No. 19-1019

IN THE

United States Court of Appeals for the Fourth Circuit

JOYCE MCKIVER; DELOIS LEWIS; DAPHNE MCKOY; ALEXANDRIA MCKOY; ANTONIO KEVIN MCKOY; ARCHIE WRIGHT, JR.; TAMMY LLOYD; DEBORAH JOHNSON; ETHEL DAVIS; PRISCILLA DUNHAM,

Plaintiffs-Appellees,

and

DENNIS MCKIVER, JR.; LAJUNE JESSUP; DON LLOYD, Administrator of the Estate of Fred Lloyd; TERESA LLOYD; TANECHIA LLOYD; CARL LEWIS; ANNETTE MCKIVER; KAREN MCKIVER; BRIONNA MCKIVER; EDWARD OWENS; DAISY LLOYD;

Plaintiffs,

v.

MURPHY-BROWN, LLC, d/b/a Smithfield Hog Production Division,

Defendant-Appellant.

On Appeal from the United States District Court
For the Eastern District of North Carolina
Civil Case No. 7:25-cv-180-BR

CORRECTED UNOPPOSED BRIEF FOR AMICUS CURIAE OF PUBLIC JUSTICE AND FOOD & WATER WATCH IN SUPPORT OF APPELLEES

DAVID S. MURASKIN
JESSICA L. CULPEPPER
KELLAN SMITH
PUBLIC JUSTICE, P.C.
1620 L Street, N.W., Ste 630
Washington, DC 20036
(202) 861-5245
Counsel for Amicus Curiae

TARAH HEINZEN
FOOD & WATER WATCH
1600 P Street, N.W., Ste. 300
Washington, D.C. 20036
(202) 683-2457

May 7, 2019

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 19-1019 Caption: Joyce McKiver, et al. v. Murphy-Brown, LLC

Pursuant to FRAP 26.1 and Local Rule 26.1,

Public Justice, P.C.
(name of party/amicus)

who is amicus curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ David S. Muraskin Date: May 7, 2019

Counsel for: Public Justice

CERTIFICATE OF SERVICE

****

I certify that on May 7, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ David S. Muraskin
(signature)

May 7, 2019
(date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 19-1019 Caption: McKiver, et al. v. Murphy-Brown, LLC

Pursuant to FRAP 26.1 and Local Rule 26.1,

Food & Water Watch
(name of party/amicus)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: __/s/David S. Muraskin_______ Date: May 7, 2019

Counsel for: Food & Water Watch

CERTIFICATE OF SERVICE

****

I certify that on May 7, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/David S. Muraskin
(signature)

May 7, 2019
(date)

TABLE OF CONTENTS

CORPORATE DISCLOSURE……………………………………………...…….i

STATEMENT OF INTEREST OF AMICUS CURIAE……………………….1

SUMMARY OF ARGUMENT………………………………………….…...2

INTRODUCTION ……………………………………………………….…...3

FACTUAL BACKGROUND……………………………………….……..6

I. Corporations Structure Industrial Animal Production to Completely Control Growers…………………………………………….…6

A. Vertical integration and contract production dominate the hog industry…………………………………………………….…….6

B. The government recognizes integrators exercise complete control over contract growers………………………………………….…10

C. Courts recognize integrators have complete control over growers……..…12

D. The record shows that Murphy-Brown completely controlled Kinlaw's operations……………………………………………….……13

E. The jury held Murphy-Brown liable because its contractual operating procedures produced the nuisance……………………………………...15

F. Kinlaw has been impacted solely because of Murphy-Brown's litigation tactic to avoid liability……………………………………………...…17

ARGUMENT………………………………………………..……………18

I. Standard of Review…………………………………………………19

II. Only Rule 19(a)(1)(B)(i) is applicable to this Court's analysis……………..21

III. The District Court did not abuse its discretion in holding Kinlaw had no interest under Rule 19(a)(1)(B)(i)………………………………………….22

A. The jury verdict did not increase Kinlaw's risk of future liability……..24

B. The jury verdict did not leave Kinlaw in breach of contract……………25

C. The jury verdict does not threaten Kinlaw's permit……………………28

IV. Murphy-Brown's and its amici's Rule 19(b) argument is a red herring…….29

CONCLUSION……………………………………………………………30

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

Table of Authorities

Page(s)

Cases

Assateague Coastkeeper v. Alan & Kristin Hudson Farm,
727 F. Supp. 2d 433 (D. Md. 2010) ……………………….……………13

Cloverleaf Standardbred Owners Ass'n, Inc.,
699 F.2d 1274 (D.C. Cir. 1983) …………………………..………………20

Coastal Modular Corp. v. Laminators, Inc.,
635 F.2d 1102 (4th Cir. 1980) ………………..……………………………19

Cty. of Brunswick v. Bond Safeguard Ins. Co.,
No. 7:12-CV-123-D, 2013 WL 663720 (E.D.N.C. Feb. 22, 2013) ………..22

Dow v. Jones,
232 F. Supp. 2d 491 (D. Md. 2002) ……………………………………….21

Freeman v. Case Corp.,
118 F.3d 1011 (4th Cir. 1997) ...……………………………………………...20

General Elec. Co. v. Joiner,
552 U.S. 136 (1997) ……………………………………….……..19, 20

Home Buyers Warranty Corp. v. Hanna,
750 F.3d 427 (4th Cir. 2014) ...…...………………………………..19, 20

James v. Jacobson,
6 F.3d 233 (4th Cir. 1993) ...………………………………………………20

Key Constructors, Inc. v. Harnett Cty.,
315 F.R.D. 179 (E.D.N.C. 2016) ……………………………………………..22

Koon v United States,
518 U.S. 81 (1996) …………………………..………………………20

Mainstream Constr. Grp., Inc. v. Dollar Props., LLC,
No. 7:09-CV-00148-BR, 2010 WL 2039671 (E.D.N.C. May 20, 2010) ..21

Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Rite Aid of S.C., Inc.,
210 F.3d 246 (4th Cir. 2000) ……………………………………………19

Picciotto v. Continental Cas. Co.,
512 F.3d 9 (1st Cir. 2008) ………………………………………….....19

Provident Tradesmens Bank & Trust Co. v Patterson,
390 U.S. 102 (1968) …………...……………………………………………5

Redner's Mkts., Inc. v. Joppatowne G.P. Ltd. P'ship,
918 F.Supp.2d 428 (D. Md. 2013) …...……………………………………26

Republic of Philippines v. Pimentel,
553 U.S. 851 (2008) ……………………….……………………...…..19

Riesett v. Mayor & City Council of Baltimore,
No. CIV.A. GLR-13-1860, 2013 WL 5276553 (D. Md. Sept. 18, 2013) …26

Overgaard v. Rock County Bd. of Comm'rs,
No. CIV. 02-601(DWF/AJB), 2002 WL 31924522
(D. Minn. Dec. 30, 2002) ...……………………………………………...13

Soho Wilmington LLC v. Barnhill Contracting Co.,
No. 7:18-CV-79-D, 2019 WL 165708 (E.D.N.C. Jan. 10, 2019) ………..22

State ex rel. Graham v. Nash Johnson & Sons' Farms, Inc.,
138 S.E.2d 773 (1964) …………………..………………………………..12

Stovall v. United States,
94 Fed. Cl. 336 (2010) ……………………………………………...……..12

Thimbler, Inc. v. Unique Solutions Design USA Ltd.,
No. 5:12-CV-695-BR, 2014 WL 1663418 (E.D.N.C. Apr. 25, 2014) …….24

Trans Pac. Corp. v. S. Seas Enterprises, Ltd.,
291 F.2d 435 (9th Cir. 1961) ……………………………………………26

Tyson Foods, Inc. v. Stevens,
783 So. 2d 804 (Ala. 2000) 13

Ward v. Apple Inc,
791 F.3d 1041 (9th Cir. 2015) 27

Rules

Fed. R. Civ. P. 19(a) ....*passim*
Fed. R. Civ. P. 19(b) 21, 28-29

Other Sources

Charles Bethea, The New Yorker, Could Smithfield Foods have Prevented the "Rivers of Hog Waste" in North Carolina after Florence? (Sept. 30, 2018) 10

Christopher Leonard, *The Meat Racket: The Secret Takeover of America's Food Business* (2014) 11

Emily Moon, Pacific Standard, *North Carolina's Hog Waste Problem has a Long History. Why Wasn't it Solved in Time for Hurricane Florence?* (Sept. 16, 2018) 10

Jeffrey J. Reimer, *Vertical Integration in the Pork Industry*, Amer. J. Agric. Econ. 88(1) 240 (February 2006) 6

R. Brent Ross and Peter J. Narry, *Contract Hog Production*: *A Case Study of Financial Arrangements*, J. of ASFMRA 17-22 (2005)..7

Sally Lee, Rural Advancement Found. Int'l-USA, *What Debt in Chicken Farming Says About American Agriculture* (July 12, 2016) 7

Smithfield Foods, 2013 Integrated Report 13

Smithfield Foods, *2015 Sustainability & Financial Report* 9

Smithfield Foods, Our Brands 10

Smithfield Foods, Profile & History 9

Smithfield Foods, Our Operations 10

Successful Farming, *Pork Powerhouses 2018*..9

USDA Nat'l Agric. Statistics Serv., *2017 Census of Agriculture*: Volume 1, Ch. 1: U.S. National Level Data, Table 23: Hogs and Pigs – Inventory by Type of Producer: 2017 8

USDA Grain Inspection, Packers & Stockyards Admin., *Assessment of the Cattle, Hog and Poultry Industries* 10, T.3 (2005) 9

U.S. Small Bus. Admin. Off. of Inspector General, *Evaluation Report: Evaluation of SBA 7(a) Loans Made to Poultry Farmers*, Report No. 18-13 (Mar. 6, 2018) 11

William D. McBride & Nigel Key, *U.S. Hog Production from 1992-2009: Technology, restricting, and Productivity Growth*, U.S. Dep't of Agric Econ. Res. Serv Report No. 158 (October 2013) 8

STATEMENT OF INTEREST OF AMICUS CURIAE

This amici curiae brief is submitted on behalf of Public Justice and Food & Water Watch. All parties have consented to the filing of this brief and no party's counsel has authored this brief or contributed money to the brief's preparation.

Public Justice is a nonprofit legal advocacy organization dedicated to using high impact litigation to combat social and economic injustice, protect the Earth's sustainability, and challenge predatory corporate conduct and government abuses. The Public Justice Food Project is the only legal project in the country that is dedicated solely to reforming industrial animal agriculture into a system that is regenerative, just, humane, and enables independent farmers to thrive.

Public Justice has a strong interest in the ability to hold corporate agribusiness—not farmers or contract growers—accountable for the harms their production methods cause to people, the planet, and independent farmers. Consistent with the work of the organization as a whole, the Public Justice Food Project's docket includes cases that hold corporations accountable for extractive and unfair contracts that push risk onto their contract growers. The issues surrounding Rule 19 in this case impact Public Justice's ability to hold agribusiness accountable, which is the only way to reform the factory farm system.

Food & Water Watch ("FWW") is a national non-profit organization that champions healthy food and clean water for all by standing up to corporations that put profits before people and advocating for a democracy that improves people's lives and protects the environment. To further this mission, FWW uses a combination of grassroots organizing, policy advocacy, research, communications, and litigation. Factory farming is one of FWW's, and its more than one million members' and supporters', priority issues. FWW is engaged in numerous campaigns to hold the factory farming industry accountable for its adverse impacts on rural communities and the environment, including campaigns focused on holding agribusiness corporations accountable for the unchecked pollution and consolidation of the livestock industry. FWW has thousands of members and supporters in North Carolina.

SUMMARY OF ARGUMENT

This brief will first provide a concise background of the industrial animal agriculture system in which Kinlaw Farm ("Kinlaw") operates. The brief will summarize the relevant factual record in this case, which demonstrates the jury determined Defendant Murphy-Brown—not Kinlaw—is liable for the nuisance at issue. These facts are critical to understanding why Kinlaw is not a "required" party under Federal Rule of Civil Procedure 19.

The second part of this brief will explain (1) why the Joey Carter Farms et al. ("Growers") Amicus Brief gets the standard of review wrong; (2) why the district court's Rule 19(a) analysis was correct, particularly in the context of the trial record; and (3) why both Murphy-Brown's and the Grower amici's arguments fail. Finally, the brief argues that this Court should not reward Murphy-Brown for using a litigation tactic that harmed Kinlaw to manufacture an issue on appeal.

INTRODUCTION

Murphy-Brown is responsible for the nuisance in this case: the corporation mandated every detail of the siting, construction, and operation of its contract hog farm, Kinlaw, creating the conditions that resulted in the nuisance. Kinlaw has no interest at stake, as the district court's well-reasoned Order explained, and was not a required party in this case. Murphy-Brown's calculated and callous termination of Kinlaw's contract following the verdict is a transparent effort to conjure a basis for appeal, and must fail.

Federal Rule of Civil Procedure 19 is a means to bring a "required" party into a case. The Rule defines a "required" party as a person without whom "the court cannot afford complete relief," who establishes an interest that would be "impair[ed] or impede[d] by the judgment," or for whom "an existing party" can show their absence could result in "double" or "inconsistent" obligations. Fed. R. Civ. P. 19(a). Amazingly, even though neither Murphy-Brown or Kinlaw *ever*

moved to add Kinlaw to the case below, they now ask this Court to overturn a jury verdict against Murphy-Brown because Kinlaw was not a party. Their arguments are pure distractions. They ignore the relationship between Murphy-Brown and Kinlaw, bringing about a damages verdict solely against Murphy-Brown. The district court did not abuse its discretion in its *two* detailed opinions concluding Kinlaw was not a "required" party, because there can be no doubt Kinlaw's presence was not "required."

Indeed, Plaintiffs sought to and did hold Murphy-Brown—a wholly-owned subsidiary of the giant multi-national agribusiness Smithfield Foods—responsible for forcing factory hog farmers, including Kinlaw, to carry out their operations in a way that harmed their neighbors. Plaintiffs' exclusive theory of liability, on which they prevailed, was that Murphy-Brown damaged Plaintiffs by dictating a production method that caused a nuisance without providing the farmers any way to mitigate those injuries.

The trial record establishes *all* parties agreed Kinlaw was a model contract grower; Kinlaw fully implemented Murphy-Brown's directives and made no independent judgments that impacted Plaintiffs, exactly as Murphy-Brown practices and procedures required—which the company actively monitored. Under that contract, Murphy-Brown proudly declared *it* directs every aspect of the farming operations, to ensure "consistency" across all of its farms. JA237. Put

another way, nothing either Plaintiffs or Defendant introduced into the record or argued to the jury ever suggested Kinlaw violated the terms of its contract with Murphy-Brown or any statutory law or regulations.

Murphy-Brown and its amici focus on *Murphy-Brown's* post-judgment decision to terminate Kinlaw as a hog farmer, but such gamesmanship is wholly improper. Rule 19 does not allow for parties to develop some post-hoc injury "to obtain a windfall escape from [] defeat at trial." *Provident Tradesmens Bank & Trust Co. v Patterson*, 390 U.S. 102, 112 (1968). That Murphy-Brown sought to gin up an argument for appeal by turning on the same contractor it previously held up in court as a model employee demonstrates the lengths to which Defendant will go to try to escape liability, as well as how it abuses its powers over rural community members. The trials are not "costing the farmers their livelihoods[,]" Growers Br. 17; Murphy-Brown's decision to terminate farmers to create the illusion of error is.

Finally, this Court has made clear Rule 19 joinder is a discretionary determination. Neither of the district court's decisions that the growers, and specifically Kinlaw, are not required reveals any abuse of discretion. Murphy-Brown's and its amici's legal arguments run counter to well-established Rule 19 law, as Murphy-Brown's amici essentially admit by urging this Court to abandon

abuse of discretion review and instead engage in a de novo analysis. Growers Br. 23. Murphy-Brown's Rule 19 argument fails based on the law and facts.

FACTUAL BACKGROUND

I. Corporations Structure Industrial Animal Production to Completely Control Growers.

Livestock production in the United States has dramatically transformed in recent decades, with the contract production model largely replacing independent, family farms. The contracts are between the former farmers ("growers"), and vertically integrated companies who control everything from the breeding stock's genetics to the contracts for sale ("integrators"). This transition has facilitated market concentration and given integrators market powers—often anticompetitive monopsony powers—to dictate their growers' practices, including those practices responsible for the nuisance in this case.

A. Vertical integration and contract production dominate the hog industry.

An animal agriculture "integrator" is a company that "owns all downstream physical assets (such as a packing-processing facility) plus inputs for upstream production, including feed, medicine, and breeding stock and/or feeder pigs." Jeffrey J. Reimer, *Vertical Integration in the Pork Industry*, Amer. J. Agric. Econ. 88(1) 240 (Feb. 2006). The contract grower is the person who previously would be considered a farmer, but now solely owns the land and "production facilities" that

service an integrator, and who "grows" the animals to the integrators' specifications. *Id*. Contract growers must find financing, often hundreds of thousands of dollars, to build and update production facilities to a particular integrator's specification. R. Brent Ross and Peter J. Narry, *Contract Hog Production: A Case Study of Financial Arrangements*, J. of ASFMRA 17-22 (2005). This debt leaves growers dependent on their integrators.[1] *Id*.

In the hog industry, integrators own the hogs at every stage in the production process, including when they are in the growers' houses. An integrator's contracts with its growers typically impose a laundry list of requirements, addressing how the animals are housed, fed, and medicated, how the animal containment facilities are ventilated, and how waste and dead bodies are stored and disposed of. JA5979 (grower manual for Kinlaw). The purpose of these requirements is to ensure a consistent product; no deviation in operation is allowed.

Such integrator-contract grower relationships have come to define the hog industry. Between 1992 and 2004 hogs produced under contract ballooned from

---

[1] *See also* Sally Lee, Rural Advancement Found. Int'l-USA, *What Debt in Chicken Farming Says About American Agriculture* (July 12, 2016), https://rafiusa.org/blog/what-debt-in-chicken-farming-says-about-american-agriculture/ (explaining debt risk for poultry industry and relating it to the hog industry).

five percent to 65 percent of total production in the United States.[2] Integrators' demands of increased concentration at fewer farms—which reduces their costs, such as transportation, feed, and inconsistent products—have rapidly driven farmers out of business. Between 1992 and 2009, the U.S. lost 70 percent of its hog farms, while the total hog inventory remained steady.[3] By 2017, hogs raised under contract had dropped to 43 percent of the total inventory, but not due to a resurgence of independent hog farming; to the contrary, integrators took ownership of the farms themselves, cutting out the contract grower.[4] This "full integration" now accounts for about 23 percent of production.[5]

Unsurprisingly, such vertical integration has been accompanied by increased sector concentration. According to USDA, the "four-firm concentration" in the hog sector, or the percentage of hogs slaughtered by the top four companies, doubled

---

[2] William D. McBride & Nigel Key, *U.S. Hog Production from 1992-2009: Technology, restricting, and Productivity Growth,* U.S. Dep't of Agric Econ. Res. Serv Report No. 158 (October 2013) at iii, https://www.ers.usda.gov/webdocs/publications/45148/40364_err158.pdf?v=0.
[3] *Id.*
[4] USDA Nat'l Agric. Statistics Serv., 2017 Census of Agriculture: Volume 1, Chapter 1: U.S. National Level Data, Table 23: Hogs and Pigs – Inventory by Type of Producer: 2017, https://www.nass.usda.gov/Publications/AgCensus/2017/Full_Report/Volume_1,_Chapter_1_US/.
[5] *Id.*

from 32 percent to 64 percent in less than twenty years, from 1985 to 2004.[6] The increase in industry consolidation means dwindling options for independent hog farmers trying to get their hogs to market and typically prevents growers from moving between integrators.

Making matters for farmers worse, integrators achieve additional cost savings related to transportation and site visits by siting contract operations near the integrators' farrowing and slaughter facilities.[7] With certain companies dominating the hog market in specific geographic areas, contract growers have even less, if any, bargaining power in negotiating the contracts that dictate how they raise hogs and manage their waste—there simply would be nowhere else for them to go.

Murphy-Brown is just such an actor in Eastern North Carolina. Smithfield (under which Murphy-Brown does business) is by far the leader in U.S. sow production, as well as the global leader in overall hog production.[8] JA7868. It is

---

[6] USDA Grain Inspection, Packers & Stockyards Admin., Assessment of the Cattle, Hog and Poultry Industries 10, T.3 (2005), https://www.gipsa.usda.gov/psp/publication/asses/05assessment.pdf.
[7] *See*, *e.g.*, Smithfield, 2015 Sustainability & Financial Report 66, https://www.smithfieldfoods.com/sustainability-reporting/past-reports.
[8] Successful Farming, Pork Powerhouses 2018, https://www.agriculture.com/pdf/pork-powerhouses-2018; Smithfield, Company Profile & History, https://www.smithfieldfoods.com/about-smithfield/company-profile.

extremely vertically integrated, controlling the production chain from breeding the hogs down, to growing the feed, to owning more than a dozen retail brands.[9] Smithfield utilizes a combination of contract hog production and full integration; out of 2,200 total hog operations in North Carolina, Smithfield owns and operates more than 200[10] and contracts with another 1,200.[11] Even more telling, Smithfield's operations account for some 90 percent of North Carolina's total hog production.[12] Such market power translates to incredible control over the company's contract hog operations.

B. The government recognizes integrators exercise complete control over contract growers.

Federal agencies have recently scrutinized the integrator-contract grower relationship, and found such comprehensive control by integrators that they determined growers must be characterized as employees rather than independent

[9] Smithfield, Our Brands, https://www.smithfieldfoods.com/our-brands.
[10] Smithfield, Our Operations, https://www.smithfieldfoods.com/about-smithfield/our-operations.
[11] Charles Bethea, The New Yorker, Could Smithfield Foods have Prevented the "Rivers of Hog Waste" in North Carolina after Florence? (Sept. 30, 2018), https://www.newyorker.com/news/news-desk/could-smithfield-foods-have-prevented-the-rivers-of-hog-waste-in-north-carolina-after-florence.
[12] Emily Moon, Pacific Standard, North Carolina's Hog Waste Problem has a Long History. Why Wasn't it Solved in Time for Hurricane Florence? (Sept. 16, 2018), https://psmag.com/environment/why-wasnt-north-carolinas-hog-waste-problem-solved-before-hurricane-florence.

businesses. In 2018, the Small Business Administration's ("SBA") Office of Inspector General reviewed the agency's "7(a) Loans" to poultry farmers.[13] The 7(a) loan program is the agency's primary small business loan program, guaranteeing billions of dollars in loans for independent businesses.[14] SBA's Inspector General found that integrators "exercised . . . comprehensive control over the growers . . . through a series of contractual restrictions, management agreements, oversight inspections, and market controls."[15] Therefore, the Inspector General concluded poultry growers had essentially no ability to "operate their business independent of integrator mandates."[16] Accordingly, poultry growers did not meet SBA's loan eligibility requirements because they were not independent operators.[17]

As numerous authors have recognized, the integrator-grower model applied to hogs is the "chickenization" of the hog industry. Christopher Leonard, *The Meat Racket: The Secret Takeover of America's Food Business* 167-169 (2014). Considering the structure of hog integration and the facts in the record, SBA would

---

[13] SBA Off. of Inspector General, Evaluation Report: Evaluation of SBA 7(a) Loans Made to Poultry Farmers, Report No. 18-13 (Mar. 6, 2018), https://www.sba.gov/sites/default/files/oig/SBA-OIG-Report-18-13.pdf.
[14] *Id*. at Exec. Summary.
[15] *Id.*
[16] *Id.*
[17] *Id.*

likely reach the same conclusion regarding Murphy-Brown's relationship to Kinlaw and its other growers.

C. Courts recognize integrators exercise complete control over contract growers.

Judicial decisions, including those in North Carolina, mirror SBA's findings and extend them to the hog sector. Examining an integrator-grower relationship in the same Eastern North Carolina communities at issue here, the North Carolina Supreme Court explained, "Under this arrangement the owners of the houses furnish the water, fuel, electricity, and labor necessary to raise the birds. Defendant provides the chicks, feed, medication, litter, and feed bins." *State ex rel. Graham v. Nash Johnson & Sons' Farms, Inc.*, 138 S.E.2d 773, 774 (1964). The Court went on to say that "employees regularly supervise all grow-out operations, including the labor of the owners of the houses." *Id*. at 776. "The farmer's compensation" is not based on his efficiency, but the integrators' rules, and "[a]fter each flock is marketed, [the integrator] decides whether to entrust the farmer with another." *Id.*; *see also Stovall v. United States,* 94 Fed. Cl. 336, 342 (2010) (stating substantially the same). The North Carolina Supreme Court relied on those facts to determine that the level of control was such that the growers were considered to be employees and not independent contractors. *State ex rel. Graham*, 138 S.E.2d at 776.

As a result, courts have held integrators can be liable for the conduct of their growers that the integrator directed. *See Overgaard v. Rock County Bd. of Comm'rs*, No. CIV. 02-601(DWF/AJB), 2002 WL 31924522, at *3 (D. Minn. Dec. 30, 2002) (level of control sufficient to sustain nuisance, trespass, and negligence claims against hog integrator); *Tyson Foods, Inc. v. Stevens*, 783 So. 2d 804, 809 (Ala. 2000) (sustaining jury's finding that a grower was not an independent contractor but rather an agent of the integrator for purposes of nuisance liability); *see also Assateague Coastkeeper v. Alan & Kristin Hudson Farm*, 727 F. Supp. 2d 433, 442 (D. Md. 2010) (level of control sufficient to allege integrator liability under the Clean Water Act).

D. The record shows that Murphy-Brown completely controlled Kinlaw's operations.

The record here leaves no doubt that Murphy-Brown is a typical integrator that "manages every aspect of the pork production process" at Kinlaw Farms, including those that caused the nuisance.[18] JA164. Indeed, Murphy-Brown asserted its control from the get-go. Mr. Kinlaw wished to site the facility on land he already owned, which had no neighbors, but Murphy-Brown refused because it feared the site was too close to another Murphy-Brown facility. Murphy-Brown

[18] Smithfield 2013 Integrated Report at 17, http://admin.csrwire.com/system/report_pdfs/1332/original/smithfield-integrated-report2013_11_.pdf.

was only willing to approve a different site, closer to community homes. *McKiver v. Murphy Brown LLC*, No. 7:14 CV-180-BR (*McKiver*) Dkt. 272 (Trial Tr., 138:2-141:7).

After Mr. Kinlaw purchased the approved parcel, Murphy-Brown directed the facility design, blueprinting, and engineering without Kinlaw's input. JA7813-JA7815. Murphy-Brown also prepared the waste management plan that controlled how Kinlaw stored, managed, transported, and disposed of the massive quantities of raw hog sewage the farm would generate, again without Kinlaw's input. JA7817-JA7818.

Once the facility opened, Murphy-Brown determined Kinlaw's operations. Murphy-Brown decided on hog placement and removal timing, hog carcass management and removal, how many hogs would be placed, and the feed and veterinary care provided. *McKiver,* Dkt. 185 at 9.

Murphy-Brown's "take it or leave it" contract also requires that its growers, including Kinlaw, "shall comply with [Murphy-Brown's] management procedures …**which may be amended in whole or in part by [Murphy-Brown] at any time without prior notice**." JA9282-9321 (at 9285) (Kinlaw Farms 2014 contract) (emphasis in original)." As a result, Murphy-Brown determined Kinlaw's practices at the most granular level (as detailed in Appellees' Br. 13), and enforced Kinlaw's implementation of these practices through inspections at least once a week. *See*

JA9286 (detailing operating procedures); *see also* JA7639 (30(b)(6) testimony of Jonathan Sargent 42:4-9) (same); *see* JA832 (Defendant Fact Sheet at Res. 41 & 42) (detailing inspection frequency). If Kinlaw failed to strictly follow any of Smithfield's extensive guidelines, Smithfield could terminate the contract or decrease Kinlaw's hogs and pay. JA6256-57; JA6469.

E. The jury held Murphy-Brown liable because its contractual operating procedures produced the nuisance.

The record also establishes that Murphy-Brown's liability resulted from, and could only have resulted from, the company enforcing its required practices and procedures on Kinlaw. Plaintiffs' theory was that Murphy-Brown's control over the operations and hogs made Murphy-Brown responsible for the facilities' interference with its neighbors' use and enjoyment of their property. JA5825:18-JA5825:14. Murphy-Brown's defense was that Kinlaw was a model facility that followed all rules and regulations, including Murphy-Brown's contractual requirements. JA5867:9-15; *see also* JA5886:15-17. Put simply, there was no way for the jury to hold against Murphy-Brown unless they concluded Kinlaw was in compliance with Murphy-Brown's directives, those directives determined the impact on the Plaintiffs, and thus Murphy-Brown was responsible for the Plaintiffs' loss.

Indeed, Plaintiffs' opening and closing arguments were focused heavily on how Murphy-Brown's control of Kinlaw proved their case. *See* JA5816:3-11 ("Smithfield…designed this industrial hog operation. Smithfield…drew up the plans for this industrial hog operation. Smithfield controls the specifications and maintenance of the facilities where it places its hogs. Smithfield controls how often it places its hogs. Smithfield brings its hogs in its hog trucks, according to its schedule, all hours of the day and night in front of the neighbors' homes."); *cf.* JA9012:11-24 (Closing); *see also* JA5815 at 19:21-24 (Opening); *cf.* JA9012:7-11 (Closing); *and see* JA5825:19-25-JA5826:1 ("The documents and the testimony will show, no, the grower is not responsible. He's under Smithfield's control and Smithfield doesn't pay him enough to do any different. The growers all sign a standard, very one-sided contract with Smithfield that gives Smithfield complete control over the operation.").

Likewise, Murphy-Brown's opening and closing arguments emphasized how Kinlaw was in compliance with its contract with Murphy-Brown. JA5825:19-JA5826:1; JA5867:8-10 ("you know what the true facts are with regard to the Kinlaw farm? Never, never has there been a problem with that farm. Never."); JA5886:13-21 ("And you'll see on every single inspection this farm has complied … . Yes, it's not an effort to blame the grower. You'll see there is nothing that Mr. Kinlaw could be blamed for in this case … ."); *see also* JA9071:10-16 (…if any of

these inspections, these audits, a couple times of week…if there was something that Murphy-Brown should have found, should have noticed, should have determined, you would have heard them…that's because there is not.").

All parties demanded the jury resolve the same question: was the operation, performing as Murphy-Brown designed and directed, producing a nuisance. The jury concluded in the affirmative, that carrying out Murphy-Brown's protocols harms the surrounding community.

F. Kinlaw has been impacted solely because of Murphy-Brown's litigation tactic to avoid liability.

This case has only indirectly affected Kinlaw because of the post-litigation decisions of Murphy-Brown. Contrary to Murphy-Brown's self-serving argument that "the depopulation of hogs at Kinlaw … followed ineluctably from a finding that the farm operated as a nuisance," Murphy-Brown Br. 56, the evidence developed in this case showed that Kinlaw was, in fact, was a model contract-grower. Kinlaw was not implicated by the verdict. *See* JA9177 (Jury Verdict). And nothing in the record or verdict indicated Kinlaw violated a single contractual provision, let alone required Murphy-Brown to act against Kinlaw.

As Murphy-Brown is forced to admit in its brief, the only reason Kinlaw's livelihood is at stake is because Murphy-Brown terminated Kinlaw's contract after the verdict was in, seeking the opportunity to generate an issue for appeal.

Murphy-Brown Br. 56. Murphy-Brown's termination letter to Kinlaw claimed that Kinlaw did not "comply with standard operating procedures," but this is the exact *opposite* of what it and Plaintiffs argued at trial. *See* JA9593 at n. 18; *see also* JA9322-23 (Smithfield Letter to Kinlaw).

ARGUMENT

Despite neither Kinlaw nor Murphy-Brown ever making a motion to have Kinlaw join this action, the district court twice considered whether Kinlaw was a required party. Murphy-Brown and its amici, seemingly recognizing their arguments on the merits will not fly, attack the district court decision as failing to properly apply Rule 19. Their position has no factual or legal basis. Murphy-Brown's amici then misstate the rule in the hopes that this court will skip the dispositive initial inquiry—whether Kinlaw was required—and focus instead on the subsequent question whether, *if* Kinlaw was required, what was the right remedy. In short, Murphy-Brown's and its amici's Rule 19 arguments depend on them rewriting the law, decisions below, and record in the case. Murphy-Brown and its amici plainly hope that the company's (improper) litigation tactic to terminate Kinlaw will distract this Court from Rule 19's requirements. But, that they must stretch so much confirms the district court did not abuse its discretion, which is the central inquiry under Rule 19.

I. Standard of Review.

In the Fourth Circuit, Rule 19 decisions are reviewed for abuse of discretion and the findings of fact underlying the determination are reviewed for clear error. *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Rite Aid of S.C., Inc.*, 210 F.3d 246, 250 & n.7 (4th Cir. 2000); *see also Picciotto v. Continental Cas. Co.*, 512 F.3d 9, 14-15 (1st Cir. 2008) (citing *Nat'l Union*) ("all of the circuits that have examined the question have applied an abuse of discretion standard to Rule 19(a) determinations."); Murphy-Brown Br. 55 (citing *Nat'l Union*).[19]

Despite Murphy-Brown's amici's assertions to the contrary, abuse of discretion review is not "overly stringent," *General Elec. Co. v. Joiner*, 552 U.S. 136, 143 (1997). *See* Growers Br. 8-9. Indeed, "deference [] is hallmark of abuse of discretion review." *General Elec. Co.*, 552 U.S. at 14; *see also Coastal Modular Corp. v. Laminators, Inc.*, 635 F.2d 1102, 1108 (4th Cir. 1980) ("[t]he inquiry contemplated by Rule 19 is a practical one…. It is addressed to the sound

---

[19] While Murphy-Brown concedes as much, Murphy-Brown Br. 55, its amici attempt to complicate the standard of review; those claims are simply misleading. *See* Grower Br. 8. Amici rely on *Home Buyers Warranty Corp. v. Hanna*, but there the district court did *not* perform a Rule 19 analysis. 750 F.3d 427, 432-33 (4th Cir. 2014). In *Home Buyers*, on appeal, this Court determined for the first time that Rule 19 needed to be applied and therefore reviewed the issue de novo. As noted above, where this Court reviews a Rule 19 decision below, it applies abuse of discretion review. Given that governing precedent, amici's fixation on the fact that "[t]he Supreme Court has not directly addressed the proper standard of review of a Rule 19 order" is irrelevant. *See* Grower Br. 8. Even so, the Supreme Court has explained the Rule 19 inquiry is "case specific," which "implies some degree of deference to the district court." *Republic of Philippines v. Pimentel*, 553 U.S. 851, 863-64 (2008).

discretion of the trial court."). Even the cases Murphy-Brown's amici cite directly support this understanding. *See e.g. James v. Jacobson*, 6 F.3d 233, 243 (4th Cir. 1993) (remanding instead of "impos[ing] our own discretionary judgment" and recognizing the "continued superiority of the trial court's vantage point in making this sort of discretionary decision[.]").

Accordingly, the cases finding an abuse of discretion—including those cited by Murphy-Brown's amici—involve true error, not disagreements of judgment. *See*, *e.g.*, *Koon v. U.S.*, 518 U.S. 81, 98 (1996) (stating "no deference" where "mathematical error" in applying sentencing guidelines, but noting the district court will otherwise "be due substantial deference"); *Freeman v. Case Corp.*, 118 F.3d 1011, 1014 (4th Cir. 1997) (district court ignored controlling precedent). As discussed below, such error is not present here. Therefore, particularly where—as here—"the decision by the court of first instance reflects a clear understanding that the Rule calls for practically-oriented consideration of the competing interests at stake," this Court should defer to the ruling of the district court. *Cloverleaf Standardbred Owners Ass'n, Inc.*, 699 F.2d 1274, 1277 (D.C. Cir. 1983).

II. Only Rule 19(a)(1)(B)(i) is applicable to this Court's analysis.

Rule 19 sets up a two-step process, although only the first is relevant here. Rule 19 looks first to whether a party is "required," Fed. R. Civ. P. 19(a)(1), and second "[i]f a person *who is required* to be joined if feasible cannot be joined, …

whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b) (emphasis added). Thus, if, as the district court determined below, the absent party is not required under Rule 19(a)(1), the inquiry ends without reaching 19(b). *Mainstream Constr. Grp., Inc. v. Dollar Props., LLC*, No. 7:09-CV-00148-BR, 2010 WL 2039671, at *2 (E.D.N.C. May 20, 2010).

In deciding if a party is "required," the rule instructs the district court to consider specific factors:

> (A) if in that person's absence, the court cannot accord complete relief among existing parties; or
> (B) if that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1).

In its Rule 19 arguments before the district court, Murphy-Brown focused exclusively on Rule 19(a)(1)(B)(i), because it is clear that no other factors apply.

First, Rule 19(a)(1)(A) is not applicable, because the court can accord complete relief among existing parties. This factor only allows the court to consider the existing relief between the existing parties, and not "the absent person whose joinder is sought." *Dow v. Jones*, 232 F. Supp. 2d 491, 498 (D. Md. 2002).

Therefore, courts in the Fourth Circuit have repeatedly ruled that when, as here, JA3301-02, plaintiffs seek monetary damages from the defendant alone, joinder is not warranted under Rule 19(a)(1)(A). *See*, *e.g.*, *Key Constructors, Inc. v. Harnett Cty.*, 315 F.R.D. 179, 184 (E.D.N.C. 2016); *Soho Wilmington LLC v. Barnhill Contracting Co*., No. 7:18-CV-79-D, 2019 WL 165708, at *3 (E.D.N.C. Jan. 10, 2019); *Cty. Of Brunswick v. Bond Safeguard Ins. Co*., No. 7:12-CV-123-D, 2013 WL 663720, at *3 (E.D.N.C. Feb. 22, 2013).

Second, Rule 19(a)(1)(B)(ii) is not applicable, because it is entirely unclear how Murphy-Brown could face a "substantial risk of incurring double, multiple, or otherwise inconsistent obligations" if Kinlaw is not joined. Accordingly, neither Murphy-Brown nor the contract grower amici have argued that such risk is present.

Thus, Murphy-Brown's Rule 19 argument requires a showing that the district court abused its discretion in concluding Kinlaw's interests would not be "impair[ed] or impede[d]" by a judgment against Murphy-Brown that Kinlaw's implementation of Murphy-Brown's directives brought about a nuisance. Fed. R. Civ. P. 19(a)(1)(B)(i).

III. The District Court did not abuse its discretion in holding Kinlaw had no interest under Rule 19(a)(1)(B)(i).

Murphy-Brown and its amici rely on the same purported property interests on appeal as Murphy-Brown argued in the district court: that a nuisance finding

would leave Kinlaw (1) with a substantially higher risk of future liability; (2) in a breach of contract with Murphy-Brown, and (3) with threatened state-issued permits for lagoon use. Murphy-Brown Br. 55-6; Growers Br. 13. To the contrary, the district court found: (1) a finding of nuisance would not mean Kinlaw can no longer raise hogs; (2) it is Murphy-Brown (not the litigation) who controls any contractual interest with Kinlaw; and (3) there was almost no risk of future liability given the current state of the law in North Carolina. JA9689 (referencing its decision in the master action (JA3300-3)). Even with the benefit of hindsight, Murphy-Brown and its amici have failed to point to any impact *the litigation* had on Kinlaw. Instead, they point only to Murphy-Brown's decision to depopulate hogs at Kinlaw, an action the litigation did not mandate or support.

Murphy-Brown admits that under Rule 19 "a court must attempt to forecast the future course" of the litigation to determine who must be a party. Br. 56 (quotation marks omitted). Here, however, no such forecast is required, as the trial has been completed and judgment rendered. Rule 19 does *not* require the district court to look at potential impacts to non-parties when those impacts do not result from the litigation, but rather the voluntary decisions of powerful corporations. The district court accurately predicted no argument or evidence in this case would undermine Kinlaw's legal rights or obligations. The district court correctly

determined that Murphy-Brown's arguments have no merit. Murphy-Brown and its amici cannot establish that the court abused its discretion in that analysis.

A. The jury verdict did not increase Kinlaw's risk of future liability.

In reviewing what impact the litigation could have on Kinlaw, the district court fully considered the relevant statutory and precedential case law, which undermined the suggestion Kinlaw would be at increased risk for future liability (JA3301-03). The district court determined that the state doctrine of collateral estoppel and state statutory law around punitive damages made the litigation risk to Kinlaw "virtually nonexistent." JA9686.

Amici now argue that the district court erred in relying on "preclusion law" to determine the growers' risk of future litigation. Grower Br. 18. However, the district court did not rest its Rule 19 analysis on preclusion law; preclusion law arose in response to an argument by Murphy-Brown. The court explained Murphy-Brown's reliance on *Thimbler, Inc. v. Unique Solutions Design USA Ltd.*, No. 5:12-CV-695-BR, 2014 WL 1663418, (E.D.N.C. Apr. 25, 2014)—which held a party should be joined if its future arguments would be precluded— was unfounded because Kinlaw was not (as in *Thimbler*) "a subsidiary corporation." JA3301-02.

B. The jury verdict did not leave Kinlaw in breach of contract.

The district court also properly recognized that the litigation could not reasonably threaten Kinlaw's contract because the contract was not at issue in the litigation, the record established that Kinlaw was in compliance with all terms of its contract, and any loss Kinlaw suffered would be a result of Murphy-Brown's decisions separate and apart from the verdict. JA3301-02. (Murphy-Brown controlled "whether to invoke any of its contractual rights against the landowner."). This is exactly what occurred; the jury held Murphy-Brown accountable and then Murphy-Brown independently decided to turn on Kinlaw to manufacture an issue on appeal.

The amici growers' fixation on the fact that Kinlaw was under contract with Murphy-Brown misses the point. In *Home Buyers Warranty Corp. v. Hanna,* the court granted joinder where the absent party was part of a contract, and the plaintiff was litigating "against [the absent party] under the contract" in another proceeding. 750 F.3d 427, 433 (4th Cir. 2014). Here, the Plaintiffs sought liability only to Murphy-Brown and did not seek to determine Kinlaw's liability or its performance under the contract, as the district court properly recognized in evaluating the Rule 19 issue. JA9686.

Indeed, courts in the Fourth Circuit have expressly warned against requiring joinder any time a contract is implicated, explaining a third-party cannot assert an interest in litigation through a fear of "falling contractual dominoes"—the precise

theory Murphy-Brown presents here, Br. 56. *Redner's Mkts., Inc. v. Joppatowne G.P. Ltd. P'ship*, 918 F.Supp.2d 428, 436 (D. Md. 2013) (citations omitted); *see also Riesett v. Mayor & City Council of Baltimore*, No. CIV.A. GLR-13-1860, 2013 WL 5276553, at *4 (D. Md. Sept. 18, 2013) (finding that contracts "cannot be the catalyst for designating… a necessary party" where those contracts are not the subject of the litigation).

Amici double down on this mistaken approach, arguing that because the trial and liability *for Murphy-Brown* "relied on that contractual relationship" and because "the[] farms were the central actor in these trials" Kinlaw should have been joined. Growers Br. 16-17. Yet, as the district court properly concluded, the mere fact that the contracts and activities at Kinlaw are "relevant" to Murphy-Brown's liability fails to make the grower a required party. Reliance on evidence related to absent parties is "an evidentiary problem, and not one that, ipso facto, creates a misjoinder." *See Trans Pac. Corp. v. S. Seas Enterprises, Ltd.*, 291 F.2d 435, 436 (9th Cir. 1961). To argue otherwise, "confuses the role of the absent persons as witnesses with their role as parties." *Id.*

Murphy-Brown works to repackage the same "contract argument" by asserting that because its discretionary decision to terminate Kinlaw's contract undermined Kinlaw's "investments," it was an abuse of discretion to conclude Kinlaw's interests would not be impeded. Murphy-Brown Br. at 55. However,

Murphy-Brown's own authority demonstrates the fallacy of its position. In *Ward v. Apple Inc*, the Ninth Circuit reversed the district court for *adding* a party because it did not "identify any specific interest" at stake. 791 F.3d 1041, 1049-50 (9th Cir. 2015). The district court here considered Kinlaw's "investments" and determined the litigation did not place that investment at stake within the meaning of the Rule 19 analysis because, in light of the parties' theories of the case, an adverse ruling would not mean Kinlaw must stop raising hogs. That Murphy-Brown ensured a different outcome does not undermine the district court's analysis. JA9686-87 ("[T]he 'new evidence,' which is entirely of defendant's making, does not warrant dismissal of this case for failure to join the landowner as a party.")

C. The jury verdict does not threaten Kinlaw's permit.

For the same reasons that a finding of nuisance against Murphy-Brown could have no impact on Kinlaw's contract, the district court was correct in determining that the decision here has no impact on Kinlaw's permit. Kinlaw's permit was not at issue in the litigation, and the record established that Kinlaw was in compliance with its permit. JA3301-02. Indeed, Murphy-Brown stated, "Since its operations began in 1995, Kinlaw Farm has maintained compliance with all applicable state regulatory requirements related to swine farming" and "…utilizes best management practices as outlined in the Standard Operating Procedures Murphy-Brown provides." JA5449-5450.

A finding of nuisance does not put Kinlaw in violation of its permit. *See* N.C. Gen. Stat. Ann. § 143-215.10E (outlining permit violations). The permit system is maligned by environmentalists precisely because its coverage is so minimal. The only relevant permit provisions relating to nuisance require that Kinlaw use "site-specific, cost-effective remedial best management practices" to control odor and insects, all of which were found sufficient for purposes of the permit, if not for the neighbors themselves. N.C. Gen. Stat. Ann. § 143-215.10C(e). The Court recognized as much. JA3302 (noting that "otherwise lawful business operations can support a nuisance.")

Indeed, Kinlaw continues to operate under its state-issued lagoon permit as it is required to and there has been no evidence that the state has moved to revoke that use. 15A N.C. Admin. Code 2T.1306 (permittees must continue operating under a permit until lagoons and operations are dismantled and permit revocation is granted by the state). If Kinlaw ceased operations and its permit coverage ended, it would be due to Murphy-Brown's refusal to continue sending hogs to one of its "model farms," JA5886:15-17, and not because of this litigation.

IV. Murphy-Brown's and its amici's Rule 19(b) argument is a red herring.

Finally, Murphy-Brown and its amici attempt to create confusion about the Rule 19 analysis, contending the district court did not make its analysis clear and

that it should have dismissed this action under Rule 19(b). Murphy-Brown Br. 56; Growers Br. 19. Murphy-Brown's amici claim it is "impossible to tell whether Murphy-Brown's motion for judgment on the pleadings failed under the first or second part of the framework," meaning Rule 19(a) or (b), "since the court did not conduct an analysis under either." Grower Br. 12. This is flatly untrue. The district court's original decision from the master action, which was incorporated into its decision in this specific case, included a multi-page analysis of Rule 19(a) and determined that "the landowners are not required for just adjudication of these cases." JA3300-3; *see also* JA9686-7. The court then reiterated those findings as applied to Kinlaw. JA9686. Because Rule 19(b) only comes into play when a party is "required" under 19(a), a Rule 19(b) analysis was plainly unwarranted below.

Murphy-Brown and its amici nonetheless try to invoke 19(b), claiming that because Murphy-Brown is not a proxy for Kinlaw's interest, the case should have been dismissed if Kinlaw could not be joined. Murphy-Brown Br. 56; Grower Br. 20. However, Rule 19(b) only applies "[i]f a person who is required to be joined if feasible cannot be joined," in order to determine whether the case can proceed. Fed. R. Civ. P. 19(b). Thus, whether Murphy-Brown would be a proxy for Kinlaw is irrelevant, because the district court correctly found that Kinlaw did not have an interest at all, and thus was not a required party. For these same reasons, amici's

efforts to raise the specter of jurisdictional issues that would arise by adding a non-diverse party are not present because there was no Rule 19 basis to add Kinlaw.

V. Conclusion.

The Rule 19 issue is fundamentally an attempt to convert Murphy-Brown's post-verdict decision to revoke its contract with Kinlaw into an argument for appellate reversal. Plaintiffs' efforts to spare Kinlaw a monetary judgment and seek relief solely from the actor that truly created the harm should not be punished because Murphy-Brown has decided to harm Kinlaw as a bad-faith litigation tactic. The district court correctly found that Kinlaw did not have an interest in the litigation under Rule 19, as Kinlaw's conduct was fully controlled by Murphy-Brown. The trial record fully supported the court's conclusion, which illustrates the one-sided nature of the integrator-contract grower relationship that defines the hog industry in North Carolina.

Counsel for Amicus Curiae

Dated: May 7, 2019

Respectfully Submitted

/s/ David S. Muraskin

David S. Muraskin
Jessica L. Culpepper
Kellan Smith
Public Justice, P.C
1620 L Street, N.W., Ste 630
Washington, D.C. 20036
(202) 861-5245
dmuraskin@publicjustice.net

Tarah Heinzen (D.C. Bar No. 1019829)
FOOD & WATER WATCH
1600 P Street NW, Suite 300
Washington, DC 20036
Phone: (202) 683-2457
Email: theinzen@fwwatch.org

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Effective 12/01/2016

No. 10-1019 **Caption:** Joyce McKiver et al. v. Murphy-Brown, LLC

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT
Type-Volume Limit, Typeface Requirements, and Type-Style Requirements

Type-Volume Limit for Briefs: Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 13,000 words or 1,300 lines. Appellee's Opening/Response Brief may not exceed 15,300 words or 1,500 lines. A Reply or Amicus Brief may not exceed 6,500 words or 650 lines. Amicus Brief in support of an Opening/Response Brief may not exceed 7,650 words. Amicus Brief filed during consideration of petition for rehearing may not exceed 2,600 words. Counsel may rely on the word or line count of the word processing program used to prepare the document. The word-processing program must be set to include headings, footnotes, and quotes in the count. Line count is used only with monospaced type. See Fed. R. App. P. 28.1(e), 29(a)(5), 32(a)(7)(B) & 32(f).

Type-Volume Limit for Other Documents if Produced Using a Computer: Petition for permission to appeal and a motion or response thereto may not exceed 5,200 words. Reply to a motion may not exceed 2,600 words. Petition for writ of mandamus or prohibition or other extraordinary writ may not exceed 7,800 words. Petition for rehearing or rehearing en banc may not exceed 3,900 words. Fed. R. App. P. 5(c)(1), 21(d), 27(d)(2), 35(b)(2) & 40(b)(1).

Typeface and Type Style Requirements: A proportionally spaced typeface (such as Times New Roman) must include serifs and must be 14-point or larger. A monospaced typeface (such as Courier New) must be 12-point or larger (at least 10½ characters per inch). Fed. R. App. P. 32(a)(5), 32(a)(6).

This brief or other document complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. R. 32(f) (cover page, disclosure statement, table of contents, table of citations, statement regarding oral argument, signature block, certificates of counsel, addendum, attachments):

☑ this brief or other document contains 6496 [*state number of*] words

☐ this brief uses monospaced type and contains ______ [*state number of*] lines

This brief or other document complies with the typeface and type style requirements because:

☑ this brief or other document has been prepared in a proportionally spaced typeface using Microsoft Word [*identify word processing program*] in 14 pt Times New Roman [*identify font size and type style*]; **or**

☐ this brief or other document has been prepared in a monospaced typeface using ______ [*identify word processing program*] in ______ [*identify font size and type style*].

/s/David S. Muraskin

Party Name Public Justice

Dated: May 7, 2019

CERTIFICATE OF SERVICE

I certify that on May 7, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

s/David S. Muraskin
Signature

May 7, 2019
Date