17-0126

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IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

IN RE: MARCELLUS SHALE LITIGATION CIVIL ACTION NO. 14-C-3000

THIS DOCUMENT APPLIES TO:

HARRISON COUNTY CHERRY CAMP TRIAL GROUP

ROBERT ANDREWS, et al. v. Antero, et al.	13-C-434 HRR ANDREWS RL
RODNEY ASHCRAFT, et al. v. Antero, et al.	13-C-434 HRR ASHCRAFT R
LINDSEY FEATHERS v. Antero, et al.	13-C-434 HRR FEATHERS LN
ROBERT GOLDEN, et al. v. Antero, et al.	13-C-434 HRR GOLDEN R
DANIEL KINNEY, et al. v. Antero, et al.	13-C-434 HRR KINNEY DL
CHARLES A. MAZER v. Antero, et al.	13-C-434 HRR MAZER CA
CHARLES T. MAZER v. Antero, et al.	13-C-434 HRR MAZER CT
DOUGLAS MAZER, et al. v. Antero, et al.	13-C-434 HRR MAZER DA
SHAWN MAZER v. Antero, et al.	13-C-434 HRR MAZER SA
SUSAN MAZER v. Antero, et al.	13-C-434 HRR MAZER SJ
GREGG MCWILLIAMS, et al. v. Antero, et al.	13-C-434 HRR MCWILLIAMS G
DAVID NUTT v. Antero, et al.	13-C-434 HRR NUTT DS
ROBERT SIDERS, et al. v. Antero, et al.	13-C-434 HRR SIDERS R

FINAL ORDER GRANTING
DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

The Court has reviewed and maturely considered *Antero Resources Corporation's Motion for Summary Judgment* and *Hall Drilling, LLC's Motion for Full or Partial Summary Judgment* (Transaction IDs 58437476 and 58439674), *Plaintiffs' Response in Opposition to Defendants Antero Resources Corporation's and Hall Drilling, LLC's Motions for Summary Judgment* (Transaction ID 58498603), the *Reply in Support of Antero Resources Corporation's Motion for Summary Judgment* (Transaction ID 58530421), and *Hall Drilling, LLC's Reply in Support of Its Motion for Full or Partial Summary Judgment* (Transaction ID 58531784). The Court has further reviewed extensive and voluminous memoranda and exhibits, and the arguments of counsel. Having conferred with one another to insure uniformity of their decision, as contemplated by Rule 26.07(a) of the West Virginia Trial Court Rules, the Presiding Judges

unanimously **GRANT** Defendants' motions for summary judgment.[1]

The Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. "This is an action by residents and/or owners of property in Harrison County, West Virginia for private temporary continuing abatable nuisance and negligence/recklessness against Defendants Antero Resources Corporation, Antero Resources Bluestone, LLC, and Hall Drilling, LLC for damages arising from Defendants' oil and/or natural gas drilling, exploration, extraction, pipeline construction, water processing, and related acts and/or omissions. . . ." Complaint, ¶ 1. Plaintiffs allege they "are no longer able to enjoy their lives and use and enjoy their homes and properties in the way they previously enjoyed prior to Defendants' acts and/or omissions . . . ." *Id.*, ¶ 2.

2. Plaintiffs claim that, "[s]ince living in Harrison County, the Plaintiffs had come to expect and enjoy the quiet, fresh air, fresh water, privacy, darkness of night, and overall peacefulness of the area." *Id.*, ¶ 23. However, "[a]s a result of Defendants' natural gas exploration, extraction, transportation and associated activities in close proximity to their properties, Plaintiffs have suffered and continue to suffer significant damages to their rights to the use and enjoyment of their property. . . ." *Id.*, ¶ 24

[1] On April 13, 2016, nearly (10) weeks after the deadline for dispositive motions and over six (6) weeks after the Court had conducted its hearing on dispositive motions, Plaintiffs filed a motion for leave to file a supplemental response. See *Motion to Supplement Response in Opposition to Defendants Antero Resources Corporation's and Hall Drilling, LLC's Motions for Summary Judgment* (Transaction ID 58857554). On April 15, 2016, Defendants filed a motion for leave to file a supplemental reply. See *Joint Response in Opposition to Plaintiffs' Motion to Supplement Response in Opposition to Defendants' Motions for Summary Judgment or, in the Alternative, Motion for Leave to File Supplemental Reply to Plaintiffs' Supplemental Response in Opposition to Defendants' Motions for Summary Judgment* (Transaction ID 58872071). The Court denied both Plaintiffs' motion for leave to file a supplemental response and Defendants' motion for leave to file a supplemental reply as untimely filed. See *Order* (Transaction ID 58876663). Upon being advised mediation would be reconvened on October 6-7, 2016, the Court ordered its detailed, final order granting summary judgment in favor of Defendants in the Harrison County Cherry Camp Trial Group cases held in abeyance, pending the outcome of the mediation. See *Order* (Transaction ID 59259366). Having been advised that mediation conducted on October 6-7, 2016, was unsuccessful, the Court now enters its final order pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure.

3. The activity at issue in this complaint is horizontal well drilling and hydro-fracturing as part of the development of the Marcellus Shale in West Virginia. Traditional oil and gas wells in West Virginia are vertical wells, with smaller drill rigs and fairly small well pads, located on one-third to one-half of an acre of land. A well road is built, the well pad is built, and the drill rig drills the vertical well several thousands of feet deep. After the well is drilled, a steel casing is put in the well, the drill rig leaves, and a hydro-fracturing company comes in to fracture the well. After the well is fractured and flow-back occurs, production starts and pipelines carry the natural gas from the well head to a larger transmission line for transport to market. See December 22, 2014 Hearing Transcript, pp. 37-39.

4. With the development of the Marcellus Shale, horizontal drilling is used to recover natural gas. Horizontal drilling requires a vertical well to be drilled, then the drill bit is turned and runs underground in a horizontal direction, extending anywhere from 2,000 to 10,000 feet away from the vertical well site. *Id.*, pp. 39-40. Several underground, horizontal wells are drilled away from the vertical well sites, much like a spider web design. Because of the horizontal drilling, more wells can be located on one well pad. Consequently, the well pads are usually larger, there are more hydro-fracturing zones, hydro-fracturing takes a longer period of time, and it takes more sand and water. *Id.*, pp. 40-41.

5. Counsel for Plaintiffs describes this drilling process, along with the infrastructure required once the wells are built as "more of an industrialization of rural West Virginia" causing Plaintiffs to complain of "traffic, noise, dust, diesel emissions, pollution, erosion, and water well contamination" creating a nuisance. *Id.*, pp. 43-44.

6. Defendant Antero Resources Corporation ("Antero") is the owner of horizontal Marcellus Shale wells located on numerous well pads in Doddridge, Harrison, and Ritchie Counties, among

others. Antero is the successor in interest to Bluestone Energy Partners by merger and mesne conveyances.

7. Antero contracted with third parties, including Hall Drilling, LLC ("Hall Drilling"), for construction of the well pads and roads, well drilling, and completion and operation of the wells and gathering lines.

8. Antero negotiated and was granted the right to use the surface property of the Plaintiffs to develop the underlying minerals pursuant to several agreements. Thus, the Court concludes Hall Drilling is entitled to the benefit of these various agreements to the same extent as Antero when Hall Drilling is performing work or services for or on behalf of Antero.

9. Antero has leasehold rights to develop the oil and gas underlying the properties that are the subject of Plaintiffs' complaint. Those development rights were retained by the oil and gas mineral owners in the severance deeds separating the surface estates from the mineral estates. Some of the terms of the severance deeds and mineral leases are as follows:

Deborah Andrews

Rights retained by the mineral owner in the July 22, 1905 severance deed (Deed Book ("DB") 150, Page ("P") 231) include:

> [T]he right to drill, bore and operate for [oil and gas] at any time, also the right to use water from said land for the purpose of said drilling, boring and operating, and the right at any time to remove all necessary machinery used for the last named purposes, upon or off said land[.]

Express rights granted to Antero by the August 17, 1984 mineral lease (DB 1146, P 190) include:

> [E]xclusive possession and use for the purposes of exploring and operating for, producing, and marketing oil, gas, natural gasoline, casing-head gas, condensate, related hydro-carbons, and all products produced therewith or therefrom by methods now known or hereafter discovered, of injecting, storing, and withdrawing any kind of gas regardless of the source, of protecting stored gas, of injecting gas, air, water, and other fluids into sands and formations for the purpose of recovering and producing said minerals or for the purpose of disposing of waste fluids . . . [along with] all other rights and privileges necessary, incident to,

and convenient for the economical operation of said land alone and conjointly with other lands for the production and transportation of said minerals[.]

Rodney and Katherine Ashcraft

Rights retained by the mineral owner in the July 22, 1905 severance deed (DB 150, P 231) include:

> [T]he right to drill, bore and operate for [oil and gas] at any time, also the right to use water from said land for the purpose of said drilling, boring and operating, and the right at any time to remove all necessary machinery used for the last named purposes, upon or off said land[.]

Express rights granted to Antero by the August 17, 1984 mineral lease (DB 1146, P 190) include:

> [E]xclusive possession and use for the purposes of exploring and operating for, producing, and marketing oil, gas, natural gasoline, casing-head gas, condensate, related hydro-carbons, and all products produced therewith or therefrom by methods now known or hereafter discovered, of injecting, storing, and withdrawing any kind of gas regardless of the source, of protecting stored gas, of injecting gas, air, water, and other fluids into sands and formations for the purpose of recovering and producing said minerals or for the purpose of disposing of waste fluids . . . [along with] all other rights and privileges necessary, incident to, and convenient for the economical operation of said land alone and conjointly with other lands for the production and transportation of said minerals[.]

Mary Mikowski and Gregg McWilliams

Rights retained by the mineral owner in the July 22, 1905 severance deed (DB 150, P 231) include:

> [T]he right to drill, bore and operate for [oil and gas] at any time, also the right to use water from said land for the purpose of said drilling, boring and operating, and the right at any time to remove all necessary machinery used for the last named purposes, upon or off said land[.]

Express rights granted to Antero by the August 17, 1984 mineral lease (DB 1146, P 190) include:

> [E]xclusive possession and use for the purposes of exploring and operating for, producing, and marketing oil, gas, natural gasoline, casing-head gas, condensate, related hydro-carbons, and all products produced therewith or therefrom by methods now known or hereafter discovered, of injecting, storing, and withdrawing any kind of gas regardless of the source, of protecting stored gas, of injecting gas, air, water, and other fluids into sands and formations for the purpose of recovering and producing said minerals or for the purpose of disposing of waste fluids . . . [along with] all other rights and privileges necessary, incident to,

and convenient for the economical operation of said land alone and conjointly with other lands for the production and transportation of said minerals[.]

Daniel and Sharon Kinney

Rights retained by the mineral owner in the June 20, 1921 and April 24, 1946 severance deeds (DB 320, P 350; DB 604, P 362) include:

[A]ll oil, gas and water rights of way[.]

[A]ll of the oil and natural gas in and underlying said two tracts of land[.]

Express rights granted to Antero by the February 10, 1988 mineral lease (DB 1183, P 276) include:

> [P]rospecting, exploring by geophysical and other methods, drilling, operating for, producing oil or gas, or both, together with the right and easement to construct, operate, repair, maintain and remove pipelines, telephones, power and electric lines, tanks, ponds, roadways, plants, equipment and structures thereon to produce, save, store and take care of such substances, and the exclusive right to inject air, gas, water, brine and other fluids into the subsurface strata and any and all other rights and privileges necessary, incident to, or convenient for the economic operation of the lands, alone or conjointly with neighboring lands[.]

Clyde Kinney, Jr. (Robert and April Golden)

Rights retained by the mineral owner in the June 20, 1921 and April 24, 1946 severance deeds (DB 320, P 350; DB 604, P 362) include:

[A]ll oil, gas and water rights of way[.]

[A]ll of the oil and natural gas in and underlying said two tracts of land[.]

Express rights granted to Antero by the February 10, 1988 mineral lease (DB 1183, P 276) include:

> [P]rospecting, exploring by geophysical and other methods, drilling, operating for, producing oil or gas, or both, together with the right and easement to construct, operate, repair, maintain and remove pipelines, telephones, power and electric lines, tanks, ponds, roadways, plants, equipment and structures thereon to produce, save, store and take care of such substances, and the exclusive right to inject air, gas, water, brine and other fluids into the subsurface strata and any and all other rights and privileges necessary, incident to, or convenient for the economic operation of the lands, alone or conjointly with neighboring lands[.]

Charles T. Mazer and Susan Mazer

Rights retained by the mineral owner in the March 1, 1904 and October 14, 1905 severance deeds (DB 140, P 265; DB 152, P 39) include:

> [T]he oil and gas in and under said land with the right to operate for same, as usually granted in oil and gas lease[.]
>
> [A]ll of the oil and gas, in and under said land, with the right to operate for same, such rights being the same as are usually granted in an oil and gas lease[.]

Express rights granted to Antero by the August 11, 1902 mineral lease (DB 133, P 107) include:

> [Use of the property] for the sole and only purpose of mining and operating for oil and gas and of laying pipe lines, and of building tanks, stations and structures thereon, to take care of said products[.]

Douglas and Catherine Mazer

Rights retained by the mineral owner in the July 3, 1915 and February 27, 1917 severance deeds (DB 255, P 377; DB 265 P277) include:

> [A]ll the coal, oil and natural gas within and underlying said tract of land with all the rights necessary and convenient to mine, operate for and remove all of said coal, oil and natural gas without being liable to the grantee herein for any damages occasioned by such operations.

Express rights granted to Antero by the July 14, 2008, June 18, 2009, and May 28, 2009 mineral leases (DB 1425, P 761; DB 1434, P 302; DB 1436, P 339) include:

> [E]xplore for, develop, produce and sell the Oil and Gas including, but not limited to: (a) conducting geological, geophysical and other exploratory work; seismic drilling (either vertically, horizontally or directionally); (b) gathering, transporting, storing, compressing and the right to construct and remove roads, electric power and telephone facilities, tanks, structures and pipelines including meters that Lessee may need for the transportation of Oil and Gas from the Premises to other lands; (c) injecting under pressure air, gas, water, brine and other fluids for the enhanced recovery of Oil and Gas and withdrawing the same therefrom; and (d) exercising all other rights that may be necessary or incident to the purposes set out above.
>
> [E]xploring by geological and geophysical and other methods, (including, but not limited to, conducting seismic surveys), drilling either vertically or horizontally, operating for, producing oil or gas or both, including methane gas present in or associated with any formations, horizons, strata or zones [along with] the right and easement to construct, operate, repair, maintain, resize and remove pipelines, telephone, power and electric lines, tanks, ponds, roadways, plant, equipment and

structures thereon to produce, save, store and take care of such substances, and the exclusive right to inject air, gas, water, brine or other fluids into the subsurface strata and any and all other rights and privileges necessary, incident to, or convenient for the economical operation of the lands, alone or conjointly with neighboring lands[.]

Robert and Betty Siders

Rights retained by the mineral owner in the February 4, 1903 severance deed (DB 136, P 321) include:

> [A]ll the oil and gas underlying the land herein conveyed together with the privilege of operating for and Marketing same.

Express rights granted to Antero by the April 3, 2001 mineral lease (DB 1330, P 545) include:

> [E]xploring and operating for, producing and marketing oil and gas, natural gasoline, casing-head gas, condensate, related hydrocarbons, and all other related products, including the building of roads, laying pipelines and installing equipment thereon to take care of such products [along with] the privilege of using sufficient water and gas from said premises to run all machinery necessary for drilling and operating thereon, and all right of way necessary to develop the premises or remove equipment, and related items[.]

10. In addition to the foregoing leases and severance deeds, Antero executed various other agreements with several Plaintiffs, or the owners of the properties on which Plaintiffs reside, entitling Antero to use Plaintiffs' properties in the course of its mineral development. These various agreements include right of way agreements, an oil and gas lease, road use agreements, surface use agreements, tank pad agreements, and pipeline easements.[2]

[2] The agreements expressly granting Antero the right to use Plaintiffs' land at issue in this matter in the course of its mineral development are as follows: Right of Way Agreement dated January 19, 2009, between Deborah Andrews and Robert Andrews and Bluestone Energy Partners recorded on February 23, 2009, in Book 1427, Page 1112; Right of Way Agreement dated November 25, 2008, between Clyde Kinney, Jr., and Bluestone Energy Partners recorded on December 30, 2008, in Book 1426, Page 357; Road Grant/Right of Way Agreement dated October 15, 2009, between Clyde Kinney, Jr., and Bluestone Energy Partners recorded on November 20, 2009, in Book 1439, Page 221; Oil and Gas Lease dated March 23, 2010, between Clyde Kinney and Bluestone Energy Partners recorded on June 15, 2010, in Book 1449, Page 69; Memorandum of Surface Use Agreement dated July 17, 2009, between Clyde Kinney, Jr. and Antero Resources Appalachian Corporation recorded on July 27, 2009, in Book 1434, Page 1285; Tank Pad Agreement dated October 1, 2013, between Daniel L. Kinney, Attorney-in-Fact for Clyde Kinney Jr., and Antero Resources Corporation; Memorandum of Tank Agreement dated July 9,

11. The agreements entered into by Plaintiffs Douglas and Catherine Mazer, expressly authorized the activities relating to the O. Rice well pad and expressly waived all damages arising out of the operations on the O. Rice well pad.

12. Antero has obtained permits from the West Virginia Department of Environmental Protection ("WVDEP") for its gas wells on the six Cherry Camp well pads.

13. Plaintiffs filed their complaint on October 11, 2013, alleging "private temporary continuing abatable nuisance and negligence/recklessness" arising from Defendants' "natural gas exploration, extraction, transportation and associated activities in close proximity to their properties" in Harrison County, West Virginia. Complaint, Paragraphs 1, 22 and 24.

14. Plaintiffs voluntarily withdrew their negligence claims in their response to Defendants' motions for summary judgment. See Transaction ID 58498603 at page 2. Accordingly, the

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2013, between Daniel L. Kinney, Attorney-in-Fact for Clyde Kinney Jr., and Antero Resources Corporation recorded on December 3, 2013, in Book 1523, Page 834; Tank Pad Agreement dated July 12, 2013, between Daniel L. Kinney, Attorney-in-Fact for Clyde Kinney, Jr., and Antero Resources Corporation; Letter of Agreement dated March 8, 2013, between Daniel L. Kinney, Attorney-in-Fact for Clyde Kinney Jr., and Antero Resources Appalachian Corporation; Memorandum of Tank Pad Agreement dated July 9, 2013, between Daniel L. Kinney, Attorney-in-Fact for Clyde Kinney Jr., and Antero Resources Corporation recorded on September 9, 2013, in Book 1517, Page 1023; Memorandum of Surface Use Agreement dated July 29, 2010, between Douglas A. Mazer and Catherine S. Mazer, husband and wife, and Bluestone Energy Partners recorded on August 25, 2010, in Book 1453, Page 1204; Memorandum of Amended and Restated Surface Use Agreement dated October 11, 2011, between Douglas A. Mazer and Catherine S. Mazer, husband and wife, and Antero Resources Appalachian Corporation recorded on October 13, 2011, in Book 1478, Page 125; Pipelines Easement and Right of Way Agreement dated January 27, 2011, between Douglas A. Mazer and Catherine S. Mazer, husband and wife, and Antero Resources Appalachian Corporation; Memorandum of Pipeline Easement and Right of Way Agreement dated January 27, 2011, between Douglas A. Mazer and Catherine S. Mazer, husband and wife, and Antero Resources Appalachian Corporation recorded on January 28, 2011, in Book 1462, Page 517; Surface Use Agreement dated July 29, 2010, between Douglas A. Mazer and Catherine S. Mazer, husband and wife, and Bluestone Energy Partners; Amended and Restated Surface Use Agreement dated October 11, 2011, between Douglas A. Mazer and Catherine S. Mazer, husband and wife, and Antero Resources Appalachian Corporation; Surface Use Agreement dated May 17, 2010, between Douglas A. Mazer and Catherine S. Mazer, husband and wife, and Bluestone Energy Partners; Right of Way Agreement dated July 27, 2010, between Douglas A. Mazer and Catherine S. Mazer, and Bluestone Energy Partners; Agreement sent via email between Kevin Kilstrom and Douglas Mazer regarding the O. Rice Pad dated September 27, 2011; and Option Agreement dated May 7, 2010, between Doug and Cathy Mazer and Bluestone Energy Partners.

Court makes no findings of fact or conclusions of law in this Order regarding Plaintiffs' negligence claims.

15. Among other things, Plaintiffs complained of excessive heavy equipment and truck traffic, excessive diesel fumes and other emissions from the trucks, vibrations, removal of and/or damage to trees, plants and vegetation, excessive lights, excessive noise, excessive dust, excessive emissions, and harassment and/or menacing, intimidating, disrespectful, arrogant, and obnoxious behavior towards Plaintiffs, resulting in Plaintiffs' loss of use and enjoyment of their properties, including annoyance, inconvenience, and discomfort. See Complaint, Paragraphs 32 and 34 generally.

16. The noise, traffic, dust, lights and odors of which Plaintiffs complain are reasonable and necessarily incident to Antero's development of the underlying minerals.

17. Although Plaintiffs' counsel initially asserted Plaintiffs had property damage claims,[3] since then they have repeatedly admitted Plaintiffs' have no property damage claims or personal injury claims, and have offered no evidence establishing such claims.

> MR. MAJESTRO: We have clients who are worried about what's in their soil, so they're getting things tested and figuring those issues out.
>
> CHAIRMAN JUDGE MOATS: But have you made claims for soil contamination?
>
> MR. MAJESTRO: Not apart from just "This is a nuisance." They're not property damage –
>
> JUDGE HUMMEL: Is that based on fracking or what?
>
> MR. MAJESTRO: The fracking chemicals. I mean, it's a – it is not a – we don't have a claim for property damage in these Complaints. They're nuisance claims.
>
> THE COURT: But how would soil contamination be a nuisance claim?
>
> MR. MAJESTRO: I think what you have in the nature of these chemicals is that you know, a lot of people worried about what they're being – and not – one of the advantages of living out

[3] "We have some property damage claims; emissions; dust, odor; improper waste disposal; erosion; issues with livestock and pets; and vibration." December 22, 2014 Hearing Transcript, 45:3-5.

in the country is presumably you are away from urban pollution, urban things, and you have peace of mind of being in nature and that's being taken away from these people.

June 26, 2015 Hearing Transcript at 36:2-37:2 (emphasis added).

JUDGE MOATS: Now it's my understanding – or our understanding from all of your briefs that nobody's claiming any property damage.

Is that correct Mr. Majestro?

MR. MAJESTRO: Yes, Your Honor.

JUDGE MOATS: Nobody's claiming any personal injury?

MR. MAJESTRO: Yes, Your Honor.

February 26, 2016, Hearing Transcript, 40:21-41:4.

18. Plaintiffs have not offered any admissible evidence of record to establish that Defendants' use of Plaintiffs' property has exceeded the scope of Antero's agreements with Plaintiffs, or what is reasonable and necessary to develop the underlying minerals, other than self-serving assertions that Defendants' activities, although within the scope of the agreements, are excessive.

JUDGE MOATS: . . . is there anything that the gas company is doing or that the Defendants are doing that would not be implied with the rights to explore or drill or produce?

I mean, No. 1, would it be an implied use to go on the surface of some property and use dozers to grade off a well?

MR. MAJESTRO: Sure. That would be approved. That would be within the scope of –

JUDGE MOATS: Would it be implied that they would have to have heavy machinery on there that makes noise?

MR. MAJESTRO: To a certain extent, I think, but the question is: If it's necessary – if the activities are necessary for the development, yes, it would be implied.

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JUDGE MOATS: . . . I'll just get straight to the bottom line. Is there anything that they are doing that would not be viewed as an implied right necessary to development? In other words, running trucks on the road, hauling water in, having lights up on their well site, having machinery going that's going to cause

noise; is there anything they're doing that would not be considered an implied right?

Now you may view it as excessive, but is there anything they're doing that's not implied, necessary to take place in developing of these - -

MR. MAJESTRO: Not as I'm sitting here today.

JUDGE MOATS: It just comes down to the question of quantity, times or things of that nature; is that accurate?

MR. MAJESTRO: Well, it's simple things like how and where they're pointing their lights.

February 26, 2016, Hearing Transcript, 15:10-16:2; 16:11-17:6.

CONCLUSIONS OF LAW

19. Summary judgment must be granted if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." W. Va. R. Civ. P. 56(c). See also Syl. Pt. 2, *Angelucci v. Fairmont Gen. Hosp., Inc.*, 217 W. Va. 364, 618 S.E.2d 373 (2005); and Syl. Pt. 2, *Harrison v. Town of Eleanor*, 191 W. Va. 611, 447 S.E.2d 546 (1994).

20. "A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 1, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995)(citations and internal quotation marks omitted). Thus,

> [s]ummary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.

Id., Syl. Pt. 2.

21. "A party seeking summary judgment bears the initial burden of showing that no genuine issue of material fact exists. Once the movant makes this showing, the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a

trialworthy issue" to avoid summary judgment. Syl. Pt. 2, *Gentry v. Mangum*, 195 W. Va. 512, 466 S.E.2d 171 (1995). "To be specific, the party opposing summary judgment must satisfy the burden of proof by offering more than a mere 'scintilla of evidence' and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor." *Williams*, 194 W. Va. at 60, 459 S.E.2d at 337 (citation omitted).

22. Although a trial court considering a summary judgment motion must view the underlying facts and all inferences in the light most favorable to the party opposing summary judgment, the trial court should consider only "reasonable inferences." Id. at 60 n. 10, 459 S.E.2d at 337 n.10. Moreover, the nonmoving party "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another." Id. at 61 n.14, 459 S.E.2d at 338 n.14, citing *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985).

23. "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248, 106 S. Ct. 2505, 2510 (1986)(emphasis in original).

24. "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986). This includes suits alleging nuisance. See *Acord v. Colane Co.*, 228 W. Va. 291, 719 S.E.2d 761 (2011) (affirming summary judgment in public nuisance case);

Browning v. Halle, 219 W. Va. 89, 632 S.E.2d 29 (2005) (affirming summary judgment in private nuisance case); *Booker v. Foose*, 216 W. Va. 727, 613 S.E.2d 94 (2005) (affirming summary judgment in private nuisance case).

25. West Virginia law requires that "[w]hen the language of a written instrument is plain and free from ambiguity, a court must give effect to the intent of the parties as expressed in the language employed and in such circumstances resort may not be had to rules of construction." *Cotiga Dev. Co. v. United Fuel Gas Co.*, 147 W. Va. 484, 490, 128 S.E.2d 626, 631(1962). The terms of the written instrument must be enforced as written: "It is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as plainly expressed in their written contract or to make a new and different contract for them." Id. at 493, 128 S.E.2d at 633. Rather, "[a] valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent." Id. at Syl. Pt. 1.

26. The parties to the agreement, and their successors-in-interest, are bound by the terms of the agreement. Id. at 491, 128 S.E.2d at 632. Antero and Plaintiffs, or the owners of the properties on which Plaintiffs reside or their predecessors in title, have entered into unambiguous agreements granting Antero the right to use Plaintiffs' properties in the course of its mineral development. These agreements include mineral severance deeds, oil and gas leases, right of way agreements, road use agreements, surface use agreements, tank pad agreements, and pipeline easements. As lessee of the minerals underlying Plaintiffs' properties, Antero has the full benefit of express surface use rights for mineral development and extraction. See Syl. Pt. 1, *Squires v. Lafferty*, 95 W. Va. 307, 121 S.E. 90, 91 (1924) ("The owner of the mineral underlying land possesses, as incident to this ownership, the right to use the surface in such

manner and with such means as would be fairly necessary for the enjoyment of the mineral estate.") and *Montgomery v. Economy Fuel Co.*, 61 W. Va. 620, 57 S.E. 137, 138 (1907) ("A lease granting minerals carries with it, by necessary implication, the right to enter upon the property and do all things necessary for the purpose of acquiring and enjoying the estate granted.")

27. "The actions or inactions of the owner of an easement, which otherwise meet the legal definition of a nuisance, do not create a nuisance as to the estate servient to the easement unless those actions or inactions exceed the scope of the easement." Syl. p. 5, *Quintain Development LLC v. Columbia Nat. Res. Inc.*, 210 W. Va. 128, 556 S.E.2d 95 (2001). Determining whether an owner of a property right has exceeded his rights is a question of law for the Court. Id. at 136, 103 (citing *Westchester Associates, Inc. v. Boston Edison Co.*, 712 N.E.2d 1145, 1149 (Mass. App. Ct. 1999) (Court of Appeals concluded Edison had not created a nuisance because its use of easement was of same amount and character as authorized, agreeing with Superior Court that Edison's use of easement was reasonable as a matter of law).

28. Because the Court resolves summary judgment based upon Antero's contractual and property rights, it does not address the issues to which common law private nuisance principles would be applied. The Court, therefore, reaches no conclusion regarding whether Antero's actions or its employees' or contractors' actions would "otherwise meet the legal definition of a nuisance."

29. Defendants Antero and Hall were operating within the scope of Antero's leasehold rights to develop oil and gas underlying the properties that are the subject of Plaintiffs' complaint, as well as various subsurface-use and right-of-way agreements Antero executed with several Plaintiffs (or the owners of the properties on which Plaintiffs reside), which agreements entitled

Defendants to conduct their oil and gas-related activities. See Syl. Pt. 5, Quintain, 210 W. Va. 128, 556 S.E.2d 95 (2001).

30. The very noise, traffic, dust, lights, and odors of which Plaintiffs complain are reasonable and necessarily incident to mineral development. The unambiguous terms of the leases and agreements between Antero and Plaintiffs or their predecessors-in-interest grant Defendants express rights to use Plaintiffs' properties in the course of their mineral development, and the terms of those agreements must be applied in accordance with their plain language. Application of these agreements completely resolves this litigation as a matter of law in Defendants' favor.

31. In addition to its express contractual rights, Antero, as lessee, has the implied right of reasonable and necessary use of Plaintiffs' properties as a matter of law. Under West Virginia law, a surface owner does not have "an unrestricted right to enjoyment in their property." *Martin v. Hamblet*, 230 W. Va. 183, 191, 737 S.E.2d 80, 88 (2012) "A mineral owner generally has the right to utilize the surface for 'purposes reasonably necessary for the extraction of minerals.'" Id., quoting *Buffalo Mining Co. v. Martin*, 165 W.Va. 10, 14, 267 S.E.2d 721, 723 (1980).

32. Plaintiffs are only entitled to recover damages for Antero's use of their surface that goes above and beyond what is "reasonably necessary" to enjoy its mineral estate; i.e. only to the extent Defendants' conduct went beyond what was reasonably necessary to extract the minerals.

33. The issue of reasonable use is to be determined by the court. *Adkins v. United Fuel Gas Co.*, 134 W. Va. 719, 724, 61 S.E.2d 633, 636 (1950) (emphasis added):

> It may be said at this point that we do not think that whether the plaintiff's rights have been invaded, or whether the defendant has exceeded its rights are questions of fact for the determination of the jury. In a case where there is a dispute of fact, the jury should find the facts, and from such finding of facts by the jury *it is the duty of the court to determine whether the use of the surface by the owner of the minerals has exceeded the fairly necessary use thereof, and whether the owner of the minerals has invaded the rights of the surface owner, and thus exceeded the rights possessed by the owner of such minerals.*

34. This rule is one of state property law. *Justice v. Pennzoil*, 598 F.2d 1339, 1342 (4th Cir. 1979)(construing West Virginia law). That is:

> Unreasonable use of land by a mineral owner is not measured by the tort standard of the ordinary reasonable man; rather, it is measured by concrete legal standards rooted in the common law. It is not a matter readily susceptible of jury determination. [This rule] assures the continuity of those substantive rights and obligations of the parties which were defined generations ago.

Id. at 1342–43 (internal citations omitted).

35. West Virginia precedent makes clear that the noise, traffic, vibrations, dust, lights, and odors of which Plaintiffs complain are well within the bounds of what is reasonable and necessary use to develop minerals. See *Adkins*, 134 W. Va. at 725, 61 S.E.2d at 636 (holding that an oil and gas developer did not act unreasonably or unnecessarily where it constructed a road to bring machinery to drill the gas well, laid pipeline over the surface of the land, constructed an open ditch for drainage of sand, water, and other refuse from the well, and caused the plaintiff to suffer damages that were *damnum absque injuria* because the plaintiff's acquisition of the land was "subject to the rights of the owner of the minerals, who by virtue of owning such minerals also possessed the rights necessary to produce and transport the same as an incident to such ownership"). See also *Adams v. Cabot Oil & Gas Corp.*, No. 13-1299, 2014 WL 6634396 (W. Va. Nov. 24, 2014) (holding that a mineral owner's construction of a new access road over a surface owner's property was reasonable); *Coffindaffer v. Hope Nat. Gas Co.*, 74 W. Va. 107, 81 S.E. 966 (1914) (holding that the building of a road was necessary to enable the operator to haul material for its rig and tools and machinery for drilling); *Teel v. Chesapeake Appalachia, LLC*, 906 F. Supp. 2d 519 (N.D. W. Va. 2012), aff'd, 542 F. App'x 255 (4th Cir. 2013) (holding that defendant's depositing of drilling waste and other materials in pits on plaintiffs' property was reasonable and therefore not trespass). Because the operations of Antero, and its contractors, were reasonable and necessary to its mineral development,

Defendants are entitled to summary judgment as a matter of law.

36. Antero's development of the minerals underlying Plaintiffs' properties through horizontal wells rather than vertical wells does not diminish its rights to use Plaintiffs' surface property in the course of that development. Under West Virginia law, parties to contracts are held to contemplate advancements in technology, absent specific language to the contrary. *Phillips v. Fox*, 193 W. Va. 657, 662, 458 S.E.2d 327, 332 (1995); *Bassell v. W. Va. Central Gas Co.*, 86 W. Va. 198, 103 S.E. 116 (1920); *Armstrong v. Md. Coal Co.*, 67 W. Va. 589, 69 S.E. 195, 203 (1910); *Squires v. Lafferty*, 95 W. Va. 307, 121 S.E. 90, 91 (1924).

37. Defendants are entitled to make use of reasonable and necessary methods to develop the minerals underlying Plaintiffs' properties. Only where those methods have been shown to be wholly incompatible with the surface estate due to total destruction may those methods be found to be beyond the contemplation of the parties. See *Quintain Dev., LLC v. Columbia Nat. Res., Inc.*, 210 W. Va. 128, 133, 556 S.E.2d 95, 100 (2001); *Buffalo Mining Co. v. Martin*, 267 S.E.2d 721, 725, 165 W. Va. 10, 15 (1980).

38. There is no evidence in the record indicating Antero's methods are "materially different" from the extraction methods contemplated at the time the minerals were severed or acquired, or are incompatible or destructive to the surface estate.

39. Business activity related to development of the Marcellus Shale, including horizontal well drilling and its related infrastructure, is encouraged and supported by the West Virginia Legislature. See Marcellus Gas and Manufacturing Development Act, W.Va. Code § 5B-2H-1, et seq. (effective July 1, 2011)("facilitating the development of business activity directly and indirectly related to development of the Marcellus shale serves the public interest of the citizens of this state by promoting economic development and improving economic opportunities of this

state." W.Va. Code § 5B-2H-2(b)); Horizontal Well Act, West Virginia Code § 22-6A-1, et seq. (effective December 14, 2011)("advancement of new and existing technologies and drilling practices have created the opportunity for the efficient development of natural gas contained in underground shales" W. Va. Code § 22-6A-2(a)(1)). In fact, the Legislature has even stated that, "[i]t is in the interest of national security to encourage post-production uses of natural gas and its various components as a replacement for oil imported from other countries." W.Va. Code § 5B-2H-2(a)(3).

40. The Legislature expressly acknowledged the use of a single surface location to develop minerals on a unit basis in the Horizontal Well Act: "[t]hese practices have resulted in a new type and scale of natural gas development that utilize horizontal drilling techniques, *allow the development of multiple wells from a single surface location*, and may involve fracturing processes that use and produce large amounts of water." (emphasis added) W. Va. Code § 22-6A-2(a) (2).

41. The Horizontal Well Act is also consistent with case law from the United States District Court for the Northern District of West Virginia. See *Miller v. N.R.M. Petroleum Corp.*, 570 F. Supp. 28, 30 (N.D. W. Va. 1983) (holding that "[i]t seems only reasonable that the surface area of each tract in a pool should be available for use in connection with the construction and operation of a well, as long as the use is reasonably necessary").

42. In addition to Antero's express and implied rights to utilize Plaintiffs' properties, two Plaintiffs—Douglas Mazer and Catherine Mazer—have expressly waived liability for damages to their properties relating to mineral development. Plaintiffs Lindsey Feathers, Charles A. Mazer, and Shawn T. Mazer also reside upon property owned by Plaintiffs Douglas Mazer and Catherine Mazer and are bound by these agreements.

43. The conveyance of the surface to Plaintiffs Douglas Mazer's and Catherine Mazer's predecessor in interest contains an express release of the mineral owner from any and all liability related to its oil and gas operations. The language of that conveyance specifically states:

> [A]ll the coal, oil and natural gas within and underlying said tract of land with all the rights necessary and convenient to mine, operate for and remove all of said coal, oil and natural gas without being liable to the grantee herein for any damages occasioned by such operations.

Rights retained by the mineral owner in the July 3, 1915 and February 27, 1917 severance deeds (DB 255, P 377; DB 265 P277).

44. As held in *Stamp v. Windsor Power House Coal Co.*, 154 W. Va. 578, 582, 177 S.E.2d 146, 148 (1970) (citations omitted), "[t]he law is well settled in this State that a party to a valid contract may in advance limit his liability for acts of negligence whether the subsequent action be based on contract or tort."[4]

45. A grantor in such a contract cannot later attempt to recover damages for the very liability that was limited. Id. at 583, 177 S.E.2d at 149 ("A grantor cannot specifically sell a right and then recover damages of his grantee for using the very right sold; nor can a grantee recover damages of his grantor for employing a right when the grantee has agreed to the unrestricted reservation of a right.") (citations omitted).

46. As a matter of law, Plaintiffs Douglas Mazer, Catherine Mazer, Lindsey Feathers, Charles A. Mazer, and Shawn T. Mazer cannot be allowed to recover damages from Antero

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[4] The Legislature has declared that "compensation and damages provided in this article for surface owners may not be diminished in a deed, lease or other contract of conveyance entered into after December 31, 2011," and has provided for the, "constitutionally permissible protection and compensation to surface owners of lands on which horizontal wells are drilled from the burden resulting from drilling operations commenced after January 1, 2012." See W. Va. Code § 22-6B-1(b) and (c). However, the conveyance of the surface to Plaintiffs Douglas Mazer's and Catherine Mazer's predecessor in interest was well before December 31, 2011. See Paragraph 43. Moreover, the well pads and wells at issue were all constructed prior to January 1, 2012. See *Defendants Memorandum of Law in Support of Antero Resources Corporations' Motion for Summary Judgment* (Transaction ID 58437703) at p. 6. Therefore, the Oil and Gas Horizontal Well Compensation provisions in W.Va. Code § 22-6B-1, et seq., do not apply.

when they are bound by the terms of a severance deed, which releases Antero from all liability.

47. Based on its review of the record, the Court concludes there are no disputed issues of material fact and Defendants Antero and Hall are entitled to summary judgment as a matter of law. Antero, as the owner of the mineral estate, and its contractors have the right to use the Plaintiffs' surface estates for the production of its mineral rights. The Court further concludes that Antero and its contractors have the legal right to develop the mineral estate. The Court finds that the activities complained of were reasonably necessary to the production of the mineral estate and did not exceed the fairly necessary use thereof or invade the rights of the surface owner under the standards outlined in *Adkins v. United Fuel Gas Co.*, 134 W. Va. 719, 61 S.E.2d 633 (1950).

It is therefore **ORDERED** that Antero Resources Corporation's Motion for Summary Judgment and Hall Drilling, LLC's Motion for Summary Judgment are **GRANTED**. The Parties' exceptions and objections are noted and preserved for the record.

The Court **FINDS** upon **EXPRESS DETERMINATION** that this is a final order available for the proper application of the appellate process pursuant to Rule 54(b) of the Rules of Civil Procedure and the Rules of Appellate Procedure. Accordingly, this order is subject to immediate appellate review. The parties are hereby advised: (1) that this is a final order; (2) that any party aggrieved by this order may file an appeal directly to the Supreme Court of Appeals of West Virginia; and (3) that a notice of appeal and the attachments required in the notice of appeal must be filed within thirty (30) days after the entry of this Order, as required by Rule 5(b) of the West Virginia Rules of Appellate Procedure.

The Clerk is directed to close this case, and place it among the cases ended. A copy of this order is this day served on the parties of record via File & Serve*Xpress*.

It is so **ORDERED**.

ENTER: October 11, 2016.

/s/ Alan D. Moats
Lead Presiding Judge
Marcellus Shale Litigation

EFiled: Jan 11 2017 04:27PM EST
Transaction ID 60058827

IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

IN RE: MARCELLUS SHALE LITIGATION Civil Action No. 14-C-3000

THIS DOCUMENT APPLIES TO:

ROBERT L. ANDREWS, et al, v. ANTERO RESOURCES CORP., et al.	Civil Action No. 13-C-434 HRR ANDREWS R L
RODNEY ASHCRAFT, et al, v. ANTERO RESOURCES CORP., et al.	Civil Action No. 13-C-434 HRR ASHCRAFT R
LINDSEY N. FEATHERS v. ANTERO RESOURCES CORP., et al.	Civil Action No. 13-C-434 HRR FEATHERS L N
ROBERT GOLDEN, et al, v. ANTERO RESOURCES CORP., et al.	Civil Action No. 13-C-434 HRR GOLDEN R
DANIEL L. KINNEY, et al, v. ANTERO RESOURCES CORP., et al.	Civil Action No. 13-C-434 HRR KINNEY D L
CHARLES A. MAZER, et al, v. ANTERO RESOURCES CORP., et al.	Civil Action No. 13-C-434 HRR MAZER C A
DOUGLAS A. MAZER, et al, v. ANTERO RESOURCES CORP., et al.	Civil Action No. 13-C-434 HRR MAZER D A
SHAWN A. MAZER, et al, v. ANTERO RESOURCES CORP., et al.	Civil Action No. 13-C-434 HRR MAZER S A
SUSAN J. MAZER, et al, v. ANTERO RESOURCES CORP., et al.	Civil Action No. 13-C-434 HRR MAZER S J
GREG G. MCWILLIAMS, et al, v. ANTERO RESOURCES CORP., et al.	Civil Action No. 13-C-434 HRR MCWILLIAMS
DAVID SCOTT NUTT v. ANTERO RESOURCES CORP., et al.	Civil Action No. 13-C-434 HRR NUTT D S
ROBERT SIDERS, et al, v. ANTERO RESOURCES CORP., et al.	Civil Action No. 13-C-434 HRR SIDERS R
CHARLES T. MAZER v. ANTERO RESOURCES CORP., et al.	Civil Action No. 13-C-434 HRR MAZER C T

ORDER

The Presiding Judges assigned to the Marcellus Shale Litigation have reviewed and considered *Plaintiffs' Motion to Amend or Alter Final Order Granting Defendants' Motions for Summary Judgment, or in the Alternative, to Reargue Defendants' Motions for Summary Judgment* (Transaction ID 59744226) filed in the above-captioned cases (sometimes collectively referred to as the "Harrison County Cherry Camp Trial Group"). [1] The Presiding Judges have also reviewed and considered Defendants Antero Resources Corporation's and Hall Drilling, LLC's *Joint Response in Opposition* (Transaction ID 59809399), and Plaintiffs' *Reply* (Transaction ID 59863549). Having conferred with one another to insure uniformity of their decision, as contemplated by Rule 26.07(a) of the West Virginia Trial Court Rules, the Presiding Judges unanimously DENY Plaintiffs' motion to amend, alter or reargue for the reasons that follow.

PROCEDURAL HISTORY

The Harrison County Cherry Camp Trial Group are actions "by residents and/or owners of property in Harrison County, West Virginia for private temporary continuing abatable nuisance and negligence/recklessness against Defendants Antero Resources Corporation, Antero Resources Bluestone, LLC, and Hall Drilling, LLC for damages arising from Defendants' oil and/or natural gas drilling, exploration, extraction, pipeline construction, water processing, and related acts and/or omissions. . . ." Complaint, ¶ 1. Plaintiffs allege their quality of life has been negatively impacted and they "are no longer able to enjoy their lives and use and enjoy their

[1] The Honorable David W. Hummel, Jr. was assigned as a Presiding Judge in the Marcellus Shale Litigation on November 13, 2014. See *Order Assigning Judges and Scheduling Status Conference*. Judge Hummel resigned from the Mass Litigation Panel on October 7, 2016. On October 11, 2016, the Supreme Court appointed the Honorable Jack Alsop to serve on the Mass Litigation Panel for the duration of Judge Hummel's unexpired term. On October 26, 2016, Judge Alsop was assigned to serve as a Presiding Judge in the Marcellus Shale Litigation. See *Second Order Assigning Judges* (Transaction ID 59751111).

homes and properties in the way they previously enjoyed prior to Defendants' acts and/or omissions . . . ." *Id.*, ¶ 2.

After reviewing extensive briefing, including voluminous memoranda and exhibits from all parties, the Presiding Judges heard *Antero Resources Corporation's Motion for Summary Judgment* and *Hall Drilling, LLC's Motions for Full or Partial Summary Judgment* filed in the Harrison County Cherry Camp Trial Group cases on February 26, 2016 (Transaction IDs 58437476 and 58439674).[2] At the conclusion of the hearing, the Court agreed to withhold its rulings on these motions in order to give the parties time to engage in a second round of mediation with the Resolution Judges to try and resolve these cases.[3] See February 26, 2016 Hearing Trans., pp. 57-59. On February 29, 2016, Lead Resolution Judge Booker T. Stephens entered an order reconvening mediation on April 7 and 8, 2016. See *Order Reconvening Mediation* (Transaction ID 58643558). The mediation did not result in settlement.

On April 13, 2016, over ten (10) weeks after the January 29, 2016, deadline for responses to dispositive motions, and over six (6) weeks after the Court had conducted its February 26, 2016, hearing on dispositive motions, Plaintiffs filed a *Motion to Supplement Response in Opposition to Defendants Antero Resources Corporation's and Hall Drilling, LLC's Motions for Summary Judgment* (Transaction ID 58857554). Two days later, Defendants Antero Resources ("Antero") and Hall Drilling, LLC ("Hall") filed a *Joint Response in Opposition to Plaintiffs'*

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[2]Throughout briefing of dispositive motions, the parties repeatedly filed motions requesting leave to exceed the twenty page limit on their supporting memoranda. All of their motions were granted. See December 28, 2015, *Order Granting Antero Resources Corporation's Motion to Exceed Page Limit* (Transaction ID 58346294); January 11, 2016, *Order Granting Hall Drilling, LLC's Motion to Exceed the Page Limit for its Memorandum of Law in Support of its Motion for Summary Judgment* (Transaction ID 58409238); January 28, 2016, *Order Granting Plaintiffs' Motion to Exceed Page Limit* (Transaction ID 58492543); February 02, 2016, *Order Granting Antero Resources Corporation's Motion to Exceed Page Limit* (Transaction ID 58507048); and February 02, 2016, *Order Granting Hall Drilling, LLC's Motion to Exceed the Page Limit for its Reply in Support of its Motion for Summary Judgment* (Transaction ID 58514362).

[3] The Harrison County Cherry Camp Trial Group cases were first mediated by the Resolution Judges on August 26, 27 and 28, 2015. See *Order Governing Mediation and Mediation Statements* (Transaction ID 57113741).

Motion to Supplement Response in Opposition to Defendants' Motions for Summary Judgment or, in the Alternative, Motion for Leave to File Supplemental Reply to Plaintiffs' Supplemental Response in Opposition to Defendants' Motions for Summary Judgment (Transaction ID 58872071).

On April 18, 2016, the Presiding Judges denied both parties' motions as untimely filed, and unanimously granted Defendants' motions for summary judgment "on the ground that Defendants were operating within the scope of Antero's leasehold rights to develop oil and gas underlying the properties that are the subject of Plaintiffs' complaint, as well as various surface-use and right of way agreements Antero executed with several Plaintiffs, or the owners of the properties on which Plaintiffs reside, which agreements entitled Antero to conduct oil and gas-related activities on Plaintiffs' properties." See *Order* entered April 18, 2016 (Transaction ID 58876663). The Court ordered Defendants Antero and Hall to prepare a proposed order, including detailed findings of fact and conclusions of law, for submission to the Court on or before May 2, 2016. *Id.*

By separate order entered on April 20, 2016, the Court notified the parties that its April 18 order was to advise the parties of the Court's ruling on the dispositive motions, but was not intended to be a final judgment pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure, as a final judgment order for appellate purposes, with findings of fact and conclusions of law, would be forthcoming. See *Order* (Transaction ID 58890543).

On May 2, 2016, Defendants Antero and Hall filed a joint proposed final order with findings of fact and conclusions of law (Transaction ID 58941616). On May 4, 2016, Plaintiffs' filed a notice of objections to Defendants' proposed final order, as well as their own proposed final order, including findings of fact and conclusions of law (Transaction ID 58955799). On

May 6, 2016, Defendants Antero and Hall filed a joint response to Plaintiffs' notice and proposed order (Transaction ID 58967116). The Presiding Judges reviewed and carefully considered each of the parties' proposed final orders, as well as the objections and response.

On July 11, 2016, Lead Resolution Judge Booker T. Stephens entered an order reconvening mediation in all Marcellus Shale Litigation cases, except those cases filed against Defendant Williams Ohio Valley Midstream, LLC, on October 6 and 7, 2016. See *Order Reconvening Mediation* (Transaction ID 59259111). Having been advised that the Resolution Judges were reconvening mediation, Lead Presiding Judge Alan D. Moats ordered the Court's final order granting summary judgment in favor of Defendants in the Harrison County Cherry Camp Trial Group cases held in abeyance pending the outcome of mediation. The Court also ordered all deadlines for the Oxford Road Trial Group and the Halls Run Road Trial Group stayed pending the outcome of mediation. See, July 11, 2016 *Order* (Transaction ID 59259366).

Upon being advised that the third round of mediation was unsuccessful, the Court entered its *Final Order Granting Defendants' Motions for Summary Judgment* on October 11, 2016 (Transaction ID 59683172)("Final Order").[4] The Court found, among other things, that:

> Antero has leasehold rights to develop the oil and gas underlying the properties that are the subject of Plaintiffs' complaint. Those development rights were retained by the oil and gas mineral owners in the severance deeds separating the surface estates from the mineral estates.

Final Order ¶ 9

> In addition to the foregoing leases and severance deeds, Antero executed various other agreements with several Plaintiffs, or the owners of the properties on which Plaintiffs reside, entitling Antero to use Plaintiffs' properties in the course of its mineral development. These various agreements include right of way agreements, an oil and gas lease, road use agreements, surface use agreements, tank pad agreements, and pipeline easements.

[4] By October 7, 2016, the three Resolution Judges assigned to the Marcellus Shale Litigation had conducted seven days of mediation regarding the Harrison County Cherry Camp Trial Group cases, as well as other cases pending against Defendants Antero and Hall.

Final Order ¶ 10

> Plaintiffs have not offered any admissible evidence of record to establish that Defendants' use of Plaintiffs' property has exceeded the scope of Antero's agreements with Plaintiffs, or what is reasonable and necessary to develop the underlying minerals, other than self-serving assertions that Defendants' activities, although within the scope of the agreements, are excessive.

Final Order ¶ 18

> Based on its review of the record, the Court concluded, among other things, that:
>
> Antero and Plaintiffs, or the owners of the properties on which Plaintiffs reside or their predecessors in title, have entered into unambiguous agreements granting Antero the right to use Plaintiffs' properties in the course of its mineral development. These agreements include mineral severance deeds, oil and gas leases, right of way agreements, road use agreements, surface use agreements, tank pad agreements, and pipeline easements. As lessee of the minerals underlying Plaintiffs' properties, Antero has the full benefit of express surface use rights for mineral development and extraction. See Syl. Pt. 1, *Squires v. Lafferty*, 95 W. Va. 307, 121 S.E. 90, 91 (1924) ("The owner of the mineral underlying land possesses, as incident to this ownership, the right to use the surface in such manner and with such means as would be fairly necessary for the enjoyment of the mineral estate.") and *Montgomery v. Economy Fuel Co.*, 61 W. Va. 620, 57 S.E. 137, 138 (1907) ("A lease granting minerals carries with it, by necessary implication, the right to enter upon the property and do all things necessary for the purpose of acquiring and enjoying the estate granted.")

Final Order ¶ 26

> Defendants Antero and Hall were operating within the scope of Antero's leasehold rights to develop oil and gas underlying the properties that are the subject of Plaintiffs' complaint, as well as various subsurface-use and right-of-way agreements Antero executed with several Plaintiffs (or the owners of the properties on which Plaintiffs reside), which agreements entitled Defendants to conduct their oil and gas-related activities. See Syl. Pt. 5, Quintain, 210 W. Va. 128, 556 S.E.2d 95 (2001).

Final Order ¶ 29

> Antero, as the owner of the mineral estate, and its contractors have the right to use the Plaintiffs' surface estates for the production of its mineral rights. The Court further concludes that Antero and its contractors have the legal right to develop the mineral estate. The Court finds that the activities complained of were reasonably necessary to the production of the mineral estate and did not exceed the fairly necessary use thereof or invade the rights of the surface owner under the

> standards outlined in *Adkins v. United Fuel Gas Co.*, 134 W. Va. 719, 61 S.E.2d 633 (1950).

Final Order ¶ 47.

Thereafter, instead of appealing the Court's Final Order, Plaintiffs filed the instant *Motion to Amend or Alter Final Order Granting Defendants' Motions for Summary Judgment, or in the Alternative, to Reargue Defendants' Motions for Summary Judgment* (Transaction ID 59744226) on October 25, 2016.

Rule 52(b) Does Not Apply To Plaintiffs' Motion

Plaintiffs have filed their motion to amend or alter the Court's Final Order or, in the alternative, to reargue Defendants' motions for summary judgment pursuant to Rule 52(b) of the West Virginia Rules of Civil Procedure. However, Rule 52 applies only to "actions tried upon the facts without a jury or with an advisory jury" W. Va. R.C.P., 52 (a).

In *James M.B. v. Carolyn M.*, 193 W.Va. 289, 293-294, 456 S.E.2d 16, 20-21 (1995), the Supreme Court of Appeals of West Virginia discussed the various post-trial or post-judgment motions authorized by the West Virginia Rules of Civil Procedure, and concluded that "Rule 59(e) is applicable to situations where a party seeks to alter, amend, or revise a judgment that was entered as a result of a pretrial motion. More specifically, Rule 59(e) provides the procedure for a party who seeks to change or revise a judgment entered as a result of a motion to dismiss or a motion for summary judgment." Accordingly,

> A motion to amend or alter judgment, even though it is incorrectly denominated as a motion to 'reconsider', 'vacate', 'set aside', or 'reargue' is a Rule 59(e) motion if filed and served within ten days of entry of judgment.

Id., Syllabus Point 2. See also, Syllabus Point 1, *Lieving v. Hadley*, 188 W.Va. 197, 423 S.E.2d 600 (1992).

Commentators have also recognized that, "Rule 52(b) was intended to apply only to cases in which a trial court issues factual findings following a trial on the merits. The rule was not intended to apply to a trial court's ruling on dispositive motions such as summary judgment." Franklin D. Cleckley, Robin J. Davis and Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure,* § 52(b)[2] at 1147 (4th ed. 2012). Because Plaintiffs' motion to alter, amend or reargue was filed within 10 days of entry of the Court's *Final Order Granting Defendants' Motions for Summary Judgment*, the Court will treat Plaintiffs' erroneously filed Rule 52(b) motion as a Rule 59(e) motion to alter or amend a judgment.

Plaintiffs' Motion Fails Under Rule 59(e)

"A motion under Rule 59(e) of the West Virginia Rules of Civil Procedure should be granted where: (1) there is an intervening change in controlling law; (2) new evidence not previously available comes to light; (3) it becomes necessary to remedy a clear error of law or (4) to prevent obvious injustice." Syllabus Point 2, *Mey v. Pep Boys-Manny, Moe & Jack*, 228 W.Va. 48, 717 S.E.2d 235 (2011). See also *Litigation Handbook on West Virginia Rules of Civil Procedure,* § 59(e)[2] at 1285. However, a Rule 59(e) motion "is not appropriate for presenting new legal arguments, factual contentions, or claims that could have previously been argued." *Mey,* 228 W.Va. at 56, 717 S.E. 2d at 243, citing numerous cases, including: *Freeman v. Busch,* 349 F.3d 582 (8th Cir. 2003)(arguments or evidence that could have been raised at an earlier time cannot be presented in Rule 59(e) motion); *Holland v. Big River Minerals Corp.,* 181 F.3d 597, 605-606 (4th Cir. 1999)(issue presented for first time in Rule 59(e) motion is not timely raised); *Sault Ste. Marie Tribe of Chippewa Indians v. Engler,* 146 F.3d 367, 374 (6th Cir. 1998)(Rule 59(e) motion cannot raise arguments not raised prior to judgment); and *Santiago v. Canon*

U.S.A., Inc., 138 F.3d 1, 3-4 (1st Cir. 1998)(new legal theory as to liability may not be raised in motion for reconsideration).

Plaintiffs' motion fails because Plaintiffs do not argue that any new evidence previously not available to them has come to light. Instead, Plaintiffs rely on evidence that was readily available to them to argue for the first time that,

> . . . Defendants do not have the legal or contractual right to use the surface of Plaintiffs' properties, or to burden same, through activities undertaken by Defendants to enjoy mineral estates beyond the boundaries of the leases encompassing Plaintiffs' properties. *** Therefore, even if Plaintiffs are not able to bring nuisance claims related to Defendants' activities in developing natural gas underlying their surface estate, which Plaintiffs' dispute, Plaintiffs should certainly be able to maintain the portions of their nuisance claims that related to Defendants' activities in developing natural gas underlying other properties, which comprise the vast majority of Plaintiffs' claims.

Motion, pp. 2-3. This argument could have been made by Plaintiffs during the extensive briefing and argument of dispositive motions, yet Plaintiffs chose not to make it. As amply demonstrated in the authorities cited above, argument or evidence that could and should have been presented cannot be raised for the first time in a Rule 59(e) motion.

Plaintiffs' argue that "the effect of the Court's order was tantamount to ratifying a taking of Plaintiffs' private property for private use." Motion p. 15. However, their reliance on *Mountain Valley Pipeline, LLC v. McCurdy*, No. 15-0919 (W.Va. Nov. 15, 2016) is wholly inapposite. The *Mountain Valley* opinion addresses the public use requirement in the context of a taking under West Virginia's eminent domain statutes, i.e., that a private corporation must establish a prospective taking is for a "public use" in order to avail itself of West Virginia's eminent domain laws.[5] Neither eminent domain, nor the public use requirement is at issue in these cases.

[5] Syllabus Point 1 of *McCurdy* states, "Pursuant to W.Va. Code § 54-1-3 (1923)(Repl. Vol. 2016), a company may enter private land it desires to appropriate for the purpose of surveying said property only when that company is

For the foregoing reasons, Plaintiffs' motion is DENIED. Syllabus Point 7 of *James M.B. v. Carolyn M.*, 193 W.Va. 289, 293-294, 456 S.E.2d 16, 20-21 (1995) provides that:

> A motion for reconsideration filed within ten days of judgment being entered suspends the finality of the judgment and makes the judgment unripe for appeal. When the time for appeal is so extended, its full length begins to run from the date of entry of the order disposing of the motion.

Having ruled on Plaintiffs' *Motion to Amend or Alter Final Order Granting Defendants' Motions for Summary Judgment, or in the Alternative, to Reargue Defendants' Motions for Summary Judgment* (Transaction ID 59744226), the parties are hereby advised that: (1) this is a final order; (2) any party aggrieved by this order may file an appeal directly to the Supreme Court of Appeals of West Virginia; and (3) a notice of appeal and the attachments required in the notice of appeal must be filed within thirty (30) days after the entry of this Order, as required by Rule 5(b) of the West Virginia Rules of Appellate Procedure.

It is so **ORDERED.**

ENTER: January 11, 2017.

/s/ Alan D. Moats
Lead Presiding Judge
Marcellus Shale Litigation

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invested with the power of eminent domain." Likewise, Syllabus Point 2 provides, "Under W. Va. Code § 54-1-1 (1931) (Repl. Vol. 2016), a company is invested with the power of eminent domain only when: (1) it is organized under the laws of, or is authorized to transact business in, West Virginia, and (2) the purpose for which said company desires to appropriate land is *for a public use* as authorized by W.Va. Code § 54-1-2 (2006) (Repl. Vol. 2016)." (emphasis in original)