IN THE COURT OF COMMON PLEAS OF FAYETTE COUNTY, PENNSYLVANIA

HAROLD BELLA and DEBORAH BELLA, *et al.*,

Plaintiffs,

v.

LAUREL MOUNTAIN MIDSTREAM, LLC, *et. al.*,

Defendants.

CIVIL DIVISION

Docket No. 2734 of 2012

President Judge John F. Wagner, Jr.

PRELIMINARY OBJECTIONS TO PLAINTIFFS' COMPLAINT

Filed on behalf of:

Defendants Laurel Mountain Midstream, LLC and the Williams Companies, Inc.

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Defendants Laurel Mountain Midstream, LLC ("LMM") and the Williams Companies, Inc., (referred to as "Williams", incorrectly sued as The Williams Companies) (both collectively referred to as the "Defendants"), by their undersigned counsel, hereby file these Preliminary Objections to Plaintiffs' Complaint pursuant to Pennsylvania Rule of Civil Procedure 1028.

I. BACKGROUND

1. On December 26, 2012, Plaintiffs filed a five count Complaint against Defendants alleging diminution of their property values because of LMM's operation of a compressor station. *See* Exhibit A, Complaint at ¶¶ 1-4.

2. Specifically, Plaintiffs allege causes of action for:

   i. Negligence (Paragraphs 26-45 of Plaintiffs' Complaint);

   ii. Private nuisance (Paragraphs 46-57 of Plaintiffs' Complaint);

   iii. Public nuisance (Paragraphs 58-72 of Plaintiffs' Complaint);

   iv. Trespass (Paragraphs 73-81 of Plaintiffs' Complaint); and,

   v. Negligence *per se* for violations of the Pennsylvania Air Pollution Control Act, 35 P.S. §§ 4001, *et. seq.* ("APCA") (Paragraphs 82-90 of Plaintiffs' Complaint).

3. Plaintiffs' negligence and negligence *per se* claims assert nearly identical allegations, namely, that Defendants violated the APCA by causing the discharge of emissions which eventually entered and settled on Plaintiffs' property. *See* Complaint at ¶¶ 40 & 84.

4. Plaintiffs' private nuisance claim alleges that air pollution has impaired their private use and enjoyment of their properties. *Id.* at ¶¶ 53-56.

5. Plaintiffs' public nuisance claim closely mirrors their private nuisance cause of action and mostly replaces the word "private" with "public." *Id.* at ¶¶ 66 – 70.

6. Plaintiffs' trespass claim alleges that Defendants caused air emissions from the compressor station "to enter into and be deposited on Plaintiffs' properties." *Id.* ¶ 75.

7. Defendants file these timely Preliminary Objections as a *demurrer* because the averments pled in the Complaint demonstrate that Plaintiffs' causes of action are legally insufficient pursuant to Pennsylvania Rule of Civil Procedure 1028(a)(4).

8. In the alternative, if any of Plaintiffs claims are deemed legally sufficient to survive *demurrer*, then many of the averments in Plaintiffs' Complaint fail to plead the required specificity. *See* PA. R. CIV. P. 1019(a); PA. R. CIV. P. 1028(a)(3).

II. PRELIMINARY OBJECTIONS IN THE NATURE OF A *DEMURRER* TO ALL CLAIMS AGAINST WILLIAMS.

9. Plaintiffs allege that LMM "...is owned and/or operated in predominant part by Defendants [sic] Williams." *See* Complaint at ¶ 12.

10. As such, Plaintiffs' allegations recognize that Williams is the parent company of LMM.

11. Plaintiffs' Complaint likewise recognizes that LMM is a separate corporate entity from Williams.

12. Nevertheless, Plaintiffs make no effort to distinguish between any alleged actions by LMM and Williams, instead referring to both Williams and LMM collectively as "Defendants." *Id.* at ¶ 13.

13. Despite Plaintiffs' best efforts to confuse things, their Complaint contains no claims as to any alleged wrongful conduct by Williams.

14. Simply being a "parent company" is not a sufficient basis to be named a party in a lawsuit. Indeed, Pennsylvania courts have found that parent companies cannot be liable in tort for the actions of their subsidiary corporations. *See McCarthy v. Ference*, 58 A.2d 49, 56 (Pa. 1948) ("[t]he mere fact that one corporation owns all the stock of another or that the two companies have common officers or directors does not impose liability upon the parent for the torts of the subsidiary corporation unless the organization and operation of the subsidiary are such that it is only a passive tool in the hands of the dominant corporation").

15. In order to hold a parent corporation liable for the torts committed by its subsidiary, the plaintiff must plead a theory of liability based upon piercing the corporate veil. *See City of Philadelphia v. Human Servs. Consultants*, 2004 Phila. Ct. Com. Pl. LEXIS 26 (Pa. C.P. 2004) (in order to withstand a *demurrer*, a plaintiff must set forth the conduct which the defendants allegedly engaged in that would bring their actions within the parameters of a cause of action based on a theory of piercing the corporate veil).

16. Such a complaint must allege facts sufficient to support a finding that the subsidiary was dominated by the parent to an extent that the subsidiary was a sham or alter ego. *Thompson v. Glenmede Trust Co.*, 1993 U.S. Dist. LEXIS 7677, *31 (E.D. Pa. June 8, 1993).

17. Here, Plaintiffs' Complaint is entirely devoid of any allegations that support piercing the corporate veil or independent liability against Williams.

18. Hence, Plaintiffs have no basis to name Williams as a defendant in this lawsuit.

WHEREFORE, Defendants respectfully request that this Honorable Court sustain Defendants' Preliminary Objections as to Williams and dismiss Williams, with prejudice, from this matter.

III. PRELIMINARY OBJECTIONS IN THE NATURE OF A *DEMURRER* TO PLAINTIFFS' CLAIM FOR NEGLIGENCE.

19. Plaintiffs' negligence claims against Defendants fail as a matter of law because: (1) the negligence claim is redundant of Plaintiffs' negligence *per se* and nuisance claims; and (2) the economic loss doctrine bars Plaintiffs' negligence claim.

A. Plaintiffs' negligence claim is redundant to their negligence *per se* and nuisance claims.

20. Plaintiffs' negligence claim mirrors and is no different than their negligence *per se* claim. Compare Complaint at ¶¶ 26 – 45 and ¶¶ 82-90.

21. Plaintiffs' negligence claim alleges violations of the APCA.

22. In *Toman v. Waste Management, Inc.*, 2005 WL 3150747, *5 (C.C.P. 2005), the Court of Common Pleas for Lackawanna County examined a similar situation where the plaintiffs were attempting to assert causes of action for negligence and for violation of the APCA.

23. In *Toman*, the Court sustained the defendants' preliminary objections in the nature of a *demurrer* to the plaintiffs' negligence claim because the purported duties breached by the defendants flowed from provisions of the APCA and not from some independent duty not covered by the APCA. *Id.* at 5.

24. Thus, even if this Court were to accept as true the conclusory factual allegations and legal conclusions in Plaintiffs' Complaint, Plaintiffs' common law claim for negligence is subsumed by the statutory action set forth in the APCA. *See* 35 P.S. § 4013.6(c).

25. Pennsylvania courts have also dismissed negligence claims in actions where, like here, the facts supporting the negligence and nuisance claims mirror each other.

26. In *Horne v. Haladay*, 728 A.2d 954, 960 (Pa. Super. Ct. 1999), the Pennsylvania Superior Court sustained the dismissal of a negligence action because the exact facts that purportedly supported the negligence claim were contained in the nuisance claim. The *Horne* Court held that the operation of a chicken farm is not wrong in itself, but potential harm arises only in the consequences that flow from certain operations. This, the Court held, is properly a nuisance claim and not a claim for negligence.

27. Here, similar to *Horne*, Plaintiffs' negligence claim is actually a nuisance claim because the facts alleged in the Complaint would be more akin to a nuisance claim. Operation of the compressor station is not a wrong in of itself.[1]

28. Therefore, Plaintiffs' claim for negligence fails as a matter of law.

B. Plaintiffs' negligence claim is barred by the economic loss doctrine.

29. The economic loss doctrine provides that no cause of action exists for negligence that results solely in economic damages unaccompanied by physical injury or property damage. *Aikens v. Baltimore & Ohio R.R. Co.*, 501 A.2d 277 (Pa. Super. Ct. 1985).

30. The *Aikens* Court, which first recognized the doctrine in Pennsylvania, held that "to allow a cause of action for negligent cause of purely economic loss would be to open the door to every person in the economic chain of the negligent person or business to bring a cause of action." *Id.* at 279.

[1] Plaintiffs' nuisance claims fail for entirely different legal reasons.

31. Here, the harm Plaintiffs allege they have sustained is nothing more than diminution of property value, a purely economic injury. *See* Complaint, *ad damnum* clause ¶¶ i – viii.

32. Plaintiffs' Complaint does not allege any physical harm or damage to their real property or to structures on their real property.

33. Furthermore, Plaintiffs have not alleged any physical injuries.

34. Therefore, Plaintiffs' negligence claim is barred by the economic loss doctrine.

WHEREFORE, Defendants respectfully request that this Honorable Court sustain Defendants' Preliminary Objections to Plaintiffs' cause of action for negligence and dismiss it with prejudice.

IV. PRELIMINARY OBJECTIONS IN THE NATURE OF A DEMURRER TO PLAINTIFFS' ALLEGATIONS OF STRICT LIABILITY/ULTRA HAZARDOUS LIABILITY.

35. While not containing a separate count for strict liability or ultra-hazardous liability, several averments of Plaintiffs' Complaint allege that the operation of the compressor station is an abnormally dangerous activity. *See* Complaint at ¶¶ 52 and 55.

36. Pennsylvania courts apply the Restatement (Second) of Torts definition of "abnormally dangerous activity," which states:

> (1) one who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm.
>
> (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

Smith v. Weaver, 665 A.2d 1215, 1219 (Pa. Super. Ct. 1995) (citing RESTATEMENT (SECOND) OF TORTS § 519 (1976)).

37. Pennsylvania also has adopted the Restatement's test for determining what constitutes an abnormally dangerous activity:

> [i]n determining whether an activity is abnormally dangerous, the following factors must be considered:
>
> (a) the existence of a high degree of risk of some harm to the person, land or chattels of others;
>
> (b) likelihood that the harm that results from it will be great;
>
> (c) inability to eliminate the risk by the exercise of reasonable care;
>
> (d) extent to which the activity is not a matter of common usage;
>
> (e) inappropriateness of the activity to the place where it is carried on; and,
>
> (f) extent to which its value to the community is outweighed by its dangerous attributes.

Smith at 1219-20 (citing RESTATEMENT (SECOND) OF TORTS § 520 (1976)).

38. In their Complaint, Plaintiffs make the broad conclusory allegation that the operation of a compressor station is an abnormally dangerous activity. *See* Complaint at ¶¶ 52 and 55.

39. No Pennsylvania court, however, has ever held that operation of a natural gas compressor station rises to the level of an abnormally dangerous activity.

40. Indeed, Pennsylvania courts have found the existence of an abnormally dangerous activity in only very limited circumstances.

41. Pennsylvania courts have refused to declare certain activities that require even greater processing and potentially for flammability, such as petroleum and refined gasoline products, as being abnormally dangerous. *See Stanton v. Nat'l Fuel Gas Co.*, 1 Pa. D & C.4th

223, 237 (C.C.P. 1987) (the Court of Common Pleas held that the transmission of gas was not an abnormally dangerous activity); *see also Diffenderfer v. Staner*, 722 A.2d 1103, 1108-09 (Pa. Super. Ct. 1999) ("gasoline and other petroleum products can be stored and dispensed safely with reasonable care, and the storage of these materials in tanks is a common use and is valuable to modern society"); *Melso v. Sun Pipeline Co.*, 576 A.2d 999, 1003 (Pa. Super. Ct. 1990) (holding that operation of an underground petroleum pipeline was not an abnormally dangerous activity because it was a regular activity in a highly industrialized society).

42. Therefore, Plaintiffs have failed to plead a cognizable claim for abnormally dangerous activity and this Court should dismiss Plaintiffs' Complaint to the extent it seeks recovery under a theory of abnormally dangerous activity.

WHEREFORE, Defendants respectfully request that this Honorable Court sustain Defendants' Preliminary Objections as to any allegations for strict or ultra-hazardous liability and dismiss such allegations with prejudice.

V. PRELIMINARY OBJECTIONS IN THE NATURE OF A DEMURRER TO PLAINTIFFS' CLAIM FOR NEGLIGENCE *PER SE*.

43. Plaintiffs' negligence *per se* claim is entirely predicated on a violation of the APCA. *See* Complaint at ¶¶ 82-90.

44. In Pennsylvania, in order to establish a claim based on negligence *per se*, a plaintiff must demonstrate that:

(1) the purpose of the statute must be, at least in part, to protect the interest of a group of individuals, as opposed to the public generally;

(2) the statute or regulation must clearly apply to the conduct of the defendant;

(3) the defendant must violate the statute or regulation; and,

(4) the violation of the statute or regulation must be the proximate cause of the plaintiff's injuries.

Mahan v. Am-Grad, Inc., 814 A.2d 1052, 1059 (Pa. Super. Ct. 2003).

A. There is No Private Right of Action for Damages Under the APCA.

45. An action under the APCA is limited to actions to compel compliance with the statute and to declare civil penalties, not to award monetary damages to individuals.

46. The APCA permits any person to commence a civil action "to compel compliance with the act." 35 P.S. § 4013.6(c).

47. The APCA, however, does not "create a right of action for monetary damages." *Mest v. Cabot Corp.*, 2004 WL 945131 (E.D. Pa. 2004); *see also Toman v. Waste Management, Inc.*, 2005 WL 3150747 (C.C.P. 2005) (sustaining defendant's preliminary objections to Plaintiff's claims of negligence *per se* based on the APCA).

48. Because an individual cannot recover monetary damages under the APCA, Plaintiffs' negligence *per se* claim fails as a matter of law.

B. Plaintiffs Failed to Comply with Required Conditions Precedent Before Initiating Suit.

49. The APCA requires, as a condition precedent before any civil action to compel compliance with the statute is initiated, for the moving party to provide written notice of the violation to the Pennsylvania Department of Environmental Protection and to provide the violator with 60 days advance notice of commencing the civil action to compel compliance. *See* 35 P.S. § 4013.6(d).

50. Plaintiffs have not alleged that they complied with the APCA's 60 day notice condition-precedent before instituting this civil action.

51. As such, even if Plaintiffs' purported claims under the APCA were statutorily authorized claims to compel compliance with the law rather than unauthorized claims for private damages (which they are not), such claims would still be improper and subject to dismissal as a matter of law.

WHEREFORE, Defendants respectfully request that this Honorable Court sustain Defendants' Preliminary Objections as to Plaintiffs' cause of action for negligence *per se*, and dismiss said cause of action with prejudice.

VI. PRELIMINARY OBJECTIONS IN THE NATURE OF A *DEMURRER* TO PLAINTIFFS' CLAIM FOR PRIVATE NUISANCE.

A. Plaintiffs Private Nuisance Claim Fails as A Matter of Law Because None of the Plaintiffs' Properties Are Adjoining To Defendants' Property.

52. A prerequisite to any nuisance claim under Pennsylvania law is that the parties share a common border and neighbor one another. *See Philadelphia Elec. Co. v. Hercules, Inc.*, 762 F.2d 303, 314 (3d Cir. 1985) ("...the historical role of private nuisance law [is] a means of efficiently resolving conflicts between *neighboring*, contemporaneous land uses")(emphasis in original)(citing *Essick v. Shillam*, 32 A.2d 416, 418 (Pa. 1943) ("An owner has a right, barring malice and negligence, to any use of his property, unless by its continuous use he prevents *his neighbors* from enjoying the use of their property to their damage") (emphasis in original).

53. Indeed, Pennsylvania courts have routinely held that a viable claim for nuisance can only be brought between adjoining, neighboring property owners. *See Dussell v. Kaufman Const. Co.*, 157 A.2d 740, 743 (Pa. 1960) (vibrations caused by defendant's pile-driving operations caused damages to plaintiff's neighboring property); *Evans v. Moffat*, 160 A.2d 465, 473 (Pa. Super. Ct. 1960)(plaintiffs' property invaded by "foul-smelling gases emanating from mine refuse dumps created" by defendant on a neighboring property); *Waschak v. Moffat*, 109

A.2d 310, 317-18 (homeowners' property invaded by gas emitted from neighboring coal mine); *Cassel-Hess v. Hoffer*, 44 A.3d 80, 86 (Pa. Super. Ct. 2012) (neighbor's actions allegedly caused mosquito-infested standing water on edge of plaintiff's property); *Kembel*, 478 A.2d 11, 14-15 (defendants' neighboring transportation business allegedly invaded plaintiffs' use and enjoyment of their property); *Cavanagh v. Electrolux Home Products*, 904 F. Supp.2d 426, 435 (dismissing Plaintiff's private nuisance claim and noted that private nuisance cases are limited to neighboring landowners).

54. Plaintiffs' Complaint does not allege that any of their properties are adjoining to Defendants' property.

55. As such, Plaintiffs have failed to set forth a legally sufficient claim for private nuisance and the private nuisance cause of action must be dismissed with prejudice.

B. Plaintiff Failed to Plead Essential Facts Necessary to Support A Claim for Private Nuisance.

56. Plaintiffs' claim for private nuisance alleges that Defendants' compressor station caused air pollutants and excessive noise to interfere with their property interests. *See, generally,* Complaint at ¶¶ 46-57. Merely alleging that interference occurred without facts showing the nature and scope of the interference does not plead the essential elements of a private nuisance cause of action in Pennsylvania.

57. Pennsylvania follows the Restatement (Second) of Torts' definition of a private nuisance. *Karpiak v. Russo*, 676 A.2d 270, 272 (Pa. Super. Ct. 1995)(citing *Waschak v. Moffat*, 109 A.2d 310 (Pa. 1954)); *Kembel v. Schlegal*, 478 A.2d 11, 15 (Pa. Super. Ct. 1984)).

58. Section 822 of the Restatement (Second) of Torts states:

> One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment, and the invasion is either

(a) intentional and unreasonable, or

(b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

RESTATEMENT (SECOND) OF TORTS, § 822.

59. Under section 822, conduct will be deemed intentional if the actor acts for the purpose of causing it or knowing that it will result or is substantially certain to result from his conduct. *Burr v. Adam Eidemiller, Inc.*, 126 A.2d 403, 408 (Pa. 1956). An intentional invasion becomes unreasonable if "the gravity of the harm outweighs the utility of the actor's conduct...." RESTATEMENT (SECOND) OF TORTS § 826 (2010); *see also Hughes v. Emerald Mines Corp.*, 450 A.2d 1, 4-5 (Pa. Super. Ct. 1982).

60. More specifically, the Pennsylvania Supreme Court has noted that "[a]nnoyance or inconvenience...sustained by reason of...noise or vibration must be regarded as incident of residence" in and around industrial and commercial districts. *Wojnar v. Yale & Towne Mfg. Co., Inc.*, 36 A.2d 321, 322 (Pa. 1944). When such residential districts border on commercial districts, property owners "must bear the inevitable consequences of being located so close to a district of that character." *Essick v. Shillam*, 32 A.2d 416, 418.

61. As emphasized by the Supreme Court in *Young v. St. Martin's Church*, 64 A.2d 814 (Pa. 1949), "it is a far cry from what is merely an annoyance or disagreeable intrusion to what the law regards and condemns as a nuisance." Moreover, where the alleged nuisance is necessarily incident to the conduct of a lawful business, it will not be restrained where, as here, the inconvenience is only slight. *See Molony v. Pounds*, 64 A.2d 802, 803 (Pa. 1949).

62. Pennsylvania courts have recognized that some noise and interference from legitimate business operations to neighbors will be inevitable. *See Kembel*, 478 A.2d at 15.

Further, if the effects from the operations arose from the normal and customary business operations, the effects cannot be considered "unreasonable." *Waschak*, 109 A.2d at 317-18.

63. A business with valid zoning approval conducted during normal operations cannot, by its mere operation, constitute an illegal nuisance. *Firth v. Scherzberg*, 77 A.2d 443, 447 (Pa. 1951).

64. As such, Plaintiffs' Complaint fails to plead facts necessary to support the required elements of a private nuisance cause of action.

C. Plaintiffs Failed to Allege Facts Demonstrating Significant Harm.

65. Pennsylvania law provides that a defendant is not subject to liability for an invasion unless it resulted in significant harm to the complaining party. *See Karpiak v. Russo*, 676 A.2d, 270, 272 (Pa. Super. Ct. 1996).

66. Section 821F of the Restatement (Second) states that:

> Significant harm is meant to be harm of importance, involving more than slight inconvenience or petty annoyance. The law does not concern itself with trifles, and therefor either must be a real and appreciable invasion of the plaintiffs interests before he can have an action for either a public or private nuisance....In the case of a private nuisance, there must be a real and appreciable interference with the plaintiff's use and enjoyment of his land before he can have a cause of action.
>
> ...If normal persons living in the community would regard the invasion in question as definitely offensive, seriously annoying, or intolerable, then the invasion is significant. If normal persons in that locality would not be substantially annoyed or disturbed by the situation, then the invasion is not a significant one, even though the idiosyncrasies of the particular plaintiff may make unendurable to him. Rights and privileges as to the use and enjoyment of land are based on the general standards of normal persons in the community and not on the standards of the individuals who happen to be there at the time.

Restatement (Second) of Torts, § 821F, cmt. c-d (2010); *see also Karpiak* at 272-273.

67. In *Kembel*, the Superior Court held:

> While the defendants' business may have aesthetical shortcomings, it is nonetheless, a legal business with respect to which the creation of some noise and interference to neighbors will be inevitable, but which is not inherently injurious to the health of the public. The issue is not whether the business creates a noise or odors but whether the noise and odors created are of an injurious level. The plaintiffs have presented no calculated readings to establish whether the noise or fumes are at a level that is environmentally unsafe or injurious to health, i.e. decibel readings of noise or readings of environmental pollution directly related to the business.

Kembel, 478 A.2d at 15 (quoting Court of Common Pleas of Westmoreland County opinion).

68. The Court thus recognized that, to prove the "significant harm" element of private nuisance, it is necessary to present quantifiable proof that conditions typical of a particular business rose to an "injurious" level. *Id.*

69. The Pennsylvania Supreme Court noted that "[n]o one is entitled to absolute quiet in the enjoyment of property." *Molony*, 64 A.2d at 803. The *Molony* Court cautioned "[i]n these cases equity cannot act with too much caution. Its strong arm must not be allowed to fall with destructive effect upon a lawful and necessary business, unless it is plainly manifest and certain beyond doubt that the pursuit of the trade would result in substantial injury." *Id.* at 805.

70. Furthermore, recognizing the social utility of commercial operations, the Supreme Court has stated:

> Persons living in a community or neighborhood must subject their personal comfort to the commercial necessities of carrying on trade and business, and where the individual is affected only in his taste, his personal comfort, or pleasures or preferences, these must be surrendered to the comfort and preferences of the many.

Hannum, 31 A.2d at 803-04. The Court stressed that:

> [t]he use of property for other than residential purposes may be, and at times is, an annoyance to dwellers in the vicinity, but the

> mere fact of annoyance does not establish the existence of a nuisance.

Id. at 804 (citing *Houghton v. Kendrick*, 132 A. 166 (Pa. 1926)).

71. Accordingly, for an alleged harm to be found "significant," the plaintiff must present some objective proof of harm beyond personal feelings or conjecture in order to demonstrate that the objectionable effects of a legitimate business exceed those typically associated with that business and result in an appreciable interference with the plaintiff's daily activities.

72. In this case, Plaintiffs have alleged no facts that they have suffered the kind of significant harm required by the law.

73. Essentially, Plaintiffs have alleged that they do not like the presence of the compressor station.

74. However, such cursory allegations are not enough. *See Kapton v. Bell Atl. NYNEX Mobile*, 700 A.2d 581, 583 (Pa. Commw. Ct. 1997)(affirming lower court's order sustaining preliminary objections to the plaintiff's nuisance claim because the plaintiff failed to allege any specific activity that reduced her enjoyment of her property).

75. As such, this Honorable Court should sustain Defendants' Preliminary Objections to Plaintiffs' claim for private nuisance.

WHEREFORE, Defendants respectfully request that this Honorable Court sustain Defendants' Preliminary Objections as to Plaintiffs' cause of action for private nuisance and dismiss said cause of action with prejudice.

VII. PRELIMINARY OBJECTIONS IN THE NATURE OF A *DEMURRER* TO PLAINTIFFS' CLAIM FOR PUBLIC NUISANCE.

A. Pennsylvania does not recognize a private cause of action for public nuisance.

76. Plaintiffs' public nuisance claim alleges that Defendants' released pollutants into the air and interfered with the "public's rights to breathe clean air and enjoy the land near to the Compressor Station." *See* Complaint at ¶ 59.

77. In addition to complaints about polluting the air, Plaintiffs' Complaint also alleges "annoyance of excessive noise..." *Id.* at ¶ 62.

78. "A public nuisance is an inconvenience or troublesome offense that annoys the whole community in general, and not merely some particular person, and produces no greater injury to one person than to another--acts that are against the well-being of the particular community--and is not dependent upon covenants. The difference between a public and a private nuisance does not depend upon the nature of the thing done but upon the question whether it affects the general public or merely some private individual or individuals..." *Blue Mountain Preservation Assoc. v. Township of Eldred*, 867 A.2d 692, 704, n. 2 (Pa. Commw. Ct. 2005).

79. Plaintiffs also claim that Defendants' actions are unreasonable based on the APCA, 35 P.S. § 4001 *et. seq.* *Id.* at ¶ 64.

80. Pennsylvania has never recognized a private cause of action for public nuisance. *See Duquesne Light Co. v. Pennsylvania Am. Water Co.*, 850 A.2d 701, 705-707 (Pa. Super. Ct. 2004).

81. As such, to the extent Plaintiffs are pursuing a private cause of action for public nuisance, which, based on Paragraphs 58 – 63 and 65-72, they are, then such a claim fails as a matter of law and should be dismissed.

82. To the extent Plaintiffs are asserting a public nuisance claim under the APCA, Plaintiffs' public nuisance claim seeking monetary damages is not permitted. *See U.S. v. EME Homer City Generation, L.P.*, 823 F. Supp.2d 274, 297 (W.D. Pa. 2011).

83. As such, Plaintiffs' claim for public nuisance fails as a matter of law.

B. Actions Authorized by the Government Are Not Subject to Public Nuisance Claims.

84. Alternatively, even if such a cause of action existed, the claim against Defendants would still be barred as a matter of law. The Pennsylvania Supreme Court has repeatedly held that, where a project has been authorized by a governmental agency through a legislatively mandated process, it cannot be the subject of a public nuisance claim. *See Borough of Collegville v. Philadelphia Suburban Water Co.*, 105 A.2d 722, 731 (Pa. 1954); *Danville, Hazelton and Wilkesbarre Railroad Co. v. Commonwealth,* 73 Pa. 29, 34 (Pa. 1873). A public nuisance must be occasioned by acts done in violation of the law. *Id.*

85. Here, the General Assembly has authorized DEP to issue permits allowing the construction and operation of natural gas compressor stations throughout the Commonwealth. Plaintiffs have not alleged that DEP has failed to take any action concerning the operation of the compressor station. As such, Plaintiffs' public nuisance cause of action fails as a matter of law.

86. As such, Plaintiffs' claim for public nuisance fails as a matter of law.

WHEREFORE, Defendants respectfully request that this Honorable Court sustain Defendants' Preliminary Objections as to Plaintiffs' cause of action for public nuisance and dismiss said cause of action with prejudice.

VIII. PRELIMINARY OBJECTIONS IN THE NATURE OF A *DEMURRER* TO PLAINTIFFS' CLAIM FOR TRESPASS.

87. Plaintiffs allege that Defendants caused various air pollutants to enter the airspace surrounding the compressor station. *See* Complaint at ¶ 74.

88. Plaintiffs further allege that these air pollutants entered into and deposited themselves on Plaintiffs' properties. *Id.* at ¶ 75.

89. Plaintiffs allege that the entry was intentional and without privilege. *Id.* at ¶ 76.

90. Lastly, Plaintiffs allege they have been harmed by Defendants' trespassing actions. *Id.* at ¶¶ 81-82.

91. Common law trespass is defined as "an unprivileged, intentional intrusion upon land in possession of another." *Kopka v. Bell Telephone Co.*, 91 A.2d 232, 235 (Pa. 1952).

92. In *Karpiak*, 676 A.2d at 275, the Pennsylvania Superior Court affirmed the trial court's dismissal of the plaintiffs' trespass action despite the plaintiffs' allegations that the defendant's business caused dust to enter onto their land.

93. The Superior Court affirmed dismissal, in part, because of the absence of harm/corrosive damage to the property and because plaintiffs did not suffer from any physical ailments. *Id.*

94. Similarly, here, Plaintiffs have not alleged any harm to their property or persons as required by *Karpiak*.

95. Therefore, Plaintiffs' trespass cause of action fails as a matter of law and should be dismissed with prejudice.

WHEREFORE, Defendants respectfully request that this Honorable Court sustain Defendants' Preliminary Objections as to Plaintiffs' cause of action for trespass and dismiss said cause of action with prejudice.

IX. ALTERNATIVELY, DEFENDANTS ASSERT PRELIMINARY OBJECTIONS FOR INSUFFICIENT SPECIFICITY.

96. Throughout the Complaint, Plaintiffs make general, vague, and conclusory allegations, and these allegations are also replete with legal conclusions.

97. Pennsylvania Rule of Civil Procedure 1019(a) requires that a complaint state "all material facts on which a cause of action . . . is based . . . in a concise and summary form," which means a complaint must plead all of the essential facts necessary to support a claim. *Smith v. Wagner*, 588 A.2d 1308, 1310 (Pa. Super. 1991). *See also Rambo v. Greene*, 906 A.2d 1232, 1236 (Pa. Super Ct. 2006) ("while absolute specificity is not required, the court is required to eliminate broad and ambiguous allegations from the Complaint"); and *Grudis v. Roaring Brook Tp.*, 2010 WL 5856069, *478 (C.C.P. Lackawanna County 2010) (court sustained preliminary objections for lack of specificity when complaint included the phrase "but are not limited to the following").

98. Furthermore, Rule 1019(f) requires "[a]verments of time, place and items of special damages shall be specifically stated."

99. Here, the following paragraphs of Plaintiffs' Complaint violate the requirements of Rule 1019:

i. In Paragraph 2, Plaintiffs assert that "Defendants have caused the emissions, release, and discharges of numerous air pollutants, ***including but not limited*** [Plaintiffs' list various organic compounds]...and other hazardous air pollutants..." *Id.* at ¶ 2.

ii. In Paragraph 4, Plaintiffs violate Pennsylvania Rule of Civil Procedure 1028(a)(3) by alleging that they have suffered "...***other injuries***." *Id.* at ¶ 4.

iii. In Paragraph 18, Plaintiffs violate Pennsylvania Rule of Civil Procedure 1028(a)(3) by not identifying the "current and proposed air quality regulations promulgated by the

Pennsylvania Department of Environmental Protection." *Id.* at ¶18.

iv. In Paragraph 20(a), Plaintiffs violate Pennsylvania Rule of Civil Procedure 1028(a)(3) when they fail to identify all "contaminants" by stating that testing revealed certain contaminates and include the phrase "...***include, but are not limited to***..." *Id.* at ¶ 20(a).

v. In Paragraph 20(b), Plaintiffs violate Pennsylvania Rule of Civil Procedure 1028(a)(3) when they fail to identify all "pollutants" by stating that testing revealed certain pollutants and include the phrase "...***include, but are not limited to***..." *Id.* at ¶ 20(b).

vi. In Paragraph 20(c), Plaintiffs violate Pennsylvania Rule of Civil Procedure 1028(a)(3) when they fail to identify all "contaminants" by stating that testing revealed certain contaminates and include the phrase "...***include, but are not limited to***..." *Id.* at ¶ 20(c).

vii. In Paragraph 21, Plaintiffs violate Pennsylvania Rule of Civil Procedure 1028(a)(3) when they fail to identify all "pollutants" by stating that testing revealed certain contaminates and include the phrase "...***include, but are not limited to***..." *Id.* at ¶ 21.

viii. In Paragraph 22, Plaintiffs violate Pennsylvania Rule of Civil Procedure 1028(a)(3) by alleging that "...Defendants' acts and omissions in operating the Springhill Compressor Station have caused various injuries to the Plaintiffs, ***including but not limited to***..." *Id.* at ¶ 22.

ix. In Paragraph 22(f), Plaintiffs violate Pennsylvania Rule of Civil Procedure 1028(a)(3) by alleging that Defendants' actions or omissions have caused "***other injuries***." *Id.* at ¶ 22(f).

x. In Paragraph 24(f), Plaintiffs violate Pennsylvania Rule of Civil Procedure 1028(a)(3) by alleging that Defendants' actions or omissions have caused "***other injuries***." *Id.* at ¶ 24(f).

xi. In Paragraph 30, Plaintiffs violate Pennsylvania Rule of Civil Procedure 1028(a)(3) by alleging Defendants violated "[t]he laws and regulations of the Commonwealth of

Pennsylvania..." without identifying the laws and regulations. *Id.* at ¶ 30.

xii. In Paragraph 33, Plaintiffs violate Pennsylvania Rule of Civil Procedure 1028(a)(3) by alleging that Defendants knew, or in the exercise of reasonable care should have known, that the release of "air pollutants" was "otherwise causing natural resource damage" but failed to identify what "natural resource damage" occurred. *Id.* at ¶ 33.

xiii. In Paragraph 39, Plaintiffs violate Pennsylvania Rule of Civil Procedure 1028(a)(3) by alleging that Defendants breached a duty of care to Plaintiffs by not comporting with "established industry standards" and then not identifying those "industry standards." *Id.* at ¶ 39.

xiv. In Paragraph 64, Plaintiffs violate Pennsylvania Rule of Civil Procedure 1028(a)(3) by alleging that Defendants' "...conduct is proscribed by a statute, ordinance or administrative regulation, including but not limited to" and only identify the Pennsylvania Air Pollution Control Act.

xv. In Paragraph 74, Plaintiffs violate Pennsylvania Rule of Civil Procedure 1028(a)(3) by alleging "...Defendants have caused the emissions and releases of air pollutants, including but not limited to ...."

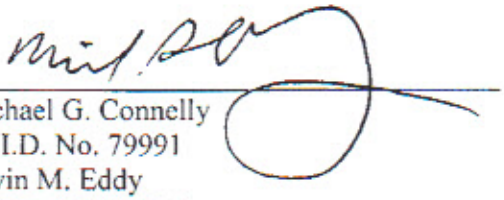
xvi. In Paragraphs 83 through 89, Plaintiffs violate Pennsylvania Rule of Civil Procedure 1028(a)(3) by alleging that Defendants had a duty to comply with certain laws, regulations and guidelines "...including, but not limited to..." and yet only identify the Pennsylvania Air Pollution Control Act. *Id.* at ¶¶ 83 - 89.

100. Such vague, general, and conclusory allegations are contrary to the extensive body of case law post *Connor v. Allegheny Gen. Hosp.*, 461 A.2d 600 (Pa. 1983) and the Pennsylvania Rules of Civil Procedure. *See Estate of Swift v. Northeastern Hosp. of Philadelphia*, 690 A.2d 719, 723 (Pa. Super, 1997) (holding that allegations "must apprise the defendant of the claim being asserted and summarize the essential facts to support [the] claim").

101. The insufficient specificity of these averments requires this Court to strike paragraphs 2, 4, 18, 20, 21, 22, 24, 30, 33, 39, 64, 74, and 83 through 89 from Plaintiffs' Complaint.

WHEREFORE, Defendants respectfully request that this Honorable Court sustain Defendants' Preliminary Objections and strike the identified paragraphs of Plaintiffs' Complaint for insufficient specificity.

Respectfully submitted,



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Dated: August 8, 2013

IN THE COURT OF COMMON PLEAS OF FAYETTE COUNTY, PENNSYLVANIA

HAROLD BELLA and DEBORAH BELLA,
et al.,

Plaintiffs,

v.

LAUREL MOUNTAIN MIDSTREAM, LLC,
et. al.,

Defendants.

CIVIL DIVISION

Docket No. 2734 of 2012

Judge John F. Wagner, Jr.

ORDER OF COURT

AND NOW, this ___ day of _____, 2013, upon the consideration of Defendants' Preliminary Objections to Plaintiffs' Complaint, it is hereby ORDERED, ADJUDGED and DECREED that said Preliminary Objections are SUSTAINED. Plaintiffs' Complaint is dismissed with prejudice.

_____
President Judge John F. Wagner, Jr.

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of August, 2013, the undersigned counsel served upon the below counsel of record Defendants' Preliminary Objections United States Mail, postage prepaid:

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