirements, it refused to narrow the claim to impose liability for only certain types of conduct or to protect only certain types of interests. Instead, it consistently considered a wide variety of scenarios and factors and emphasized that whether an interference was actionable as a private nuisance depended ultimately on what was 'reasonable . . . under all the circumstances.'" *Id.* (citing *Oakes,* 58 S.W. at 1001). The Court emphasized that recent cases use a more "comprehensive" definition of nuisance: "A 'nuisance' is a **condition** that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use and enjoy it." *Id.* (emphasis added). This definition—which includes the term "condition"— "derives from this Court's early 'hurtful-and-inconvenient' definition, but reflects Texas courts of appeals' efforts to incorporate the requirement that the hurt and inconvenience be 'substantial' and 'unreasonably' annoying or discomforting to a person of 'ordinary sensibilities.'" *Id.* In short, early decisions such as *Comminge* have virtually no

precedential value when reviewing what conduct may qualify as a "nuisance." Rather, the common thread through Texas nuisance jurisprudence is that the defendant has invaded the plaintiff's property by some physical means, creating a "condition" that substantially interferes with the plaintiff's use and enjoyment of its land. *See, e.g.*, *Amini v. Spicewood Springs Animal Hosp., LLC*, No. 03-18-00272-CV, 2019 WL 5793115, at *11 (Tex. App.—Austin Nov. 7, 2019, no pet.).

Plaintiffs further misrepresent the holding in *Nugent v. Pilgrim's Pride Corp.*, 30 S.W.3d 562, 574–75 (Tex. App.—Texarkana 2000, pet. denied). In *Nugent*, farm owners brought action against owners of an adjoining farm, asserting claims of trespass and temporary damage with respect to the adjoining owners' dumping of noxious chemicals and chicken waste, and claims of nuisance and personal injuries in regard to adjoining owners' operation of a feed mill, as well as claims of ultra-hazardous activity, assault, destruction of natural resources, and remediation. *Id.* In *Nugent*, the Court found the plaintiffs developed a "well-founded apprehension" because there was proof that their (1) property was damaged by successive overflows of chicken manure and other waste materials; and (2) health had been damaged by airborne particles from the mill. *Id.* In other words, the plaintiffs' "apprehension" was "well founded" because they *had actually been damaged*—their apprehension was caused by existing harm, *not* speculative harm.

The import of the *Comminge*, *Crosstex,* and *Nugent* decisions are clear. Under modern law, a nuisance claim supported by an allegation like "apprehension" is only permittable in two instances:

- With respect to nuisance per se claims involving a defendant that is unlawfully using his or her property; or
- With respect to nuisance in fact claims that involve an active "invasion" that would cause an objective individual to have well-founded apprehension.

Neither situation applies here. Plaintiffs do not claim that Rogers Draw is conducting an unlawful operation, and Plaintiffs effectively *admit* that there is no active "invasion" of their Properties.

F. Plaintiffs' strict liability claim should be dismissed because Rogers Draw is not engaged in the type of ultrahazardous conduct required to assert this claim.

Plaintiffs' First Amended Petition only asserts one new claim: strict liability nuisance. Like the rest of their claims, this claim is unsupportable under Texas law. Strict liability based on ultrahazardous activity is also frequently applied by courts under the name of "absolute nuisance," or "nuisance per se." RESTATEMENT (Second) OF TORTS, § 520, comment C; PROSSER LAW OF TORTS, 4th Ed. (1971) at 582. "The law of nuisance has been divided into two categories, nuisance per se and nuisance in fact." *Guetersloh v. Rolling Fork Owners Comm.*, *Inc.*, No. 14-95-01272 CV, 1996 WL 580931, at *2 (Tex. App.—Houston [14th Dist.] Oct. 1996, no writ) (citing *Freedman*, 776 S.W.2d at 216). "Nuisance per se occurs when an act, occupation, or structure is a nuisance at all times." *Id.* In support of this claim, Plaintiffs only argue that the Facility will create an "abnormally dangerous condition" that is "out of place for its surroundings." Amend. Pet. at ¶ 35. This allegation is nowhere near enough to support a claim for strict liability nuisance.

This new claim fails for the same reasons outlined in Rogers Draw's Motion—it is premised on rank speculation. Nowhere do Plaintiffs argue that the Facility is a "nuisance at all times."

Further, Texas law is clear that a nuisance per se claim cannot apply to lawful uses of a property. *Maranatha Temple v. Enterprise Products Company et al.*, 893 S.W.2d 92, 100 (Tex. App.—Hou. [1st Dist] 1994, writ denied). Here, Plaintiffs do not allege that Rogers Draw is

unlawfully using its property, meaning Plaintiffs cannot assert a claim for strict liability per se nuisance.

Finally, regarding the remainder of their First Amended Petition, the alleged "conditions" that allegedly make the Facility "abnormally dangerous" are all speculative and do not allege why the Facility, itself, is "ultrahazardous." Indeed, Plaintiffs' allegations all stem from the community's purported inability to contain a potential fire—the Texas Supreme Court in *Crosstex* expressly rejected this type of basis as sufficient support for a strict liability nuisance claim:

> In other words, the mere fact that the defendant's use of its land is 'abnormal and out of place in its surroundings' will not support a claim alleging a nuisance; instead, in the absence of evidence that the defendant intentionally or negligently caused the nuisance, the abnormal and out-of-place conduct must be abnormally 'dangerous' conduct that creates a high degree of risk of serious injury.

See Crosstex, 505 S.W.3d 580, 592 (Tex. 2016). As an example, the *Crosstex* court cited *Austin & N.W. RY Co. v. Anderson*, 15 S.W. 484 (Tex. 1891), wherein the defendant constructed an embankment and culverts, which was not of itself a nuisance. *Id.* at n. 5. A nuisance was created, however, when the defendant diverted destructive waters onto the plaintiff's land, destroying Anderson's crops in 1886, 1887, and 1888. *Anderson*, 15 S.W. at 485 ("The building of the embankment and the culverts, as alleged, was not of itself a nuisance. It was no invasion of plaintiff's rights. They were not put on his land. They became a nuisance only at intervals, by diverting water from rain-falls from its usual flow upon plaintiff's land."). Here, the Facility itself is not a "nuisance," and the speculative fears that it may create a nuisance are not enough to support a strict liability claim. Simply put, Plaintiffs have no claim until a nuisance is actually caused.

It should be noted that, post-*Crosstex*, courts have consistently rejected strict liability nuisance claims, illustrating the extremely narrow nature of such a claim. For example, in *In re Oncor Elec. Delivery Co. L.L.C.*, 694 S.W.3d 789, 802 (Tex. App.–Houston [14th Dist.]

2024, not pet.), the Court of Appeals rejected a strict liability argument relating to transmission of electricity: "Plaintiffs cite no Texas court case that has held that the transmission or distribution of electricity is an abnormally dangerous activity giving rise to a nuisance injury for which a defendant is strictly liable." *See also Lara v. Encana Oil & Gas* (*USA*), *Inc.*, No. CV H-18-4585, 2021 WL 3878884, at *1 (S.D. Tex. Apr. 26, 2021) (stating the plaintiffs alleged "nothing more than legal conclusions to say that Encana's conduct was abnormally dangerous" and "[n]o facts were pleaded for how Encana's operation of the plant is abnormally dangerous"); *see also Dealer Computer Servs., Inc. v. DCT Hollister Rd, L.L.C.*, 574 S.W.3d 610, 623 (Tex. App.—Houston [14th Dist.] 2019, no pet.) (stating none of the arguments regarding the operation of Staples's warehouse or that additional paving "resulted in substantial flooding and drainage issues that burden" DCT's facility and the surrounding properties and community asserted that Staples engaged in abnormally dangerous conduct that created a high risk of serious injury).

In short, Plaintiffs do not argue that Rogers Draw is engaged in "abnormally dangerous conduct" that "creates a high degree of risk of serious injury." As such, the Plaintiffs' speculative allegations regarding a possible inability to contain an unlikely fire cannot support such a drastic claim as strict lability nuisance.

G. Plaintiffs misstate Rogers Draw's arguments regarding Plaintiffs' public nuisance claim.

Plaintiffs assert that Rogers Draw argues their public nuisance claim should be dismissed because Tex. Health & Safety Code § 343.013(a) is limited to the abatement of current nuisances. This is correct—the statute states that a "county or district court may by injunction prevent, restrain, abate, or otherwise remedy **a violation** of this chapter in the unincorporated area of the county." In other words, there must be an existing *violation* of this chapter, and the "to be affected" language clearly provides that an injunction may be sought where the county or person has been

or will be affected by the *existing* violation. But there is no basis for what Plaintiffs seek, namely, an injunction to prevent a *speculative* violation.

Regardless, Plaintiffs ignore Rogers Draw's second argument—the statute clearly relates to *maintaining* a *building*. Plaintiffs do not argue that Rogers Draw is currently maintaining a building in a manner that constitutes a fire hazard; rather, Plaintiffs assert claims related to the eventual *contents* of the facility's outdoor enclosures (lithium batteries). Essentially, Plaintiffs assert that Tex. Health & Safety Code § 343.013(a) creates per se strict liability for any storage facility that contains items that Plaintiffs fear may cause a fire—but as explained above, Plaintiffs cannot assert such a claim against Rogers Draw as there is no allegation that Rogers Draw is in engaged ultrahazardous conduct.

PRAYER

WHEREFORE, for the foregoing reasons, Defendant Rogers Draw prays that the Court grant Defendants' Rule 91a Motion to Dismiss and award Rogers Draw its costs in defending against this baseless lawsuit and in filing this Motion.

CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2025, a true and correct copy of this document was served on all counsel of record by e-mail and/or the Court's ECF System.

/s/ Jason Huebinger
Jason Huebinger

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Nikki Sims		nsims@mcguirewoods.com	12/1/2025 2:38:39 PM	SENT