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September 12, 2016

Kimberly Bose
Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, D.C. 20426

Re: Missing Site-Specific Information in FERC Docket No. CP15-558

Dear Ms. Bose:

I write this letter on behalf of Homeowners Against Land Taking-PennEast (HALT) to request that the Commission withdraw its Draft Environmental Impact Statement (DEIS) until it is able to obtain the requisite data that is currently missing from its record on environmental impacts. PennEast has consistently told landowners and a New Jersey state court that it is under no obligation to gather site-specific information or survey data before FERC makes its Certificate decision. But the law prohibits FERC from similarly overlooking the missing data.

Under the National Environmental Policy Act (NEPA), an agency:

(1) Must consider—take a "hard look" at—every significant aspect of the environmental impacts of a proposed action prior to taking the action

(2) Inform the public of the environmental impacts and provide an opportunity for public comment on the relevant environmental information.[1]

Typically, cases challenging an agency's failure under these provisions can point to a ***single*** type of environmental impact that an agency has failed to consider. Thus, the D.C. Circuit found the Bureau of Ocean Management violated NEPA by failing to complete site-specific surveys on the seafloor in the Nantucket Sound before issuing a project lease.[2] A recent district court opinion found that the Bureau of Land Management violated NEPA by failing to provide a "thorough" or "meaningful" discussion of the environmental effects of fracking in a programmatic management plan.[3] Because NEPA requires an agency to "***consider*** and ***analyze***

[1] *See, e.g.*, *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983).
[2] *Pub. Emps. for Envtl. Responsibility v. Hopper*, No. 14-5303, 2016 WL 3606363 (D.C. Cir. July 5, 2016).
[3] *Los Padres ForestWatch v. U.S. Bureau of Land Mgmt.*, No. 15-cv-04378 (C.D. Cal. Sept. 6, 2016).

the data," the Bureau could not make a decision before it had conducted, and then analyzed, the environmental effects from fracking.[4]

This DEIS is unique in that FERC assumes that it can fail to evaluate ***multiple*** environmental impacts and yet still issue a Final Environmental Impact Statement. For instance, FERC has admitted it lacks survey data and site-specific information for 72 percent of classified wetlands (4-66), nearly all the private wells in New Jersey (4-31), 74.2 percent of vernal pools (4-68), 93 percent of migratory bird habitat (4-89), 87.5-89.3 percent of state listed endangered species habitat, and 68 percent of land required to be surveyed for archaeological surveys (4-193). And FERC does not plan to take a hard look at any of this information until after it decides whether to "authorize[] the PennEast Pipeline Project" (5-19).

Nor does PennEast have any plans to supply the missing data before the Final Environmental Impact Statement. To evade liability for previous trespasses, it represented to a New Jersey court that FERC would not enforce PennEast's obligation to provide site-specific data or to "conduct any necessary land surveys" on environmental impacts until after "FERC ultimately issues a Certificate."[5] Put another way, "PennEast has no intention" of obtaining site-specific information "as a prerequisite to obtaining FERC approval."[6]

But FERC lacks authority to waive its legal obligations to base its decision on the public interest and an evaluation of environmental impacts. The Commission must withhold its Certificate decision until it can fully analyze the environmental impacts under NEPA and evaluate all factors bearing on the "public convenience and necessity" under the Natural Gas Act.

Contrary to PennEast's mistaken contention to a New Jersey court, FERC cannot waive legal obligations or rely on "[p]ost-hoc examination of data to support a pre-determined conclusion."[7] ***For FERC, the data must justify the decision, not the other way around***.

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[4] *Id.* (emphasis in original).
[5] *See* Attachment A at 28-29 (Supplemental Memorandum in Further Opposition to Preliminary Injunctive Relief).
[6] *See* Attachment B at 3 (Opposition to Application for an Order to Show Cause).
[7] *Sierra Club v. Bosworth*, 510 F.3d 1016, 1026 (9th Cir. 2007).

Not only has FERC failed to identify, consider, or analyze data on the relevant environmental impacts, its failure to analyze impacts makes it impossible to recommend mitigation to avoid these unidentified impacts. Because mitigation cannot be "perfunctory" and must "provide[] an estimate of how effective the mitigation measures would be if adopted,"[8] FERC must withdraw its DEIS until it has sufficient data to develop appropriate mitigation measures. These adverse impacts and mitigation measures cannot be provided for the first time in the Final Environmental Impact Statement or after a Certificate decision.

The harm from deferred analysis was amply demonstrated by the recent experience in Hunterdon County of another pipeline that failed to conduct adequate site-specific surveys. Transcontinental Gas Pipe Line Company (Transco) recently admitted that despite six months of attempts, it was unable to use horizontal directional drilling (HDD) in several parts of Hunterdon County due to the bedrock conditions.[9] Transco had not analyzed the bedrock before beginning construction and now proposes to use a more environmentally harmful method in Hunterdon County. As many residents of Hunterdon County have told FERC in this proceeding, the unique local geologic conditions mean that environmental harm likely will be much higher than the DEIS contemplates because PennEast has proposed a drilling method that does not work in Hunterdon County. For the PennEast proposal, FERC has not even evaluated the environmental impacts under the HDD drilling method, let alone under other methods that likely would have even greater environmental impacts.

FERC must withdraw its DEIS until it obtains its missing information. Its "lack of knowledge" about site-specific conditions "does not excuse the preparation of an EIS; rather it requires [the agency] to do the necessary work to obtain it."[10] Because FERC has not done the necessary work to obtain the missing information, FERC must withdraw its DEIS. The public interest demands it.

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[8] *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380-81 (9th Cir. 1998)
[9] Greg Wright, *Transco Pipeline Drilling Problem Leads to Public Hearing*, nj.com (Aug. 8, 2016), http://www.nj.com/somerset/index.ssf/2016/08/drilling_problem_with_transco_pipeline_leads_to_pu.html.
[10] *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 588 F.3d 718, 727 (9th Cir. 2009) (citing *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 733 (9th Cir. 2001).

Best regards,

s/ R. Steven Richardson

Enclosures:
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ATTACHMENT A

HOMEOWNERS AGAINST LAND TAKING-PENNEAST, INC., *et al.* Plaintiffs, v. PENNEAST PIPELINE COMPANY, LLC, Defendant.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION: HUNTERDON COUNTY DOCKET NO. : HNT-C-14014-16

DEFENDANT'S SUPPLEMENTAL MEMORANDUM OF LAW IN FURTHER OPPOSITION TO PLAINTIFFS' APPLICATION FOR PRELIMINARY INJUNCTIVE RELIEF

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PRELIMINARY STATEMENT

Defendant, PennEast Pipeline Company, LLC ("PennEast"), respectfully submits this supplemental memorandum of law and the accompanying Affidavits of Tyrone Baccile, Daniel Murphy and Grace Zeising in further opposition to HALT's application for preliminary injunctive relief.[1]

At the Order to Show Cause hearing on May 10, 2016, the Court properly denied HALT's request for temporary restraints, finding that it failed to present clear and convincing evidence to establish the prerequisites for such relief. Despite being given ample opportunity to present additional evidence to show why HALT is entitled to the extraordinary remedy of a preliminary injunction, it has failed to do so. Instead, HALT continues to press theories that have been completely refuted, such as its speculation that underground facilities locators like USIC and Audrius Dobilas ("Dobilas") are surreptitiously conducting surveys on behalf of PennEast. Worse, HALT has now procured and introduced a demonstrably false sworn statement to in an attempt to salvage its claim of trespass relating to an attempted bat survey on the Copper Creek Preserve. The Court should roundly reject these tactics and deny HALT's application in its entirety.

With respect to its nuisance claim, HALT effectively concedes that it has no such claim by remaining silent in the face of PennEast's undeniable proof that the flights that allegedly disrupted its quiet enjoyment were not conducted, sanctioned, or paid for by PennEast.

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[1] Unless otherwise noted, Plaintiffs are referred to collectively herein as "HALT." In its Supplemental Submission, HALT does not explain how, as a non-profit corporation, it has "organizational standing" given that the Verified Complaint is not "confined strictly to matters of common interest" and includes numerous "individual grievance[s] of named HALT members. Crescent Park Tenants Association v. Realty Equities Corp., 58 N.J. 98, 109 (1971).

With respect to its trespass claim, HALT has not presented any additional proof to establish the Crowe factors by clear and convincing evidence. Indeed, HALT essentially asks the Court to reconsider its ruling that HALT has not satisfied the Crowe factors and that the public interest weighs against injunctive relief.

Although the majority of HALT's trespassing allegations involve Dobilas and other USIC employees, HALT failed to present any evidence that Dobilas and USIC were performing surveys for PennEast or were otherwise working for, or affiliated with, PennEast. That is not surprising for the reasons explained in PennEast's initial opposition and more fully below: USIC (Dobilas's employer) is a company that locates and marks out underground facilities for utility companies and has not been engaged by PennEast in any capacity in connection with the pipeline project. Although PennEast fully complies with its statutory requirement to "call before [it] dig[s]," it has no involvement in (i) how the utility companies discharge their legal obligation to markout underground facilities after receiving notification from the One Call Center; (ii) who the underground facility operators choose to locate their facilities; or (iii) who the locator companies assign to perform the actual markouts. PennEast has demonstrated that it only alerts the One Call System of its intention to dig on properties on which it has permission to dig. Because USIC and Dobilas are beyond the control of PennEast, PennEast cannot be held liable for any alleged trespasses on their part to perform the work they are contracted to do by operators of underground facilities.

PennEast has also disproven the other trespass allegations advanced in HALT's supplemental submission. HALT contends that it has proven a trespass on Scolnick-King's property because PennEast does not dispute that an agent walked up to her gate and posted a note requesting a meeting to discuss the Project. HALT similarly believes that it established a trespass

on Rebecca Hoff's property because PennEast does not dispute that an agent walked up to her front door to request survey access. PennEast does not contest these facts, but they do not constitute trespass. The common law recognizes an implied license to engage in this activity, and the presence of "No Trespassing" signs does not revoke that implied license. In all events, PennEast has promised Ms. Scolnick-King and Ms. Hoff not to approach their homes in the future, completely removing any need for a preliminary injunction based on these incidents.

HALT also continues to harbor the mistaken belief that PennEast trespassed by setting up a civil survey base station on the edge of Russell Poles's property adjoining County Road 523 ("CR 523") on June 27, 2015. That is not so. The surveyors had a statutory right to conduct a survey for the project on the land adjacent to the road and within the public right of way. HALT's discussion in its supplemental submission regarding the width of the public right of way on Worman Road, where Poles lives, is completely irrelevant. The police report HALT submitted with its Complaint establishes that the survey activity in question took place, if at all, on CR 523/Sergeantsville Road, not on Worman Road. PennEast is authorized by statute to conduct surveys on lands adjacent to roads such as CR 523 for proceedings touching public improvements, such as the pipeline. And Delaware Township tax maps and other public records establish that the public right of way extends to the area where the survey equipment was alleged to have been.

The only new "evidence" HALT submitted is the Certification of Frank Palopoli (the "Palopoli Certification"), which is demonstrably false. In an attempt to rebut PennEast's proof that the entry onto the Copper Creek Preserve to conduct a bat survey did not constitute an intentional trespass, HALT submitted a certification stating that PennEast did not have permission to be on the adjacent property it intended to enter. As PennEast demonstrated in its initial opposition, two college students engaged to conduct that survey unwittingly strayed onto the

Copper Creek Preserve due to their use of an older map file that did not reflect that the parcel had been subdivided from an adjacent parcel for which PennEast had been given survey permission. In his Certification, Palopoli claims that PennEast had no right to be on the adjoining property, which he owns, and that he only gave permission for PennEast to conduct civil engineering surveys, not to perform bat or other type of environmental surveys. That is not true. PennEast submits with this brief a Survey Permission Form Palopoli signed on December 17, 2014, in which he expressly granted PennEast permission for all surveys and tests necessary for a pipeline route study, including environmental studies, on the property at issue.

HALT has thus failed to establish by clear and convincing evidence that it is likely to succeed on the merits of its trespassing claim. As for the remaining Crowe factors, HALT has not presented any new evidence, but simply seeks to have the Court reconsider its finding that they do not weigh in favor of injunctive relief. The Court should decline to do so.

For the reasons set forth above and amplified below, and for those outlined in PennEast's initial opposition to HALT's application for a TRO and its motion to dismiss, PennEast respectfully requests that the Court deny HALT's application for a preliminary injunction.

ARGUMENT

I. HALT'S SUPPLEMENTAL SUBMISSION DOES NOT ESTABLISH THE PREREQUISITES FOR A PRELIMINARY INJUNCTION.

The standards governing the issuance of a preliminary injunction and a TRO are the same: a showing (1) of irreparable harm: (2) that the applicable underlying law is well-settled; (3) that the material facts are not substantially disputed and there exists a reasonable probability of success on the merits; and (4) that the balance of hardships to the parties favors the issuance of the requested relief. Crowe v. De Gioia, 90 N.J. 126, 132-34 (1982); Confident Care Corp. v. Amerigroup New Jersey, Inc., No. BER-C-114-15, 2015 N.J. Super. Unpub. LEXIS 1166, at *19,

33 (Ch. Div. May 18, 2015). And when a case involves a matter of "significant public importance," the court must consider that interest in addition to the Crowe factors. Garden State Equality v. Dow, 216 N.J. 314, 321 (2013). Although HALT obviously has an established right not to be subject to nuisance and trespass as a general matter, it has not satisfied any of the other Crowe factors, and its application should therefore be denied.

A. HALT Effectively Concedes That It Is Unlikely To Succeed On The Merits Of Its Nuisance Claim.

In its TRO opposition, PennEast demonstrated that none of the flights underlying HALT's nuisance claim was conducted, sanctioned, or paid for by PennEast.[2] (England Aff., ¶¶ 14-20; Fansler Cert., Ex. 11, 3/11/2016 letter from PennEast to FERC; Fansler Cert. Ex. 10-10 to 10-11, 1/14/2016 letter from the FAA to Evans.) PennEast further demonstrated that it is not currently conducting any over-flights, has no plans to conduct such flights, and has not done so since July 2015. (England Aff., ¶¶ 17, 20.) HALT did not dispute these facts in its supplemental submission. In fact, HALT did not attempt to rebut PennEast's argument that HALT is unlikely to succeed on the merits of its nuisance claim. The Court should construe HALT's silence as an effective concession that PennEast is correct on this point. See Northern N.J. Orthopaedic Specialists, PA v. Health Net of N.J., Inc., No. 12-cv-6257, 2013 U.S. Dist. LEXIS 157265, at *9 (D.N.J. Nov. 1, 2013) (construing plaintiff's silence as to defendant's preemption argument as a concession that defendant was correct).

[2] These flights allegedly occurred on August 26, 2015, September 16, 2015, November 3, 2015, December 7, 2015, March 31, 2016, September 18-20, 2015, October 10, 2015, and February 26, 2016. (Compl., ¶¶ 89, 90, 92, 93, 96, and 97.)

B. PennEast Substantially Disputes The Facts Supporting HALT's Trespass Claim And HALT Has Not Presented Any Clear And Convincing Evidence That It Is Likely To Succeed On The Merits Of That Claim.

1. The WLS Agent Had An Implied License To Enter Scolnick-King's Property In August 2014.

HALT alleges that in August 2014, a Western Land Services ("WLS") agent passed multiple "No Trespassing" signs on Scolnick-King's property, entered her property, and posted a note on her gate. (Compl., ¶¶ 50-51.) The note referred to in the Verified Complaint (the "Complaint") was left by Scott Kissner of WLS and requested a meeting to discuss the Project. (Fansler Cert. Ex. 4-6, WLS note.) After Scolnick-King complained about the entry, WLS sent Scolnick-King a letter dated September 2, 2014, in which it apologized for the entry and assured Scolnick-King that "going forward everyone will be instructed to ONLY enter your property if and when they have an appointment with you pre-arranged by phone or letter." (Compl., ¶ 51; Fansler Cert., Ex. 4-5, 8/27/2014 letter from Scolnick-King to WLS; Fansler Cert., Ex. 4-7, 9/2/2014 letter from WLS to Scolnick-King.)

PennEast does not dispute these facts, which as a matter of law do not constitute a trespass. As the Supreme Court explained in Florida v. Jardines, 133 S. Ct. 1409 (2013), a visitor has an implied license to "approach the home by the front path, knock promptly, wait briefly to be received and then (absent invitation to linger longer) leave." 133 S.Ct. at 1415; see also id. at 1420 (Alito, J., dissenting) ("The law of trespass generally gives members of the public a license to use a walkway to approach the front door of a house and to remain there for a brief time."). The WLS agent thus had an implied license to approach King's gate even though he did not speak to King and simply left a note. As Justice Alito explained, the implied license "is not limited to persons who intend to speak to an occupant or who actually do so. (Mail carriers and persons delivering packages and flyers are examples of individuals who may lawfully approach a front door without

intending to converse.)" Id. at 1420 (Alito, J., dissenting). That the WLS agent may not have been a welcome visitor is wholly irrelevant because the implied license is not "restricted to categories of visitors whom an occupant of the dwelling is likely to welcome;" it "applies even to solicitors, hawkers and peddlers of all kinds." Id.

Moreover, the allegation that there were "multiple 'No Trespassing' signs posted in plain view on [Scolnick-King's] property" (Compl., ¶ 51) did not revoke the implied license. See State v. Smith, 783 S.E.2d 504, 510 (N.C. Ct. App. 2016) ("[W]e are not aware of any court that has ruled that a sign alone was sufficient to revoke the implied license to approach"); State v. Ague-Masters, 156 P.3d 265, 272 (Wash. Ct. App. 2007) (finding that a reasonably respectful citizen may believe that entry onto private residential property during daylight hours through an open, unlocked gate and down an unobstructed driveway does not exceed the scope of implied invitation to the property, notwithstanding the presence of a "No Trespassing" sign); State ex rel. J.M., 339 N.J. Super. 244, 248 (App. Div. 2001) ("The mere fact that a no trespassing sign was displayed in the window did not make [the juvenile] a trespasser."); Michel v. State, 961 P.2d 436, 437-38 (Alaska Ct. App. 1998) (holding that "[p]ersons visiting the residence for social or commercial purposes" would not construe "no trespassing" signs along driveway "as meant to prohibit their entry"); State v. Rigoulot, 846 P.2d 918, 920 (Idaho Ct. App. 1992) (holding that "no trespassing" signs "cannot reasonably be interpreted to exclude normal, legitimate, inquiries or visits by mail carriers, newspaper deliverers, census takers, neighbors, friends, utility workers and others who restrict their movements to the areas of one's property normally used to approach the home."); State v. Gabbard, 877 P.2d 1217, 1221 (Or. Ct. App. 1994) ("We conclude that the 'No Trespassing' sign on the boundary fence, alone, was inadequate to exclude visitors who would use the driveway to make contact with the occupants of the house. A reasonable visitor could have

assumed that that sign was intended only to exclude those who might put the property to their own uses, but that it did not apply to visitors who desired to contact the residents."); United States v. Ventling, 678 F.2d 63, 66 (8th Cir. 1982) (quoting with approval the magistrate judge's opinion stating: "The absence of a closed or blocked gate in this country creates an invitation to the public that a person can lawfully enter along the driveway during daylight hours to contact the occupants for a lawful request and if the request is refused to leave by the same way. The presence of 'no trespassing' signs in this country without a locked or closed gate make the entry along the driveway for the purposes above described not a trespass"); see also United States v. Carloss, No. 13-7082, 2016 U.S. App. LEXIS 4547, at *15 (10th Cir. Mar. 11, 2016) (presence of "No Trespassing" sign is alone insufficient to convey to an objective police officer or member of the public that he or she may not go to the front door and knock); United States v. Denim, No. 2:13-cr-63, 2013 U.S. Dist. LEXIS 123269, at *4, *11-13 (E.D. Ten.. Aug. 26, 2013) (posting of six "No Trespassing" signs along the length of driveway did not revoke the implied license), adopted by, 2013 U.S. Dist. LEXIS 122498 (E.D. Tenn. Aug. 28, 2013). There was no trespass on the Scolnick-King property as a matter of law, and WLS's apology does not convert the event into one.

Even if the "No-Trespassing" sign could be regarded as having revoked the implied license for a WLS agent to approach Scolnick-King's gate and leave the note, the Complaint itself alleges that WLS apologized for the entry (Compl., ¶ 51) and WLS's September 2, 2014 apology letter assured Scolnick-King that "everyone will be instructed to ONLY enter your property if and when they have an appointment with you pre-arranged by phone or letter." (Fansler Cert., Ex. 4-7, 9/2/2014 letter from WLS to King.) Accordingly, there cannot be any reasonable apprehension that an alleged incident of this type would reoccur, which HALT would have to prove by clear and convincing evidence to justify the imposition of an injunction.

2. The WLS Agent Had An Implied License To Walk Up Hoff's Driveway And Knock On Her Front Door On August 7, 2015

Like the WLS agent on Scolnick-King's property in August 2014, the WLS agent had an implied license to walk up Hoff's driveway and knock on her front door to request survey access a year later, on August 7, 2015. (Compl., ¶ 58.) See Jardines, 133 S. Ct. at 1415; see also Davis v. City of Milwaukee, No. 13-cv-982, 2015 U.S. Dist. LEXIS 11054, at *41-42 (E.D. Wis. Aug. 21, 2015) (implied license extends to "areas that society would expect others to walk on your property—up to the front door, along a side walk that is open to reach a back door, up a driveway, etc.").[3] As HALT points out, there is a dispute as to whether there was a "No Trespassing" sign on Hoff's property. (HALT Supp. Br. at 10; Marx Aff., ¶ 19.) This factual dispute, however, is immaterial because even if there was a "No Trespassing" sign, it would not have revoked the WLS agent's implied license. See J.M., 339 N.J. Super. at 248; Carloss, 2016 U.S. App. LEXIS 4547, at *15; Denim, 2013 U.S. Dist. LEXIS 123269, at *4, *11-13.

3. The Surveyors Were Lawfully In The Public Right Of Way And Thus Not Trespassing On Poles's Property On June 27, 2015.

HALT continues to believe, wrongly, that the civil survey base station that was set up on the public right of way along Russell Poles's property on June 27, 2015, constitutes an "illegal survey." (Compl., ¶ 56; HALT Supp. Br. at 8; Marx Aff. ¶ 18.) As discussed below, the surveyors had a legal right to conduct a survey on the land adjacent to the county road and within its forty-foot public right of way on that side of the street.

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[3] Because the implied license extends to driveways, the allegations concerning entries into driveways by USIC and Dobilas (Compl., ¶¶ 63-64, 67-71) likewise do not amount to trespassing as a matter of law.

The Delaware Township police report on which HALT relies for its claim states that Patrolman Schumacher responded to Poles's residence at 118 Worman Road for a report of trespassing on June 27, 2015. (Fansler Cert., Ex.5-1, Delaware Township police report.)[4] Patrolman Schumacher further reports:

> Earlier today the survey team was in his field alongside of ***Route 523***. When he tried to approach them they drove off in a white Cadillac Escalade leaving their survey equipment behind. I advised Mr. Poles that if he did not want the equipment on his property he had the right to remove it. I followed him to the location where he took down the survey tripod and layed it out at the edge of the roadway on ***Rt. 523***. The tripod was located approx. ***25 to 30 ft*** on to Mr. Poles' property.

(Id.) (emphasis supplied). CR 523 is a road owned by Hunterdon County. (Affidavit of Tyrone Baccile, ¶ 7 and Ex. 2, Delaware Township Tax Map.)

Although the alleged trespass occurred on CR 523, HALT's supplemental submission offers proof about the width of the public right of way on Worman Road, where the police originally responded and where Poles lives. (HALT Br. at 9 ("Mr. Poles lives on an unpaved, rural lane"); Compl, Caption (citing 118 Worman Road as Poles's address); Fansler Cert., Ex.5-1, Delaware Township police report) ("Responded to the Poles residence at 118 Worman Road.") At page 9 of their brief, Plaintiffs state that Mr. Poles lives on a rural road that has at most a forty-foot ROW that would extend no more than 10-15 feet from the edge of the road. Plaintiffs are incorrect that N.J.A.C. § 5:21-4.2 applies to county roads. The public right of way on Worman Road is irrelevant because it is a completely different type of road, and the police report referred

[4] The Delaware Township police report is also referenced in the Complaint and in Poles's Certification. (Compl., ¶ 56; Poles Cert., ¶¶ 5, 8.) Poles discusses in his Certification an alleged incident that occurred "[a] few months earlier." (Poles Cert. ¶¶ 6-7.) This incident, however, does not serve as the basis for HALT's trespass claim. (Compl., ¶ 56.)

to in the Complaint makes clear that the surveying activity is alleged to have taken place on Poles's property alongside CR 523.

Crediting the Police Report, the alleged incident took place in the field on the east side of 118 Worman Road (Block 53, Lot 1), in the area adjoining CR 523. (Baccile Affidavit, ¶ 8.) The Tax Map attached as Exhibit 2 to the Baccile Affidavit, specifies that the right of way ("ROW") in that area is eighty (80) feet, or forty (40) feet to the west of the centerline of CR 523. (Id., ¶ 9.) The ROW is designated on the map by a marking on Block 53, Lot 2, reading 40′ with an arrow pointing east towards the center of the road, and a second arrow on Block 53, Lot 6.05 pointing west towards the road. (Id.) According to information from the New Jersey Department of Transportation, the pavement on CR 523 is 24 feet wide with a 2-foot shoulder on either side in that area. The total width of the pavement, including the shoulder, is therefore 14 feet on either side of the centerline. Because the ROW extends 40 feet from the centerline, 26 feet of unpaved property is within the public ROW on either side of CR 523. (Id. ¶ 10.) That information was posted electronically so that survey teams could use it for the project. (Id.) The Police Report's estimate that survey equipment was located approximately 25-30 feet onto Mr. Poles's property adjacent to CR 523, therefore, is consistent with the equipment being within the public ROW. (Id. ¶ 11.)

While in the public right of way, the surveyors were permitted to conduct surveys pursuant to N.J.S.A. § 46:11-1 ("Right of entry to make surveys in certain proceedings."). See also Starego v. Soboloski, 21 N.J. Super. 389, 391-92 (App. Div. 1952) ("There seems to be little doubt but that a person who owns lands across which a highway has been constructed owns the fee simple of the highway, subject only to the public easement, and that the public easement extends not only to the use of the surface of the land for purposes of passage, but also to the portion

which lies beneath the surface wherever it is needed for water pipes, sewer pipes, gas pipes or any other legitimate state use."). Specifically, the statute provides:

> In any proceeding to lay out, alter, vacate or open a public road or street, or to determine which of the proprietors or possessors of the lands adjacent to any highway have narrowed or encroached on the same, and in any proceeding under the act entitled "An act to enable the owners of swamp or meadow ground to drain the same, and to repeal a law heretofore made for that purpose," approved November twenty-fourth, one thousand seven hundred and ninety-two, and the several supplements thereto, ***and in any other proceeding touching a public improvement, any practical surveyor, with the necessary assistants, employed by any person interested in any of such proceedings, may enter on the lands adjacent to such highways or streets***, or the lands to be drained under the provisions of said act, ***or other lands, for the purpose of making necessary surveys***, doing as little damage as possible to the owner or owners of such lands.

N.J.S.A. § 46:11-1 (emphasis supplied). [5]

As PennEast explained in detail in its accompanying motion to dismiss the Complaint with prejudice, the FERC proceeding, which involves a determination as to whether to permit PennEast to construct, own, and operate a new natural gas pipeline system, is a "proceeding touching a public improvement" within the meaning of the statute. See generally PennEast Motion to Dismiss § I.B., discussing authorities. The surveyors thus had the right to be within the public right of way for the purpose of conducting surveys necessary for the FERC proceeding.

4. PennEast Cannot Be Held Liable As A Trespasser For The Unintentional Entry Onto Copper Creek Preserve On July 27, 2015.

The New Jersey Supreme Court has recognized that a defendant is liable in trespass (a) for an intentional entry onto another's land, Ross v. Lowitz, 222 N.J. 494, 510 (2015) (citing Restatement 2d Torts ("Restatement") § 158); and (b) if the defendant "'recklessly or negligently,

[5] FERC, in fact, advises landowners that statutes such as N.J.S.A. § 46:11-1 exist to allow a gas company access to property for survey purposes. (Fansler Supp. Cert., Ex. 34, *Gas facility on my land? What do I need to know?*, at 34-24 ("Some states have laws that allow a company to get access to property for survey purposes.").

or as a result of an abnormally dangerous activity enters' onto another's land, and the entry causes harm." Ross, 222 N.J. at 510 (quoting Restatement § 165.) Here, HALT asserts a claim for intentional trespass against PennEast based on entries by third party surveyors and others. A defendant may be liable for trespass if he intentionally causes a third person to enter land in the possession of another. Restatement § 158(a) and comment *j*. Any allegation that PennEast intentionally entered onto Copper Creek Preserve on July 27, 2015 (Compl., ¶ 45), or caused another to do so on its behalf, is directly contradicted by (a) PennEast's letter dated August 11, 2015 to the New Jersey Conservation Foundation ("NJCF"), which is referred to in ¶ 45 of the Verified Complaint and attached as Exhibit C to the Devito Certification; (b) the Marx Affidavit; and (c) the Affidavit of Daniel Murphy.

As PennEast explained in its August 11th letter, the entry was "unintentional" as the surveyors "unwittingly strayed" onto the Copper Creek Preserve due to their use of an older map file that did not reflect that the parcel had been subdivided from an adjacent parcel for which PennEast had been given survey permission. (Devito Cert., Ex. C, 8/11/2015 letter from PennEast to NJCF.) Marx further explained:

> Based upon my investigation of this matter, I concluded that the surveyors were relying on an outdated map file that did not reflect that the landowner's parcel (Block 12, Lot 31.01) had been subdivided from an adjacent parcel (Block 12, Lot 31.00) for which PennEast had been given survey permission. Upon arrival, the surveyors—college students working under the supervision of a trained biologist—began setting up their mist-net poles and gear. At sunset they opened their nets and went to the road where they were parked, to get the remaining gear needed for the night. As soon as they were made aware of their error, the surveyors immediately left the property.

(Marx Aff., ¶ 13.) Daniel Murphy's affidavit provides the court with copies of maps reflecting the original data used by the survey crews and the updated data that shows the split between Block 12, Lot 31.00 (owned by Frenchtown Run LLC/Frank Palopli) and Block 12, Lot 31.01 (owned by

NJCF and Hunterdon Trust Alliance). (Murphy Aff., Exs. 5 & 6.) Anyone using the older map, as the bat survey team was, would believe they were on the Frenchtown property for which survey permission had been granted.

In an attempt to prove an intentional trespass on Copper Creek Preserve through its supplemental submission, HALT offers the Palopoli Certification, which states that he is the owner of the property adjacent to Copper Creek Preserve and that (a) he gave permission for civil engineering surveys; but (b) "I did not give PennEast any permission to perform bat or other type of environmental surveys on my land." (Palopoli Cert., ¶¶ 5, 9.) These statements are false.

On December 17, 2014, Palopoli signed a Survey Permission Form on behalf of Frenchtown Run, LLC ("Frenchtown"), the owner of the adjacent property, expressly stating, in pertinent part:

> I/We hereby give PennEast Pipeline Company, LLC (PennEast), its affiliates, agents, employees, and contractors, as well as its surveyors, biologists, archeologists, and environmental scientists, permission to enter upon my/our premises described below ("Property") to conduct civil surveys, ***environmental surveys, and all other surveys and tests necessary for a pipeline route study*** . . . .

(Affidavit of Daniel Murphy, Ex. 3) (emphasis supplied). The Survey Permission Form contains handwriting that states: "This permission expires one year from the date hereof." (Id.) The alleged trespass clearly took place within the period covered by Palopoli's express written permission. On March 27, 2015, Palopoli modified the survey rights granted to exclude surveys that require digging, specifically archeological surveys. (Murphy Aff., ¶ 8.) At no time prior to December 17, 2015, did he rescind the Survey Permission Form. (Murphy Aff. ¶ 8.)

On July 24, 2015, Daniel Murphy ("Murphy"), a WLS right-of-way agent, emailed Palopoli to notify him that PennEast was planning to conduct a bat survey on his property at night

in the coming days. (Id., ¶ 9 and Ex. 4.) On July 27, 2015, Murphy emailed Palopoli to confirm that the bat survey would take place that evening. (Id.)

HALT has presented no facts demonstrating that PennEast intentionally caused or directed the surveyors to enter the Copper Creek Preserve. To impose liability upon PennEast for trespass under these circumstances would be tantamount to strict liability, which the Supreme Court in Ross expressly held was eliminated except for abnormally dangerous activities. 222 N.J. at 510. Specifically, the Ross Court held:

> [A] defendant is not liable in trespass for "an unintentional and non-negligent entry on land in the possession of another," regardless of the harm done. [Quoting Restatement, § 166[6].] The commentary confirms that strict liability is eliminated except for abnormally dangerous activities. [Citing Restatement, § 166, comment *b*.[7]] Like a private nuisance claim under section 822 of the Restatement, a cause of

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[6] Section 166 provides:

> Except where the actor is engaged in an abnormally dangerous activity, an unintentional and non-negligent entry on land in the possession of another, or causing a thing or third person to enter the land, does not subject the actor to liability to the possessor, even though the entry causes harm to the possessor or to a thing or third person in whose security the possessor has a legally protected interest.

Restatement § 166 (emphasis supplied).

[7] Comment *b* to § 166 states:

> The early English common law seems to have imposed liability upon one whose act directly brought about an invasion of land in the possession of another, irrespective of whether the invasion was intended, was the result of reckless or negligent conduct, or occurred in the course of an abnormally dangerous activity, or was a pure accident, and irrespective of whether harm of any sort resulted to any interest of the possessor. All that seems to have been required was that the actor should have done an act which in fact caused the entry. At the present time, however, except in the case of one carrying on an abnormally dangerous activity, an unintentional and non-negligent entry or remaining on land in the possession of another or causing a third person or thing so to enter or remain is not a trespass on

> action for trespass requires a showing of intentional, reckless or negligent conduct, or the conduct of abnormally dangerous activity. [Citing Restatement, §§ 165-66.] In short, "[strict] liability without fault should not be imposed, whether that activity be classified as a nuisance or a trespass, absent intentional or hazardous activity requiring a higher standard of care, or as a result of some compelling policy reason." [Quoting Burke v. Briggs, 239 N.J. Super. 269, 273 (App. Div. 1990)]

Id.

Here, PennEast's intent was for the surveyors to conduct the bat surveys on the parcel of land for which PennEast had survey permission, not on Copper Creek Preserve, (Marx Aff., ¶ 13), but the surveyors "unwittingly strayed" onto the Copper Creek Preserve. (Devito Cert., Ex. C, 8/11/2015 letter from PennEast to NJCF.) The Complaint contains no facts demonstrating that PennEast intentionally caused the surveyors to enter the Copper Creek Preserve. Absent such facts, PennEast cannot be held liable for the intentional tort of trespass. Further, any trespass under these circumstances—entry by mistake followed by an apology and concrete steps taken to avoid a similar mistake in the future—demonstrate that there is no risk of imminent and irreparable harm and that this incident cannot support HALT's application for injunctive relief.

HALT's reliance on the 1960 Appellate Division decision in La Bruno v. Lawrence, 64 N.J. Super. 570 (App. Div. 1960), and on Restatement § 164 is misplaced. (HALT Supp. Br. at 4-8.) In La Bruno, the court stated that a surveyor committed a trespass when he wrongfully placed stakes that were subsequently used to erect a fence on the plaintiff's property, and that "his mistake, honest belief, or professional neglect, is no defense to a trespass." 64 N.J. Super. at 576 (citing

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> land and imposes no liability upon him. This is true although harm results to the land or to some other interest of the possessor.

Restatement § 166, cmt. *b*.

Restatement § 164.) Last year in Ross, however, our Supreme Court effectively rejected § 164 in holding that strict liability without fault should not be imposed for trespass. 222 N.J. at 510; see also Burke, 239 N.J. Super. at 270, 273 (finding the imposition of strict or absolute liability on a landowner for a trespass due to the falling of a tree onto the neighbor's property would be "basically unfair and inappropriate").

To hold PennEast liable for intentional trespass when it did not intend for its surveyors to enter Copper Creek Preserve would contravene the Supreme Court's decision in Ross and the Restatement's own definition of "intent," which the Supreme Court has adopted. See Millison v. E.I. Du Pont de Nemours & Co., 101 N.J. 161, 178 (1985). Specifically, Restatement § 8A provides: "The word 'intent' is used throughout the Restatement of this Subject to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it." Restatement § 8A. There is no basis in the Complaint, the documents referenced therein, or the submissions of the parties to conclude that PennEast desired to cause the surveyors to enter upon the Copper Creek Preserve on July 27, 2015, or that PennEast believed that that entry was substantially certain to result from any act on the part of PennEast. And even if there was, an isolated incident of trespass would not support granting the injunctive relief HALT seeks.

5. PennEast Cannot Be Held Liable For Alleged Trespasses On The Part Of Dobilas And Other USIC Employees

The majority of HALT's trespass allegations are based on conduct by Dobilas and USIC employees. (Compl., ¶¶ 53, 60, 63-71.) As PennEast explained in its TRO opposition, "Dobilas does not work, and never has worked, for or on behalf of PennEast or WLS" and he has "no

connection to PennEast." (Marx Aff., ¶¶ 15, 17.)[8] Dobilas works for USIC, a company that performs location and markout of underground facilities for utility companies. (Id., ¶ 15; http://www.usicllc.com/damage-prevention.)[9]

Striving to rebut those facts, HALT describes USIC as a "natural gas surveyor" and relies almost exclusively on a "work order showing that Dobilas was performing surveys on behalf of UGI," which is the project manager for the Project. (HALT Supp. Br. at 11.) But that work order is referenced in a Delaware Township Police Report, which confirms that Dobilas is a USIC employee and that he was checking for underground and electric and gas utilities on behalf of USIC as part of the State's "Call Before You Dig" program. (Fansler Cert., Ex. 15-1 – 15-2.) Specifically, the report by Police Officer Gray states, in part:

> I made contact with the operator/USIC employee, Audrius Dobilus. Dobilus stated he is contracted through the State's Program #881 or NJ1 "Call Before You Dig." He received a work order from his company to check for underground electric and gas utilities in the area of Sandy Ridge Road, Worman Road, and Sergeantsville Road. I asked to see Dobilas's work order. Dobilas had the work order on his lap top inside the vehicle. ***The work order was requested by UGI Energy and American Gas to the State of New Jersey.***
>
> . . . .
>
> At headquarters I completed internet searches on all the companies. USIC does complete underground utility work for the New Jersey "Call Before You Dig" program.

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[8] Although HALT asserts, in conclusory terms, that some of the alleged trespassers are PennEast's agents, it has not presented any evidence establishing the existence of an agency relationship between PennEast and any of the alleged trespassers. See TBI Unlimited, LLC v. Clearcut Lawn Decisions, LLC, No. 12-cv-3355, 2013 U.S. Dist. LEXIS 41206, at *11 (D.N.J. Mar. 25, 2013) ("A plaintiff may not simply assert in conclusory terms that a party is another party's agent for purposes of vicarious liability.").

[9] USIC's legal name is USIC Locating Services, LLC. (https://bsd.sos.in.gov/PublicBusinessSearch/BusinessInformation?businessId=370328.)

(Id.) (emphasis supplied). The police report does not state that Dobilas or USIC were performing surveys on behalf of UGI Energy in connection with the Project.[10]

HALT argues that unless PennEast produces the work order, "the evidence suggests that USIC was surveying on behalf of PennEast, and therefore PennEast would be liable for Dobilas' acts of trespass." (HALT Supp. Br. at 16.) This argument impermissibly shifts the burden of proving the likelihood of success to PennEast. As the movant, HALT alone has the burden of

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[10] The police report also provides further detail of the confrontation between Dobilas and Evans, as alleged in the Verified Complaint. (Compl., ¶¶ 68-69.) The Complaint states that Dobilas told Evans that he was doing work for a buyer's realtor, but that Evans called the realtor and homeowner who stated that Dobilas had no permission to be on the land. The police report shows erratic behavior on the part of Evans and confirms that Dobilas did, in fact, have permission to be on the property. The police report states, in pertinent part:

> At approximately 1130 hours, Jacqueline Evans arrived at headquarters to report suspicious activity. Evans stated she observed the subject along Sergeantsville Road. ***She began following and video recording Dobilas.*** She followed Dobilas from Worman Road to Severns Way. She then observed Dobilas park in a vacate lot on Severns Way. She then observed Dobilas south again on Sergeantsville Road. Dobilas then pulled over to confront Evans due to him being followed by her. He stated that he did not want to be video recorded and felt what she was doing was illegal. She stated she didn't believe it was and said he could video her. He stated he called the police. The police department was not contacted. He asked why she was following him. She stated because I want to know what you are doing and who you are working for. He stated he is working for a gas company. She then followed Dobilas North on Sergeantsville Road to Sandbrook Headquarters Road, then to Yard Road. Dobilas pulled into 35 Yard Road, a house which is for sale. She called the realtor from the sign at the end of the driveway to see if Dobilas had permission to be on the premises. The seller realtor and homeowner both stated Dobilas did not have permission to be on the property. The buyer's relator then arrived for inspections. ***The buyers realtor then stated Dobilas had permission to be on the premises for ground work***. Evans stated the incident was suspicious due to Dobilas working in the area of the proposed PennEast Pipeline route, then claiming to work for the realtor.

(Marino Cert., Ex. 13) (emphasis supplied).

proving the Crowe factors by clear and convincing evidence. Shakibai v. Hackensack Univ. Med. Ctr., No. BER-C-15, 2015 N.J. Super. Unpub. LEXIS 2399, at *15 (Ch. Div. Oct. 19, 2015) (recognizing that the movant bears the burden of proving each Crowe factor by clear and convincing evidence); Mega Brands Am., Inc. v. Cerillo, No. ESX-C-69-14, 2014 N.J. Super. Unpub. LEXIS 2990, at *27 (Ch. Div. Dec. 5, 2014) ("The movant carries the burden of proving its entitlement to injunctive relief by clear and convincing evidence."). HALT's suspicion and conjecture that Dobilas was a surveyor conducting surveys on behalf of UGI, which, in turn, was conducting surveys on behalf of PennEast, does not meet the requisite standard of clear and convincing evidence. See Landau v. Rosenbaum, 15 N.J. Super. 524, 532 (Ch. Civ. 1951) (suspicion and conjecture do not amount to clear and convincing proof); Oldham v. Dendrite Int'l, Inc., No. SOM-C-12017-07, 2007 N.J. Super. Unpub. LEXIS 2999, at *44 (Ch. Div. May 2, 2007) ("The Court will not issue a preliminary injunction based upon conjecture.").

Although PennEast does not have the burden of proof, it has submitted the Affidavit of Grace Ziesing, RPA ("Ziesing") to provide the Court with information regarding the manner in which PennEast complies with the Underground Facilities Protection Act ("UFPA"), N.J.S.A. § 48:2-73 to -91 and its implementing regulations before it digs on a property for which it has secured survey permission. Ziesing is a registered professional archaeologist and Senior Archaeologist for AECOM. (Ziesing Aff., ¶ 1.) PennEast engaged AECOM to perform archaeological surveys along the route of the proposed interstate natural gas pipeline. (Id.) As a Senior Archaeologist for AECOM, Ziesing is responsible for scheduling and conducting archaeological surveys along the planned pipeline route in New Jersey. These surveys are designed to locate and identify artifacts, archaeological sites, and other cultural features so that PennEast, in consultation with the New

Jersey Historic Preservation Office, can determine whether the pipeline route should be adjusted to account for the presence of the cultural resources. (Id., ¶ 2.)

To conduct cultural resource surveys, AECOM must dig shovel test pits on properties under evaluation. (Id., ¶ 3.) Approximately once a week, Ziesing receives an updated list of properties for which WLS has obtained survey permission from landowners or their agents. Cultural surveys, like all other surveys conducted by or on behalf of PennEast, are only conducted on properties for which WLS has obtained express permission or where otherwise authorized by law. (Id., ¶ 4.) Because the cultural resource surveys require digging shovel test pits, the survey planning process involves complying with the UFPA. Under N.J.S.A. § 48:2:82, "[a]n excavator shall notify the One-Call Damage Prevention System established pursuant to section 4 [C.48:2-76] of this act of his intent to engage in excavation or demolition not less than three business days and not more than 10 business days prior to the beginning of the excavation or demolition."

In compliance with the UFPA, Ziesing contacts the New Jersey One Call center by creating an electronic ticket on the One Call's online system to provide notice of the intent to dig in a particular area at least three business days before the survey. (Id., ¶ 5.) The One Call center then contacts utility companies that have facilities in that area to notify them of AECOM's intent to dig. (Id., ¶ 6.) The utility companies then must comply with N.J.S.A. § 48:2-80 and mark out their facilities; often they do so by sending out locating companies, such as USIC, Utiliquest, and Atlantic Infratrac, to perform the markouts on behalf of the utility companies. Ziesing does not contact the utility companies or the locating companies directly. (Id. ¶ 7.)

As Ziesing further explains, a Delaware Township police report referred to in the Complaint describes an area where Dobilas was to check for underground facilities pursuant to the request of "UGI Energy and American Gas" that matches the area for which Ziesing created a One

Call online ticket on January 11, 2016. (Id., ¶¶ 9-12.) To the extent Dobilas was sent by USIC to markout utilities for American Gas for the ticket created by Ziesing, the address on the ticket describes a property for which PennEast had survey permission. (Id., ¶ 13.)

In short, HALT cannot succeed on the merits of its trespass claim based upon the acts of Dobilas and USIC employees because (i) Dobilas and USIC do not work for PennEast, as employees, agents, or independent contractors; and (ii) PennEast cannot be held liable for their acts, as they are all entirely outside of PennEast's control.[11] See State, Dep't of Envtl. Protection v. Exxon Corp., 151 N.J. Super. 464, 483-84 (Ch. Div. 1977) ("A person is not civilly liable for a nuisance caused or promoted by others over whom he has no control . . . ."). Moreover, HALT has not identified a single instance in which USIC or Dobilas committed a trespass.

[11] Dobilas and USIC are not independent contractors retained by PennEast, as HALT speculates (Pl. Supp. Br. at 14). And even if they were, PennEast could not be held vicariously liable for any tortious acts that it did not direct or participate in. As the New Jersey Supreme Court recognized, "[g]enerally, . . . the principal is not vicariously liable for the torts of the independent contractor if the principal did not direct or participate in them." Baldasarre v. Butler, 132 N.J. 278, 291 (1993). HALT mistakenly relies on Restatement § 427B in arguing that PennEast could be held liable for conduct on the part of an independent contractor. (HALT Supp. Br. at 14.) But the Marx Affidavit submitted with PennEast's original application confirms that Dobilas was not working for PennEast, as an independent contractor or otherwise. (Marx Aff. ¶ 17 ("Mr. Dobilas has no connection to PennEast.") Even if New Jersey had adopted Restatement § 427B, which it has not, it is inapplicable because PennEast did not know and had no reason to know that Dobilias's work would "be likely to involve a trespass upon the land of another." As the Affidavit of Grace Ziesing makes clear, when PennEast alerts the New Jersey Once Call System of its intent to dig, it identifies properties for which it has permission to conduct those activities. PennEast has no knowledge of or control over how operators of underground facilities thereafter discharge their statutory obligation to markout their facilities on those properties. (Marx Aff., ¶ 21; England Aff., ¶ 7; Ziesing Aff. ¶¶ 5-13.)

6. HALT Does Not Allege Any Unauthorized Entry On The Markus Property On March 24, 2016[12]

The Complaint includes allegations relating to the surveyors' encounter with the Markuses on March 24, 2016 (Compl., ¶ 73) but these allegations themselves show that there was no trespass. As HALT alleges, surveyors "began walking towards [Markus's] land to enter for surveys, but "William Markus stopped the surveyors from entering his property . . . ." (Id.) The surveyors heeded Markus's direction not to enter the property to conduct a survey. (Marx Aff., ¶ 23.) Of course, absent any entry onto the Markus property, there was no trespass.

7. HALT Does Not Allege Any Unauthorized Entry On The Markus Property To Perform A Survey.

HALT alleges that color-coding in PennEast's application filed with the DRBC on February 8, 2016, shows that the Markus property was "surveyed" and asks the Court to conclude that there must have been a trespass because the Markuses did not give survey permission. (Compl., ¶ 75.) PennEast disproved this alleged instance of trespass through the Marx Affidavit, which stated unequivocally that no survey has been performed on the Markus property. (Marx Aff. ¶ 24.) HALT's unfounded suspicion that a survey must have been conducted by an unconsented entry on the Markus property is entitled to no deference whatsoever. See Myska v. New Jersey Mfrs. Ins. Co., No. BER-L-5136-13, 2014 N.J. Super. Unpub. LEXIS 650, at *7 (Law Div. Mar. 21, 2014) (court should not accept as true "conclusions or inferences that are unsupported by facts"); see also Nassau Constr. Co. v. Pulte Homes, Inc., No. 07-cv-5536, 2008 U.S. Dist. LEXIS 41631, at *13 (D.N.J. May 29, 2008) (allegation that constituted "nothing more than an intangible suspicion" could not, by itself, survive a motion to dismiss).

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[12] HALT does not include the Markus property in its discussion of the instances in which it believes that PennEast admitted the facts necessary to prove trespass. (HALT Supp. Br. at 8-11.)

As Marx explained in his Affidavit, on November 12, 2015, Markus granted limited survey permission for the purpose of allowing an engineer to walk his property to show him the planned location of the pipeline. (Marx Aff., ¶ 23.) On February 10, 2016, Anthony Akers ("Akers") from WLS and Jeff Law ("Law"), an engineer from Hatch Mott McDonald, met Markus on his property. Akers and Law pointed out to Markus the intended location of the pipeline on the Markus parcel. (Id.) Markus showed Akers and Law the location he would prefer to have the pipeline and showed them the location of a garage he intended to build and the location of two perk tests he had performed. (Id.) This was ***not*** a survey, but an information sharing meeting. (Id.) At Markus's request, no pictures were taken of the sites he pointed out. (Id.) There was never an unauthorized entry on the Markus property and no survey has been or will be done on that property without authorization. (Id.)

8. Entry onto Muddy Run Preserve on September 30, 2015[13]

HALT alleges that PennEast workers entered the Muddy Run Preserve after being denied access by the Hunterdon Land Trust. (Compl., ¶ 61.) The Hunterdon Land Trust is not a named plaintiff and is not alleged to be a member of HALT. Accordingly, this entry cannot serve as the basis for a trespass claim in this action. In any event, as Marx explained in his Affidavit, on September 30, 2015, surveys were being conducted on properties for which PennEast had survey permission. (Marx Aff., ¶ 22.) While the surveys were being conducted, the surveyors were approached by two gentlemen who believed that they were surveying a property for which access had been denied. (Id.) That was not the case. A control point was set up in the public right of way adjoining the Muddy Run Preserve, but the property itself was not being surveyed. (Id.)

[13] HALT does not include the Muddy Run Preserve in its discussion of instances in which PennEast allegedly admitted facts necessary to prove trespass. (HALT Supp. Br. at 8-11.)

Although the surveys were discontinued to avoid any further confrontation, PennEast was not legally required to discontinue the surveys because it had the right to put survey equipment on a public right of way. (Id. and Ex. 2, 11/4/2015 letter from PennEast to the Township of Kingwood.)

C. HALT Has Not Presented Any Additional Proof That It Will Suffer An Immediate, Irreparable Harm Absent A Preliminary Injunction.

In denying HALT's request for a TRO, the Court determined that the alleged conduct did not rise to the level of irreparable harm. With respect to HALT's nuisance claim, the Court determined that "there's no indication whatsoever that any of the flights after . . . December 2015 were caused by PennEast or an agent of PennEast." (5/10/2016 Tr. at 32:3-5.)[14] With respect to the trespass claim, the Court determined that "there is nothing in the last . . . seven months since September 30th that rises to the level of a potential trespass." (Id., 5/10/2016 Tr. at 33:12-14.) The Court also found that there was no threat of future trespasses given the significant amount of time that had passed since the last alleged trespass, and that "an injunction should not issue to allay fears or apprehension of future conduct when the evidence does not point to the fact that that will continue." (5/10/2016 Tr. at 34:7-13); Local Bd. of Health v. Interstate Waste Removal Co., 191 N.J. Super. 128, 142 (Law Div. 1983); McGuire v. Township of Waterford, No. A-3196-05T5, 2007 N.J. Super. Unpub. LEXIS 2436, at *8 (App. Div. Feb. 28, 2007); see also Howard v. Jersey City, 102 N.J. Eq. 213, 220 (Ch. Ct. 1928) ("Courts of equity do not ordinarily restrain, by injunction, particularly by interlocutory injunction, the commission of mere trespass; there must be some great vexation from continued trespasses, or some irreparable mischief, which cannot be

[14] Apparently, in light of the indisputable proof that PennEast is not currently conducting any overview flights, has no plans to conduct such flights, and has not done so since July 2015. (England Aff., ¶¶ 17, 20), HALT has abandoned its irreparable harm argument as to its nuisance claim.

easily measured by money damages, to authorize interference by injunction."). These findings were sound, and HALT has presented no facts that would cause the Court to revisit them.

As the Court also acknowledged, PennEast has represented that it will not enter any properties at this time without landowner permission. (5/10/2016 Tr. at 37:16-18; see England Aff., ¶ 7 ("PennEeast continues to work with landowners to obtain voluntary access . . . If FERC approves PennEast's application, it will have the power of eminent domain and thus be able to compel any necessary surveys before constructing the project. Until that time, property owners have every right to deny PennEast access to their property to conduct surveys and PennEast has honored and will continue to honor the landowners' wishes in that regard."); id., ¶ 12 ("PennEast has no plans to, and will not, survey private property unless it has (i) express permission from the property owner, or (ii) eminent domain power."); Marx Aff., ¶ 25 ("WLS's primary responsibility at this stage of the project is to work with landowners to obtain [their] permission.").

Because HALT has not alleged any new trespasses and PennEast has represented that it will honor landowners' property rights, an injunction is wholly unnecessary. Medimport, S.R.L. v. Cabreja, No. 12-cv-22255, 2012 U.S. Dist. LEXIS 121667 (S.D. Fla. July 31, 2012) (finding no need for preliminary injunctive relief where the challenged conduct ceased and the defendant represented that such conduct would not continue); Stokely-Van Camp, Inc. v. Coca-Cola Co., 646 F. Supp. 2d 510 (S.D.N.Y. 2009) (defendant's cessation of the challenged conduct during the pendency of the lawsuit and its sworn declarations and testimony under oath that the conduct would not resume obviated the need for a preliminary injunction).

The remedy for any past acts of intentional trespass, if they could be proven, is money damages. See Wilkie v. Robbins, 551 U.S. 537, 551 (2007) (noting that plaintiff had "a civil remedy in damages for trespass" due to an unauthorized survey of a desired easement); Columbia

Gas Transmission Corp. v. First Congregational Church, No. 1:07-cv-661, 2008 U.S. Dist. LEXIS 4584, at *6 (N.D. Ohio. Jan. 10, 2008) (recognizing that an "action for trespass is a traditional tort, and damages are traditional legal relief" and that an action for trespass seeking money damages for the past clearing of trees along a pipeline was a legal claim that came with a right to a jury trial).

HALT has not presented ***any*** additional evidence in its supplemental submission tending to show that it is subject to an immediate threat of continued trespasses. Instead, HALT points to its allegations of past acts of trespass and of the attempted entry onto the Markus property on March 24, 2016. (HALT Supp. Br. at 18-20.) These allegations, beyond having been effectively rebutted, are hardly "clear and convincing evidence" that HALT is subject to an immediate threat of continued trespasses. See City of Newburg v. Sarna, 690 F. Supp. 2d 136, 168 (S.D.N.Y. 2010) (finding that excessive sediment discharges that occurred a year and two years earlier were isolated events and not proof of an imminent threat of irreparable harm). As this Court recognized, an injunction may not be granted to prevent past acts of conduct. (5/10/2016 Tr. at 31:6-8); see also Local Bd., 191 N.J. Super. at 142; McGuire, 2007 N.J. Super. Unpub. LEXIS 2436, at *8.

HALT's claim that PennEast trespassed more than once on King's property, the Buchanans' property, and the NJCF property (HALT Supp. Br. at 18 & n.10) is false. The entry on King's property in August 2014 did not constitute a trespass as a matter of law because, as discussed above, the WLS agent had an implied license to walk up to King's gate and leave the note. There are no allegations that, after King complained and WLS apologized (Compl., ¶ 51; Fansler Cert., Exs 4-5, 4-7), any WLS agent or other person acting for PennEast subsequently entered the King property without permission. The alleged trespass by Dobilas two years later (Compl., ¶ 53) cannot be attributed to PennEast because, as discussed above, Dobilas was working

for USIC and was beyond PennEast's control. Similarly, the allegedly July 23, 2015 and January 4, 2016 entries onto the Buchanans' property cannot be attributed to PennEast because the workers were employed by USIC. (Compl., ¶¶ 60, 63-64; Fanser Cert. Ex. 8-2.) Moreover, Dobilas had an implied license to drive in the Buchanans' driveway. As for the July 27, 2015 entry onto NJCF's property, PennEast did not intentionally cause that entry, as discussed above. The subsequent re-entry was with permission for the purpose of removing equipment. (Marx Aff., ¶ 13.)

As for the March 24, 2016 incident, it actually undermines, rather than supports, HALT's irreparable harm argument. As the Marx Affidavit explains, Markus had previously given limited survey permission. (Markus Aff., ¶ 23.) Representatives from WLS and Hatch Mott McDonald subsequently walked with Markus, with his permission, on his property to discuss the planned location of the pipeline. (Id.) Markus rescinded survey permission on March 25, 2016, the day ***after*** the surveyors approached Markus. (Id.) There is no allegation that surveyors ever entered Markus's property on March 24, 2016, either before or after Markus directed them not to. As Marx averred, the surveyors "heeded [Markus's] direction not to conduct a survey on [his] property, and no survey has been or will be done on that property without authorization." (Id.)

In further support of its claim that it is subject to irreparable harm, HALT again argues that PennEast has an imminent need for surveys on HALT-owned properties. (HALT Supp. Br. at 20-25.) As England explained in his affidavit, there is no urgent need for PennEast to complete land surveys of all potentially impacted properties as a prerequisite to obtaining FERC approval. (England Aff., ¶¶ 5-7.) Moreover, HALT has not identified any additional instances of trespassing since it brought this action—a fact that completely undermines its theory of PennEast's motivation and the risk of future irreparable harm. If FERC ultimately issues a Certificate, PennEast will acquire the power of eminent domain and will then be able to conduct any necessary land surveys

prior to construction. (Id., ¶ 12); see also East Tenn. Natural Gas Co. v. Sage, 361 F.3d 808, 818 (4th Cir. 2004); 15 U.S.C. § 717f(h). There is no basis to believe it will violate the property rights of unwilling landowners in the interim.

Nor has HALT presented any "clear and convincing evidence" that rebuts England's Affidavit. Rather, HALT argues that (a) PennEast considers surveys necessary and intends to conduct them; and (b) surveys are needed for PennEast's FERC application and its applications with other agencies. (HALT Supp. Br. at 21-25.) PennEast does not dispute that land surveys are necessary or that it intends to conduct them. However, PennEast does not need to immediately conduct surveys of all affected properties and it will not survey private property unless it has either express permission from the property owner or eminent domain power. (England Aff., ¶ 12.) HALT has failed to produce any evidence demonstrating that, in the immediate future, PennEast will enter one or more HALT properties without the owner's permission to conduct surveys.

Finally, HALT argues that it will suffer irreparable harm if PennEast submits to FERC the survey data that HALT claims were illegally obtained from past trespasses. (HALT Supp. Br. at 25-26.) As explained above, none of the incidents cited by HALT amounts to an intentional trespass on the part of PennEast. And even if they did, HALT has failed to explain how FERC's consideration of such data would irreparably harm HALT. HALT states, in conclusory fashion, that the NJFC "faces an imminent threat that the bat survey data will be used . . . ." (HALT Supp. Br. at 26.) But, as Peter Marx explained in his original Affidavit, ***there is no bat survey data.*** (Marx Aff., ¶ 13 ("No bats were surveyed, no engineering, boring or soil work was conducted, and nothing was removed from the property.").)

The District of New Jersey decision HALT cites, Jackson Hewitt Inc. v. Cline, No. 14-cv-6931, 2015 U.S. Dist. LEXIS 147167 (D.N.J. Oct. 29, 2015), is inapposite. (HALT Supp. Br. at

25.). In Cline, the defendant was "poised to use or disclose" plaintiff's client files and its trade secret, confidential, and proprietary information in connection with defendant's businesses, which were competing with plaintiff's business. 2015 U.S. Dist. LEXIS 147167, at *3, 12. HALT does not assert that any information allegedly obtained from the properties owned by NJCF or Poles constitutes a trade secret or is confidential or proprietary in nature.

Even if HALT were able to demonstrate some sort of harm resulting from FERC's consideration of survey data, that harm would not be irreparable. If FERC does issue the Certificate and HALT believes it was improvidently issued because of FERC's reliance on unlawful data, HALT may apply to FERC for a rehearing pursuant to 15 U.S.C. § 717r(a). See Alliance Pipeline L.P. v. 4.360 Acres of Land, No. 4:12-cv-140, 2012 U.S. Dist. LEXIS 185443, at *21 (D.N.D. Nov. 26, 2012) (recognizing that "challenges attacking the propriety of a certificate of public convenience and necessity must first be brought to FERC upon an application for rehearing"). If HALT is unsuccessful at the rehearing, it may appeal that ruling to a United States Court of Appeals pursuant to 15 U.S.C. § 717r(b). See id.; see also Williams v. Natural Gas Co. v. Oklahoma City, 890 F.2d 255, 262 (10th Cir. 1989) ("Judicial review . . . is exclusive in the courts of appeals once the FERC certificate issues.").

HALT's failure once again to show any "immediate, irreparable harm is fatal to [its] application for preliminary injunctive relief." Confident Care Corp. v. Amerigroup N.J. Inc., No. BER-C-114-15, 2015 N.J. Super. LEXIS 1166, at *24 (Ch. Div. May 18, 2015).

D. HALT Has Not Shown That The Court's Prior Determination As To The Balancing Of The Hardships And The Public Interest Factors Was Incorrect.

At the OTSC hearing, the Court determined that "the balancing of the hardships here is . . . not very great in either party's favor[,]" but found that the public interest weighed against the issuance of injunctive relief. (5/10/2016 Tr. at 37:1-7.) Specifically, the Court found that "what

tips the balance is, because there's a public issue, I believe the consideration of the ability to have FERC make a determination . . . tips the balance in the Defendant's favor." (Id. at 37:3-7.) The Court further found that "the federal process needs to go forward" and that PennEast should not be "restrained from conducting any surveys which is what has been requested at this time." (Id. at 37:13-16.)

Citing National Sportswear, Inc. v. Red Diamond Co.-Athletic Lettering, No. 2:14-cv-01117, 2014 U.S. Dist. LEXIS 108604 (D.N.J. Aug. 6, 2014), HALT argues that PennEast would suffer no hardship from an injunction that would simply require PennEast to follow New Jersey law. (HALT Supp. Br. at 27.) National Sportswear, however, did not involve an application for a preliminary injunction, but an application for entry of a default judgment and, in that context, a request for, inter alia, a permanent injunction. 2014 U.S. Dist. LEXIS 108604, at *5, 7. On a motion for a default judgment, unlike an application for a preliminary injunction, the court treats the factual allegations as conceded by the defendant. Id. at *6. The court in National Sportswear determined that the plaintiff had adequately supported each cause of action asserted in the complaint: federal trademark infringement, unfair competition, common law trademark infringement, common law unfair competition, and tortious interference with prospective economic advantage and thus found that entry of a default judgment was appropriate. Id. at *4, 8-16. With respect to the request for a permanent injunction, the court found that a balance of hardships weighed in plaintiff's favor because the injunction "simply allows Plaintiff the protection [to which] it is entitled without harming Defendant in any way except to prevent it from its illegal activities." Id. at *18-19. Here, by contrast, HALT has not proven, and PennEast has not conceded, that PennEast has engaged in any illegal activities, or will do so in the future. An injunction is thus inappropriate.

As this Court already determined, an injunction prohibiting PennEast from conducting surveys would be contrary to the public interest because it would impede the FERC proceedings. HALT's supplemental submission offers no evidence to rebut that determination.

Finally, PennEast's position that the proposed PennEast Pipeline is a matter of significant public importance is not, as characterized by HALT, "only self-serving marketing." (HALT Supp. Br. at 29.) HALT does not want a pipeline to be installed, but bringing clean, affordable natural gas to millions of homes in New Jersey and Pennsylvania is, without doubt, a matter of significant public importance. See Sage, 361 F.3d at 826 (recognizing that the "need for natural gas supply" is "a substantial public interest").

II. THE COURT LACKS THE AUTHORITY TO ISSUE THE REQUESTED RELIEF

The National Gas Act "confers upon FERC exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale." Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300-301 (1988). It is beyond dispute that this exclusive jurisdiction encompasses the issuance of a Certificate of Public Convenience and Necessity for the construction and operation of a pipeline. American Energy Corp. v. Rockies Express Pipeline LLC, No. 2:09-cv-284, 2009 U.S. Dist. LEXIS 59972, at *7-8 (S.D. Ohio July 14, 2009) (citing cases). Indeed, FERC has promulgated "extensive and detailed regulations concerning applications for certificates." Colorado Interstate Gas Co. v. Wright, 707 F. Supp. 2d 1169, 1177 (D. Kan. 2010) (citing 18 C.F.R. Part 157, Subpart A).

Here, HALT seeks an injunction that would prevent PennEast from using data obtained through the surveys "in any filings with FERC or other state and federal agencies" (Compl., ¶¶ 115, 132) or "for any purpose." (Id., Requested Relief, ¶ 1(c)). If the Court were to grant the requested relief, it would undermine the authority of FERC and other federal agencies and impermissibly contravene the Supremacy Clause of the United States Constitution (Art. VI, cl. 2).

Arkansas La. Gas. Co. v. Hall, 453 U.S. 571, 581-82 (1981) (The Supremacy Clause will not permit a state court to usurp a function that Congress has assigned to a federal regulatory body); County of Stanislaus v. Pacific Gas & Elec. Co., 114 F.3d 858, 862 (9th Cir. 1997) (finding that to permit recovery under state law for antitrust claims arising out of the importation of natural gas "would impermissibly contravene the Supremacy Clause"); Washington Fed. Sav. & Loan Ass'n v. Balaban, 281 So.2d 15, 16 (Fla. 1973) ("state court was without authority to interfere with a hearing called by and before a Federal agency regulated by Federal law").

Moreover, the decision whether FERC should consider survey data that was allegedly obtained from site visits without first obtaining landowner consent in contravention of FERC's direction to PennEast to do so (Compl., ¶ 4) falls squarely within the exclusive jurisdiction of FERC. HALT recognized as much when it filed on FERC's docket comments making the trespass allegations. (Compl., ¶ 8) ("Plaintiffs have repeatedly alerted . . . FERC to Defendant's repeated trespasses by posting trespass information, police reports, videos, photographs and other direct evidence on the FERC official record for Defendant's application."). HALT's comments led PennEast to file a response on FERC's docket on March 11, 2016. (Compl., ¶ 101; Fansler Cert., Ex. 3/11/2016 letter from PennEast to FERC.)

HALT did not dispute, and thus effectively conceded, that the Court would violate the Supremacy Clause if it granted the requested relief. HALT instead discusses a preemption argument that PennEast never made. (HALT Supp. Br. at 31-32.) PennEast does not contend that the trespass and nuisance claims are preempted by federal law; rather, it contends that the relief requested by HALT falls within the exclusive jurisdiction of FERC and contravenes the Supremacy Clause.

CONCLUSION

For the foregoing reasons, the Court should deny HALT's application for a preliminary injunction.

Dated: June 1, 2016

Respectfully submitted,

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ATTACHMENT B

HOMEOWNERS AGAINST LAND TAKING-PENNEAST, INC., *et al.* Plaintiffs, v. PENNEAST PIPELINE COMPANY, LLC, Defendant.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION: HUNTERDON COUNTY DOCKET NO. : HNT-C-14014-16

DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' APPLICATION FOR AN ORDER TO SHOW CAUSE

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PRELIMINARY STATEMENT

Defendant, PennEast Pipeline Company, LLC ("PennEast"), respectfully submits this memorandum of law and the accompanying Affidavits of Jeffrey England (the "England Affidavit"), Senior Project Manager at UGI Energy Services, LLC ("UGI"), PennEast's Project Manager, and Peter Marx (the "Marx Affidavit"), Right-of-Way Manager for Western Land Services, Inc. ("Western"), a PennEast's consultant on this project, in opposition to the application of Plaintiffs, Homeowners Against Land-Taking PennEast, Inc., Russell Poles, Deborah Scoblink-King, Terese and Joe Buchanan, William and Viola Markus, Jacqueline Evans, and the New Jersey Conservation Foundation (unless otherwise noted, Plaintiffs are referred to collectively herein as "HALT"), for an Order to Show Cause with temporary restraints and a preliminary injunction.

Plaintiffs are a consortium of entities and individual landowners who, as their name makes clear, have vowed to halt installation of a 118-mile natural gas pipeline PennEast plans to construct from Luzerne County, Pennsylvania through portions of Hunterdon County and Mercer County, New Jersey. Consistent with that vow, HALT's application for an Order to Show Cause makes a host of allegations with no basis in fact, and seeks various forms of relief with no basis in law.

Factually, HALT makes the patently false claim that in its desperation to conduct time-sensitive surveys needed to win federal approval of its pipeline project, PennEast has engaged in a pattern and practice of trespassing on their property and hovering above their homes in low-flying aircraft, resulting in the disruption of their quiet enjoyment and terrorizing their families. Nothing could be farther from the truth. Indeed, HALT's allegations are false in every particular.

First and foremost, only three of the many alleged instances of trespassing described in HALT's application even involved PennEast, and none qualifies as a trespass. The Marx Affidavit explains those incidents in painstaking detail, refuting HALT's allegations of trespass with hard documentary evidence that reveals the absurdity of those allegations.

Second, of the flights over the pipeline's proposed route that HALT alleges in the Verified Complaint were disruptive to their quiet enjoyment, PennEast was not involved in any of them. Although PennEast has been involved in a total of seven flights over the proposed route, the last of those flights—which took place on July 28, 2015, and is not mentioned in the Verified Complaint—was a helicopter overflight with representatives of the Federal Energy Regulatory Commission ("FERC") made at their request to show proposed routes and prior alternatives. (England Affidavit, ¶ 20.) PennEast had nothing whatsoever to do with the other flights HALT claims disrupted its quiet enjoyment, as the England Affidavit and its exhibits confirm. That the properties in question lie in the path of a local flight school—and that at least one of the photos attached to HALT's submission depicts military aircraft—only underscores the absurdity of HALT's aerial-surveying contentions.

Legally, HALT's attempt to use baseless allegations of trespass and disruption to convince this Court to restrain PennEast's lawful surveying activity—thus advancing HALT's mission of halting the PennEast pipeline—is not only frivolous, but an abuse of process. Stated simply, HALT has not established and cannot establish *any* of the elements that must be present to justify the extraordinary relief of a temporary injunction. First, there is no threat of irreparable harm. By HALT's own description, the alleged acts of trespass and disruption it details occurred months and in some cases more than a year ago, and PennEast has confirmed that it has no immediate need or intention to conduct the surveys HALT asks the Court to enjoin—much less any plans to trespass on private property or to begin conducting surveys by air. Moreover, there is no emergency to justify the relief HALT seeks. The England Affidavit makes clear that HALT's animating contention—that PennEast is laboring under time pressure to survey all the properties along the proposed pipeline route to complete a submission to FERC needed to win pipeline approval—is

demonstrably false. As England attests, there is no requirement that PennEast conduct civil surveys of all potentially impacted properties as a prerequisite to obtaining FERC approval, and PennEast has no intention of doing so. HALT's mistaken belief that PennEast is laboring under time pressure to complete its surveys during the FERC application process may help explain, but in no way justifies, HALT's desperate and baseless application for injunctive relief. And as HALT well knows, the appropriate remedy for the acts of trespass and disruption it alleges—should it prove them—is money damages, not an injunction to bar a party that has demonstrated that it did not, and never will, engage in such acts. Where, as here, money damages will adequately compensate one aggrieved by the conduct a plaintiff alleges, there is no basis for the equitable relief of an injunction.

Second, the legal right underlying HALT's claim, far from being settled, is non-existent. There is no authority for the proposition that the acts of trespass and disruption HALT alleges would warrant injunctive relief—much less the exclusion of survey information PennEast has already gathered—if such acts had occurred, which they have not. The very notion that this Court even has jurisdiction, much less the desire, to prevent a federal agency from considering survey information placed before it on a pending pipeline application is ludicrous.

Third, because the material facts HALT alleges are not only controverted by the England and Marx Affidavits—which, together with the exhibits to those sworn statements, form the basis for all of the facts set forth in this memorandum—but are demonstrably false, HALT has plainly failed to demonstrate a likelihood of success on the merits of its claims.

Fourth, the balance of equities tips decidedly in PennEast's favor on this application. PennEast has not trespassed on HALT's property or disrupted its quiet enjoyment of that property with aerial surveys, and has no intention of doing so. HALT therefore has no need for an injunction

to prevent such actions. But if PennEast is enjoined from conducting lawful surveys or using the surveys it has lawfully conducted in support of its pipeline application, it will be denied the ability to place before FERC information critical to that agency's consideration of PennEast's application.

Beyond these four factors, the injunctive relief HALT seeks is contrary to the public interest. The notion that depriving FERC of survey information regarding the pipeline route PennEast proposes—and thus depriving the regulators of the information they need to make an informed decision as to the public convenience and necessity of that proposed route—is or would ever be in the public interest is patently absurd. Contrary to HALT's contentions, ordering PennEast to cease appropriate efforts to survey the projected path of the pipeline would impose an undue hardship on the public, which would be well served by an approval process that entailed more, rather than less, information about the propriety of the planned route.

In sum, this application—indeed, this entire lawsuit—states no *bona fide* claim for equitable relief. Rather, it is a thinly-disguised attempt to bend the rules of equity to accomplish the political goal of halting a pipeline project that HALT hopes to halt and PennEast plans to prove is in the public interest. For that overarching reason and those outlined above and amplified below, HALT's application for a TRO should be denied with costs.

STATEMENT OF FACTS

PennEast is a consortium of six energy companies formed to establish a new interstate natural gas pipeline system. If approved and constructed, the pipeline will help satisfy the growing natural gas transportation capacity needs of local distribution companies, electric generators, and end-users in eastern and southeastern Pennsylvania, New Jersey, New York and surrounding states, as well as producers located in close proximity to these markets. (England Affidavit, ¶ 2.)

In this action, HALT alleges that PennEast has engaged in a pattern of trespassing on their property to obtain surveys that they claim are necessary for PennEast to get FERC approval for

the proposed project. Those allegations are completely false. Moreover, they misrepresent both the prerequisites for PennEast to obtain FERC approval and the steps it has taken to do so. (England Affidavit, ¶ 3.) As the Marx Affidavit establishes, HALT's allegations of trespass are simply untrue. As Marx attests, PennEast and its subcontractors take extraordinary measures to respect the rights and wishes of private property owners. Neither PennEast nor its subcontractors have or will knowingly trespass on private property. (Marx Affidavit, ¶¶ 4-5; England Affidavit, ¶ 4.)

HALT's suggestion that PennEast "has now reached a critical time period in the pendency of its federal application and for completing these surveys," (Verified Complaint ¶ 3), is also false. There is no requirement that PennEast conduct civil surveys of all potentially impacted properties as a prerequisite to obtaining FERC approval. Therefore, there was no time pressure on PennEast. And while PennEast makes every effort to obtain permission to survey properties that may be impacted by the project, it understands and anticipates that it will not be able to survey many properties along the proposed route during the application stage. (England Affidavit, ¶ 5.)

Although it is in the best interest of PennEast and all affected property owners for FERC to have the most complete information possible to facilitate its assessment of the environmental impacts of the proposed project—and although PennEast is doing everything in its power to lawfully provide FERC with that information—there is no statutory or regulatory requirement for PennEast to survey every property along the proposed route before FERC approves the project. Consequently, contrary to HALT's core contention, PennEast has no incentive to ignore the rights or wishes of property owners who make clear that they do not want PennEast or its subcontractors on their land. PennEast has respected and will continue to respect valid property rights in every particular. (England Affidavit, ¶ 6.)

While PennEast continues to work with landowners to obtain voluntary access, there is no urgent need, as HALT wrongly contends, for PennEast to complete land surveys at this time. If FERC approves PennEast's application, it will have the power of eminent domain and thus be able to compel any necessary surveys before constructing the project. Until that time, property owners have every right to deny PennEast access to their property to conduct surveys and PennEast has honored and will continue to honor the landowners' wishes in that regard. (England Affidavit, ¶ 7.)

A. The Federal Approval Process And Status Of PennEast's Application

On September 24, 2015, PennEast submitted an application to FERC for a Certificate of Public Convenience and Necessity ("Certificate") pursuant to § 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c), seeking authorization for PennEast to construct, own, and operate a new natural gas pipeline system. (England Affidavit, ¶ 8; Exhibit 1.) The proposed project consists of approximately 118.8 miles of transmission pipeline and laterals originating in Luzerne County Pennsylvania, and extending to Mercer County, New Jersey. In New Jersey, the pipeline will extend through Hunterdon County as well as Mercer County. (England Affidavit, ¶ 9; Exhibit 2.)

As part of the process for assessing PennEast's application—and, in particular, determining whether the project is required by the present or future public convenience and necessity—FERC is preparing an environmental impact statement ("EIS"). PennEast expects the Commission to publish a draft EIS in July 2016. FERC's current schedule calls for it to issue a notice of availability of the final EIS in December 2016, with a decision deadline in March 2017. (England Affidavit, ¶ 10; Exhibit 3.)

To assist it in preparing the draft EIS for public comment, FERC asked PennEast to provide many types of information regarding the proposed pipeline route's impact on (i) water use and water quality; (ii) fish, wildlife, and vegetation; (iii) socioeconomic concerns; (iv) geological

concerns; (v) historical and cultural concerns; (vi) soil; (vii) land use, recreation and aesthetics; and (viii) air and noise quality. PennEast is working diligently to provide FERC with pertinent information, including additional property survey information, but the most recent environmental information request makes clear that surveys are only one of many types of information FERC is considering to assess PennEast's application. (England Affidavit, ¶ 11; Exhibit 4.)

If FERC issues a Certificate to PennEast, it will acquire the power of eminent domain under Section 7(h) of the Natural Gas Act, after which it will be able to conduct any necessary property surveys prior to construction. Although PennEast has survey permission for 60% of the overall project, it expects that it will not be able to survey almost 70% of the route in New Jersey until after the Certificate issues and it gets eminent domain power. Accordingly, PennEast has no plans to, and will not, survey private property unless it has (i) express permission from the property owner, or (ii) eminent domain power. (England Affidavit, ¶ 12.)

In short, PennEast is under no critical time pressure to survey parcels of property for which the owners have declined to give survey permission. FERC's issuance of a Certificate is not contingent on PennEast obtaining surveys of every property impacted by the proposed route before approval. (England Affidavit, ¶ 13.)

B. Alleged Acts Of Trespass

In response to HALT's allegations of trespass, PennEast respectfully submits and relies on the sworn statements contained in the Marx Affidavit, the Right-of-Way Manager of WLS, which is the land acquisition agent engaged by Hatch Mott MacDonald, PennEast's Engineering, Procurement, and Construction Management Contractor. (Marx Affidavit, ¶ 1.) As Marx explains, WLS works with landowners along the proposed PennEast pipeline route to make them aware of the project and ultimately to obtain a right of way if the project is approved. Among WLS's responsibilities is to get landowner permission to conduct surveys to support PennEast's

application to FERC for a Certificate, including civil surveys, environmental surveys, cultural resource surveys, and all other surveys and tests necessary for a pipeline route study. (Marx Affidavit, ¶ 2.)

In their Verified Complaint, HALT alleges that in order to get approval from FERC for the PennEast pipeline, "PennEast must first conduct site-specific surveys on properties it intends to cross, including those owned by the Plaintiffs." (Verified Complaint, ¶ 23.) For the reasons stated in the England Affidavit, that allegation is untrue. (Marx Affidavit, ¶ 3.) Plaintiffs further allege that "[t]o conduct these surveys, PennEast and its agents have repeatedly violated Plaintiffs' fundamental property rights under New Jersey law by entering Plaintiffs' properties without authority or consent." (Verified Complaint, ¶ 25.) These allegations are simply not true; PennEast has not conducted any survey of any kind in violation of law or Plaintiffs' property rights. (Marx Affidavit, ¶ 4.)

Contrary to Plaintiffs' allegations, the manner in which PennEast surveys properties along the proposed pipeline route rests entirely on obtaining consent of the property owner, and in no way involves trespassing or other violations of property rights. Each of Plaintiffs' allegations of trespassing is false. (Marx Affidavit, ¶ 5.) As Marx attests, WLS has been working with landowners along the PennEast line since August 2014. At the outset of the project, WLS sent mailings to area landowners, alerting them that that their parcels were being considered for inclusion in the project. Since August 2014, WLS's primary objective has been to obtain survey permission from landowners. WLS also provides support to surveyors by notifying landowners of upcoming surveys and dealing with any issues that arise as surveys occur. (Marx Affidavit, ¶ 6.)

As Marx further explains, WLS seeks permission to study properties and document landowners' concerns and special details about each property. Granting survey permission does not necessarily mean that the landowner supports the project or wants the pipeline on their property. Surveys are conducted to determine which route will be least impactful to landowners, the environment, and local communities, and is most constructible. (Marx Affidavit, ¶ 7.) The initial engagement with the landowner is to gain permission to do the survey. Accordingly, WLS provides its agents with written consent forms that its agents seek to have the homeowners sign. (Marx Affidavit, ¶ 7-8; Exhibit 1.) WLS keeps careful record of which property owners have given survey permission and which ones have denied permission. Where a property owner has denied permission, PennEast does not conduct any survey activities on the property. (Marx Affidavit, ¶ 9.)

As the Marx Affidavit states, WLS currently has twenty land agents, all of whom have been vetted and background checked, to work with landowners to obtain survey permission and to address any questions or issues as the process proceeds. Each of these land agents is trained to look for and honor property owners' requests not to trespass and to work with survey teams to make sure that they do the same. (Marx Affidavit, ¶ 10.)

C. The Trespassing Allegations In The Verified Complaint Are False.

The Marx Affidavit goes on to state, without qualification or equivocation, that the instances of trespassing set forth in the Verified Complaint are not true, and that no survey has been conducted or submitted in support of PennEast's application without express landowner permission. (Marx Affidavit, ¶ 11.)

In paragraphs 43-80 of the Verified Complaint, HALT sets forth several instances in which PennEast allegedly entered their properties to conduct surveys without permission. As set forth below, neither PennEast nor any of its agents has ever committed an act of trespass on any of

HALT's properties. Any instance in which PennEast or one of its agents have entered onto a property without permission has been the result of an outdated map or a mistake to leave information about giving survey permission. HALT has not identified a single instance in which PennEast conducted a survey without landowner permission, and that has never occurred (Marx Affidavit, ¶ 12.)

In paragraphs 45-49, HALT alleges that WLS entered the Copper Creek Preserve without permission nine months ago, between July 27, 2015, and July 29, 2015, to conduct a bat survey. Based upon his investigation of this matter, Marx concluded that the surveyors were relying on an outdated map file that did not reflect that the landowner's parcel (Block 12, Lot 31.01) had been subdivided from an adjacent parcel (Block 12, Lot 31.00) for which PennEast had been given survey permission. Upon arrival, the surveyors—college students working under the supervision of a trained biologist—began setting up their mist-net poles and gear. At sunset they opened their nets and went to the road where they were parked, to get the remaining gear needed for the night. As soon as they were made aware of their error, the surveyors immediately left the property. The following day they asked for and were granted permission to return and remove their equipment. No bats were surveyed, no engineering, boring or soil work was conducted, and nothing was removed from the property. PennEast subsequently apologized for this mistake. (Marx Affidavit, ¶ 13.)

In paragraph 51 of the Verified Complaint, HALT alleges that twenty months ago, WLS trespassed on the property of Deborah Scoblink-King by going up her driveway past "no trespassing" signs to leave a note on her gate. The note sought permission to conduct a survey. Marx attests that when he was made aware of Ms. Scoblink-King's complaint, he immediately apologized to her and confirmed PennEast's commitment to honoring her property rights.

Although the agent, consistent with WLS's policy and training, should not have proceeded past the no-trespassing sign to Ms. Scoblink-King's gate, the entry was not for purposes of surreptitiously conducting a survey; it was to provide a form to the property owner seeking permission to conduct a survey. Ms. Scoblink-King did not provide survey permission, and Marx has stated that no survey has or will be done on her property unless she grants permission or PennEast gets eminent domain power. (Marx Affidavit, ¶ 14.)

In paragraph 53 of the Verified Complaint, HALT asserts that despite Ms. Scoblink-King's denial of permission, "PennEast surveyor, Audius Dobilas," entered onto her property to conduct surveys on January 16, 2016. In describing Mr. Dobilas as a "PennEast surveyor," HALT is mistaken. Mr. Dobilas does not work, and never has worked, for or on behalf of PennEast or WLS. Marx states that his investigation revealed that Mr. Dobilas is employed by USIC, a company that performs location and mark-out of underground facilities for utility companies. (Marx Affidavit, ¶ 15.)

A substantial portion of the Verified Complaint focuses on alleged instances of trespassing by Mr. Dobilas. In paragraphs 62-71, Plaintiffs accuse Mr. Dobilas of changing stories multiple times about who he works for, and that "[a]s a result of [his] false stories, landowners have experienced stress and anxiety and had to expend their own resources to investigate and document Dobilas' connection to PennEast." (Verified Complaint, ¶ 66.) Although Plaintiffs have apparently taken pictures of Mr. Dobilas's USIC truck (Certification of Becky Mazzei, Attachment A), and Mr. Dobilas has identified himself as working for "Call Before You Dig," (Verified Complaint, ¶ 67), Plaintiffs persist in their irrational belief that he is a PennEast agent. He is not. (Marx Affidavit, ¶ 16.) To the contrary, Mr. Dobilas has no connection to PennEast. His activities are conducted in compliance with New Jersey's Underground Facility Protection Act, N.J.S.A. §

48:2-73 et seq., which requires utility companies to markout their facilities when alerted that someone intends to perform an excavation. (Marx Affidavit, ¶ 17.)

In paragraphs 55-56, Plaintiffs allege that PennEast entered the property of Russell Poles ten months ago and set up survey stakes even though he had posted no-trespassing signs. Plaintiffs are incorrect. Although Mr. Poles was convinced that PennEast was on his property, all it had done was set up a civil survey base station on the public right of way adjacent to his property. (Marx Affidavit, ¶ 18.)

In paragraph 58, Plaintiffs allege that PennEast entered the property of HALT member Rebecca Hoff nine months ago, past clearly posted no-trespassing signs, to knock on her door to request survey access. Plaintiffs are mistaken. On August 6, 2015, a WLS agent approached Ms. Hoff's property and spoke with a gardener who instructed the agent to walk back to Ms. Hoff's house and knock on the door. Ms. Hoff become upset with the agent, told her to leave, and asked if she saw the signs on her property. The landowner then showed the agent the signs that were down the road, but they stated "Stop PennEast Pipeline." There were no "No Trespassing" signs present at the public street entrance to the driveway. (Marx Affidavit, ¶ 19.)

In paragraph 60, HALT claims that Terese and Joe Buchanan denied PennEast permission to enter their property in a letter dated April 13, 2015, but that PennEast surveyors ignored that letter and entered the property on July 23, 2015. HALT further claims that neighbors photographed the surveyors' trucks and witnessed them walking on the Buchanan's property. HALT is correct that the Buchanans sent a letter denying survey permission, but they are incorrect that PennEast failed to honor that request. PennEast has not entered on the Buchanan property and has not conducted any survey there. (Marx Affidavit, ¶ 20.)

The "survey truck" HALT claims to have photographed was a "New Jersey One-Call"

truck not affiliated with PennEast or WLS. As noted above, in accordance with New Jersey's Underground Facility Protection Act, excavators are required to notify utilities before they dig, through the New Jersey One-Call system. Utilities, in turn, typically contract with companies like USIC to fulfill their statutory obligation to mark out their facilities within a specific period of time from the notification. When PennEast plans to dig, it must call the New Jersey One-Call system just like any other person in the State. Any resulting entry on land by a markout contractor, however, is done on behalf of the utilities as mandated by law. The call to 811 alerting them of PennEast's intention to dig is on a parcel for which it has permission. PennEast has no control over the actions of the responding utility or its contractor, who may do markouts on any property in the vicinity of the one for which PennEast requested a markout. (Marx Affidavit, ¶ 21.)

In paragraph 61, HALT claims that more than seven months ago, on September 30, 2015, PennEast workers ignored a letter from the Hunterdon Land Trust and entered onto the Muddy Run Preserve and began conducting surveys on the land. HALT is again incorrect. It is accurate that PennEast was conducting surveys on properties for which they had express permission to do so on September 30, 2015. While they were conducting those surveys, the surveyors were approached by two gentlemen who believed they were surveying a property for which access had been denied. That was not the case. A control point was set up in the public right of way adjoining the Muddy Run Preserve, but the property itself was not being surveyed. When State police arrived on scene the surveys stopped to avoid any further confrontation. As counsel confirmed to the Township of Kingswood in a follow-up letter, however, PennEast was not legally required to discontinue those surveys, as it did and does have the right to put survey equipment on a public right of way. (Marx Affidavit, ¶ 22; Exhibit 2.)

In paragraphs 72-74, HALT alleges that PennEast trucks stopped in front of property

owned by Viola and William Markus on March 24, 2016, and began walking towards their land to enter it and conduct surveys that would have taken place but for his vigilance. Between October 2014 and March 2016, WLS agents communicated with Mr. Markus on more than forty occasions—by e-mail, letter, telephone, and in person—primarily to discuss a possible change to the proposed pipeline route on his property to accommodate an improvement he planned. On November 12, 2015, Mr. Markus granted limited survey permission for the purpose of allowing an engineer to walk his property to show him the planned location of the pipeline. Anthony Akers from WLS and Jeff Law, an engineer from Hatch Mott McDonald, met Mr. Markus on his property on February 10, 2016. Akers and Law pointed out to Mr. Markus the intended location of the pipeline on the Markus parcel. Mr. Markus showed Akers and Law the location he would prefer to have the pipeline. He also showed them the location of a garage he intended to build and the location of two perk tests he had performed. This was not a survey but rather an information sharing meeting. At Mr. Markus's request no pictures were taken of the sites he pointed out. On March 25, 2016, Mr. Markus rescinded survey permission. The surveyors who were approaching the Markus property on March 24, 2016, heeded the landowners' direction not to conduct a survey on their property, and no survey has been or will be done on that property without authorization. (Marx Affidavit, ¶ 23.) In paragraphs 75-76 of the Verified Complaint, Plaintiffs allege that an application PennEast submitted to the Delaware River Basin Commission ("DRBC") showed the Markuses' property as surveyed. That is incorrect. As WLS agents confirmed to Mr. Markus when he raised the issue, no survey has been done of his property. (Marx Affidavit, ¶ 24.)

In sum, PennEast is keenly aware of the importance to FERC that the information it gathers be obtained in an appropriate manner. The surveys PennEast conducts are always done with express landowner permission, and WLS's primary responsibility at this stage of the project is to

work with landowners to obtain that permission. PennEast and WLS make every effort to identify and honor landowner wishes with respect to their property. With the exception of the few isolated and innocent mistakes made months or years ago, which are explained in the Marx Affidavit, they have honored those wishes in every particular. The allegation that PennEast is engaged in a pattern of trespassing on private property to obtain surveys to support its FERC application is thus demonstrably false. (Marx Affidavit, ¶ 25.)

D. Allegedly Unlawful Aerial Surveys

In addition to the baseless trespass allegations rebutted above, HALT also alleges, in paragraphs 81-103 of the Verified Complaint, that PennEast conducted aerial surveys over HALT's land using low-flying planes and helicopters on specific dates and times. That is false. None of the flights identified in the Verified Complaint were paid for, sanctioned, or solicited by PennEast or any of its subcontractors. (England Affidavit, ¶ 14.)

The flights referred to in paragraphs 87-88 (August 26, 2015), paragraph 89 (September 16, 2015), paragraph 90 (November 3, 2015), paragraph 92 (December 7, 2015), paragraph 93 (March 31, 2016), paragraph 96 (September 18-20, 2015 and October 10, 2015), and paragraph 97 (February 26, 2016) of the Verified Complaint were not made by or for PennEast. (England Affidavit, ¶ 15.) As England notes in his Affidavit, one of the photographs submitted to support Plaintiffs' claim that PennEast has been conducting flights appears to be a military helicopter. (Id.) Indeed, when Plaintiff Jacqueline Evans raised complaints with the Federal Aviation Administration regarding many of these flights, the FAA explicitly advised her, "Regarding flights before December 2015 for which you were able to provide registration numbers, we have determined those flights were conducted by aircraft operated by several flying schools in your vicinity." (England Affidavit ¶ 16; Exhibit 5; see also Affidavit of Craig Fansler at Exhibit 10-10 and -11.) Although the FAA confirmed to Ms. Evans that the flights before December 2015 were

not made by or on behalf of PennEast, HALT inexplicably persisted in alleging in their Verified Complaint that they were. (England Affidavit, ¶ 16.)

Moreover, even if those flights had been made by or on behalf of PennEast—and they were not—the FAA confirmed that anyone is entitled to conduct flights over private property as long as they comply with applicable FAA regulations. (England Affidavit ¶ 17; Exhibit 5.) The FAA found no evidence that any of the flights about which Ms. Evans complained violated such regulations. Thus, while PennEast has made aerial overview flights on a handful of occasions not described in the Verified Complaint, it is not currently conducting any overview flights, has no plans to conduct such flights, and has not done so since July 2015. (England Affidavit, ¶ 17.)

In keeping with PennEast's sensitivity to community concerns, England attests that it is his practice to notify local officials in advance of any flights PennEast intends to conduct so that residents are not alarmed when such flights occur. Consistent with that representation, the England Affidavit attaches an email exchange confirming that the flight on November 3, 2015, at 10:00 p.m. (Verified Complaint ¶ 90) was not related to the PennEast pipeline project, and that England would inform local officials should any flights be scheduled in the future. (England Affidavit, ¶ 18; Exhibit 6.)

With respect to the December 7, 2015, helicopter flight referred to at paragraphs 92 and 102 of the Verified Complaint, although the FAA advised Ms. Evans that this helicopter flight "was a flight on behalf of the PennEast Pipeline Project for the purpose of aerial survey along the proposed pipeline route," that information was not correct. (England Affidavit, ¶ 19.) To the contrary, that flight was conducted by Associated Pipeline Contractors, Inc., a contractor who was interested in bidding on the construction of the pipeline. (Id.) When Associated Pipeline advised PennEast of its intention to perform a flyover to assess terrain and constructability, England

notified the FAA and Delaware Township official Charlie Hermann about the planned flyover. (England Affidavit, ¶ 19.)

Thus, PennEast did not trespass on HALT's property; has no intention of doing so in the future; is under no time pressure to complete surveys to support its application; did not conduct or sponsor the flights described in the Verified Complaint; has not conducted or sponsored an aerial overview flight in more than nine (9) months; and, to the extent such flights become necessary in the future, will honor PennEast's practice and policy of giving advance notice to any affected communities, as it has done in the past. Thus, the facts alleged in the Verified Complaint are false in every material respect.

ARGUMENT

I. THE COURT SHOULD DENY HALT'S APPLICATION FOR INJUNCTIVE RELIEF BECAUSE HALT HAS FAILED TO ESTABLISH THE PREREQUISITES TO SUCH RELIEF

Injunctive relief is an "extraordinary remedy" that should be granted "sparingly." McGuire v. Township of Waterford, No. A-3196-05T5, 2007 N.J. Super. Unpub. LEXIS 2436, at *7 (App. Div. Feb. 28, 2007); see also Paul Otto Bldg. Co. v. Kearny Bd. of Educ., No. HUD-L-851-16, 2016 N.J. Super. Unpub. LEXIS 806, at *33 (Law Div. Apr. 16, 2016) ("Injunctive relief is an extraordinary remedy intended to prevent irreparable harm and is administered with discretion upon consideration of justice, equity, and morality in a given case."). The purpose of injunctive relief is "to prevent a continuing, irreparable injury." McGuire, 2007 N.J. Super. Unpub. LEXIS 2436, at *7. Injunctive relief may not be used to "prevent a past act of conduct, or some possible unspecified future action of another" as a matter of law. Id. at *8. Stated otherwise, "a preliminary injunction will never be ordered" unless there is an "urgent necessity" to prevent irreparable "damage threatened to be done" during the pendency of the suit. Athens v. Oliver, No. WRN-C-16017-05, 2005 WL 3047264, at *2 (Ch. Div. Nov. 4, 2005).

To obtain such extraordinary relief, a movant must demonstrate each of the factors articulated by the Supreme Court in Crowe v. De Gioia, 90 N.J. 126 (1982)—i.e., that (1) it is subject to immediate, irreparable harm; (2) the legal right underlying its claim is settled; (3) the material facts it alleges are uncontroverted and demonstrate a reasonable probability of ultimate success on the merits; and (4) a balancing of the hardships to the parties favors granting injunctive relief. Crowe, 90 N.J. at 132-34; Cherry Hill Twp. v. Oxford House, Inc., 263 N.J. Super. 25, 42-43 (App. Div. 1993); Communication Workers of Am., AFL-CIO, Local 1040 & 1081 v. Treffinger, 291 N.J. Super. 336, 351 (Law Div. 1996); LifeCell Corp. v. Tela Bio, Inc., No. SOM-C-12013-15, 2015 N.J. Super. Unpub. LEXIS 1608, at *7 (Ch. Div. May 12, 2015). The movant bears the burden of proving "each of the *Crowe* factors by clear and convincing evidence." Garden State Equality v. Dow, 216 N.J. 314, 320 (2013); see also Paul Otto, 2016 N.J. Super. Unpub. LEXIS 806, at *21. The clear and convincing standard is met "'by evidence so clear, direct and weighty and convincing so as to enable [the fact-finder] to come to a clear conviction without hesitancy, of the truth of the precise facts in issue.'" LifeCell, 2015 N.J. Super. Unpub. LEXIS 1608, at *7 (quoting Cruzan by Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 285 n.11 (1990)). And when a case involves a matter of "significant public importance," the court must consider that interest in addition to the Crowe factors. Garden State, 216 N.J. at 321. Thus, even if a movant makes a substantial showing of irreparable injury, the court may withhold relief in furtherance of the public interest. Paul Otto, 2016 N.J. Super. Unpub. LEXIS 806, at *22.

Here, HALT has failed to establish the Crowe factors by clear and convincing evidence, and the relief it seeks—preventing PennEast from conducting lawful surveys that would enable FERC to make an informed decision as to the propriety of the proposed pipeline route—is directly contrary to the public interest. HALT's application for injunctive relief should therefore be denied.

A. HALT Is Not Subject To A Threat Of Immediate, Irreparable Harm.

As noted above, to obtain preliminary injunctive relief, a movant must show that such relief is necessary to prevent immediate, irreparable harm. Treffinger, 291 N.J. Super. at 351.[1] Harm is considered irreparable if "it cannot be redressed adequately by monetary damages." Id. at 132-33. Here, any harm to HALT arising from the alleged acts of trespass can be redressed adequately by monetary damages. As the Court of Chancery recognized long ago:

> Courts of equity do not ordinarily restrain, by injunction, particularly by interlocutory injunction, the commission of a mere trespass; there must be some great vexation from continued trespasses, or some irreparable mischief, which cannot be easily measured by money damages, to authorize interference by injunction.

Howard v. Jersey City, 102 N.J. Eq. 213, 220 (Ch. Ct. 1928); see also Wilkie v. Robbins, 551 U.S. 537, 551 (2007) (noting that plaintiff had "a civil remedy in damages for trespass" due to an unauthorized survey of a desired easement). Even if HALT's trespass allegations were true, and they are not, they all involve discrete, past acts of conduct. (Verified Compl., ¶¶ 45-49: July 27, 2015 and July 29, 2015 on NJCF property, ¶¶ 50-53: August 2014 and January 16, 2016 on King's property; ¶ 60: July 23, 2015 and January 4, 2016 on the Buchanans' property). Injunctive relief, however, may not granted to prohibit acts already done. Local Bd. of Health v. Interstate Waste

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[1] As a preliminary matter, it is not clear that the HALT entity itself even has standing to bring trespass and nuisance claims. HALT is a non-profit corporation organized and existing under the laws of New Jersey with a main business address of 557 Rosemont Ringoes Road, P.O. Box 32, Sergeantsville, New Jersey 08857. As such, it is a legally distinct entity. Jaguar Cars v. Royal Oaks Motor Car Co., 46 F.3d 258, 268 (3d Cir. 1995). The Verified Complaint contains no allegations that PennEast trespassed or caused a nuisance on any property owned or possessed by HALT. HALT's argument that it has "organizational standing" is unavailing because, unlike in Crescent Park Tenants Association v. Realty Equities Corp., 58 N.J. 98 (1971) (the case relied on by Plaintiffs), the Verified Complaint is not "confined strictly to matters of common interest" and does include "individual grievance[s]" of named HALT members. 58 N.J. at 109.

Removal Co., 191 N.J. Super. 128, 142 (Law Div. 1983) ("An injunction will not issue to prohibit the doing of acts already done, and merely to allay a plaintiff's fears or apprehension, where there is nothing to show that the wrongs complained of are likely to be continued unless constrained."); McGuire, 2007 N.J. Super. Unpub. LEXIS 2436, at *8 (plaintiff was not entitled to an injunction as a matter of law because "an injunction will not be granted to prevent a past act of conduct"). HALT has presented no evidence, much less clear and convincing evidence, of a probable, imminent threat of continued trespasses. The minor trespasses that allegedly occurred in the past—which PennEast flatly denies in the England and Marx Affidavits—would in no event amount to irreparable harm. See Athens, 2005 WL 3047264, at *4 (defendant failed to show irreparable harm where there did not appear to be any harm caused other than a "minor trespass").

To be entitled to injunctive relief on a private nuisance claim, "'the injury must be such as from its nature is not susceptible of being adequately compensated for by damages, or such as from its long continuance may occasion a constantly recurring grievance, which cannot be prevented otherwise than by injunction.'" 41 Slater Drive Partners, LLC v. 35 Mkt. St., L.P., No. BER-C-74-14, 2015 N.J. Super. Unpub. LEXIS 564, at *33 (Ch. Div. 2015) (citing Holsman v. Boiling Spring Bleaching Co., 14 N.J. Eq. 335, 343 (Ch. Ct. 1862)). As Exhibit 6 to the England Affidavit shows, PennEast has conducted seven aircraft overview flights of the proposed Project route for observational purposes between May 2014 and July 2015, none of which is mentioned in the Verified Complaint and none of which had anything to do with conducting surveys. Moreover, PennEast is not currently conducting such flights, has not done so since ***July 2015***, and has no plans to do so in the future. The December 7, 2015 helicopter overflight (as referred to in the Verified Complaint, ¶ 99) was conducted by a contractor intending to bid on the Project construction work, and was neither paid for nor sanctioned by PennEast. (England Affidavit, ¶

19.) HALT has presented no evidence, much less clear and convincing evidence, to the contrary. And even if it had, if HALT is ultimately able to prove that they have been harmed by PennEast's flights during the May 2014 to July 2015 time period, that harm can adequately be addressed by money damages.

Attempting to manufacture irreparable harm where there is none, HALT asserts that they will face "multiple forms of irreparable harm" absent preliminary relief. (Plfs. Br. at 19.) But none of these purported "forms of irreparable harm" has any basis in law or fact. First, HALT contends that "the threat of future trespasses, supported by a series of past trespasses" constitutes irreparable harm. (Plfs. Br. at 19.). That is wrong as a matter of law. HALT's alleged fear that trespasses will occur at some unspecified time in the future and upon some unspecified properties (Verified Compl., ¶¶ 72, 78) is not a viable ground for the issuance of an injunction. Local Bd. of Health, 191 N.J. Super. at 142 ("An injunction will not issue to . . . merely to allay a plaintiff's fears or apprehension, where there is nothing to show that the wrongs complained of are likely to be continued unless constrained."); McGuire, 2007 N.J. Super. Unpub. LEXIS 2436, at *7 ("A party is not entitled to injunctive relief against some unspecified future action on the part of another party. [Citation omitted.] Therefore, the mere possibility of a remote future injury is not enough."); id. at *8 ("an injunction will not be granted to prevent . . . some possible unspecified future action of another"); First Camden Nat'l Bank & Trust Co. v. Wilentz, 19 A.2d 648, 653 (Ch. Ct. 1941) (the court may not grant injunctive relief "to allay the fears and apprehensions of individuals; they must show the court that the acts against which they ask protection are not only threatened but will, in all probability, be committed to their injury"). Similarly insufficient is the allegation that trespasses occurred in the past. Local Bd. of Health, 191 N.J. Super. at 142; McGuire, 2007 N.J. Super. Unpub. LEXIS 2436, at *8; see also Cottrell v. Norman, No.12-cv-

1986, 2016 U.S. Dist. LEXIS 15372, at *10 (D.N.J. Feb. 9, 2016) (recognizing that "past conduct is insufficient to warrant injunctive relief unless it is accompanied by continuing, present adverse effects") (quotation marks omitted).

In support of their "threat of future trespasses" argument, HALT relies on Bellemead Development Corp. v. Schneider, 193 N.J. Super. 85 (Ch. Div. 1983), aff'd, 196 N.J. Super. 571 (App. Div. 1984), and Jersey City Medical Center v. Halstead, 169 N.J. Super. 22 (Ch. Div. 1979) (Plfs. Br. at 19-20.) But those cases are inapposite. In Bellemead, the defendants admitted that they were "likely to return to plaintiffs' property to distribute leaflets" in an attempt to unionize non-managerial office workers. 193 N.J. Super. at 100. Here, by sharp contrast, PennEast has made no such admission; to the contrary, it swears that it has not conducted and will not conduct surveys on properties without prior landowner consent. In Halstead, the alleged trespass consisted of the continuing presence of a patient in a hospital's medical bed. 169 N.J. Super. at 23-25. HALT does not allege that PennEast or any of its agents are presently occupying their property.

Plaintiffs also rely on two federal precedents, both of which are readily distinguishable. (Plfs. Br. at 20.) In Minard Run Oil Co. v. United States Forest Service, 670 F.3d 236, 256 (3d Cir. 2011), the Third Circuit found that a moratorium on new drilling caused irreparable injury to mineral rights owners because it deprived them of the "unique oil and gas extraction opportunities afforded them by their mineral rights." 670 F.3d at 256. PennEast's effort to obtain survey permission has not deprived, and will not deprive, HALT of any "unique opportunities" afforded them by their property rights. In RoDa Drilling Co. v. Siegal, 552 F.3d 1203 (10th Cir. 2009), the plaintiff was denied record title to various oil and gas investments, resulting in delays and missed opportunities. 552 F.3d at 1205, 1211. Expert testimony established that the damages suffered absent a preliminary injunction likely could not be proven given that the plaintiff could not

"participate in the everyday operations of its own interests, and the damages arising from the[] denial [of title] were incalculable." Id. at 1211. HALT's assertion that they, like the plaintiff in RoDa, "are unable to 'participate in the everyday operations' on their land, because they must constantly be vigilant about whether PennEast surveyors will return to their land" is ridiculous. (Plfs. Br. at 20.) As the Marx and England Affidavits (and even the police reports and FAA letters attached to HALT's own OTSC application) demonstrate, HALT's members irrationally attribute every action relating to their property to PennEast although that is simply not the case. In HALT's imagination, lawful activities of a flight school become illegal aerial surveys; lawful markouts conducted pursuant to the Underground Facilities Protection Act become illegal civil surveys. Paranoia, like fear, is not a proper ground for the granting of injunctive relief. D'Ambrosio v. Concord, No. 89-cv-2367, 1991 U.S. Dist. LEXIS 7396, at *7 (N.D. Cal. May 24, 1991).

HALT further claims that they will suffer harm if PennEast is able to use the allegedly "unlawfully obtained surveys" to obtain approval from FERC and other relevant and state authorities, which, in turn, will enable PennEast to "take plaintiffs' land and destroy its value through construction." (Plfs. Br. at 20-21). Aside from the fact that the surveys were validly obtained, and only lawful surveys will be obtained in the future, the Court may not base an injunction on such speculative and hypothetical injuries. See Access 4 All, Inc. v. Boardwalk Regency Corp., No. 08-cv-3817, 2010 U.S. Dist. LEXIS 124625, at *11 (D.N.J. Nov. 23, 2010) (recognizing that "because injunctions regulate future conduct, a party seeking prospective injunctive relief must demonstrate a "real and immediate"—as opposed to a merely speculative or hypothetical—threat of future harm"). Moreover, if FERC does issue the Certificate and Plaintiffs believe it was improvidently issued because of FERC's reliance on unlawful data, they may apply to FERC for a rehearing pursuant to 15 U.S.C. § 717r(a). See Alliance Pipeline L.P. v. 4.360 Acres

of Land, No. 4:12-cv-140, 2012 U.S. Dist. LEXIS 185443, at *21 (D.N.D. Nov. 26, 2012) (recognizing that "challenges attacking the propriety of a certificate of public convenience and necessity must first be brought to FERC upon an application for rehearing"). If Plaintiffs are unsuccessful at the rehearing, they may appeal that ruling to a United States Court of Appeals pursuant to 15 U.S.C. § 717r(b). See id.; see also Williams v. Natural Gas Co. v. Oklahoma City, 890 F.2d 255, 262 (10th Cir. 1989) ("Judicial review . . . is exclusive in the courts of appeals once the FERC certificate issues.").

Second, Plaintiffs assert that legal remedies are inadequate because a damages action would require individual landowners to return to court each time there was a new act of trespass, thereby resulting in a "multiplicity of suits" that would not afford an adequate remedy and would lead to judicial waste. (Plfs. Br. at 21-22.) As discussed above, however, Plaintiffs have not established by clear and convincing evidence that there will be future trespasses. Consequently, there is no risk of a "multiplicity of suits" as in the cases on which HALT relies. Pittsburg, S. & W.R. Co. v. Fiske, 123 F. 760, 761 (3d Cir. 1903) ("[T]he proofs made it quite evident that the trespass which had been committed would, if not restrained, be repeated and continued . . . ."); Lucy Webb Hayes Nat'l Training School v. Geoghegan, 281 F. Supp. 116, 117 (D.D.C. 1967) ("The correspondence introduced in evidence shows that the male defendant takes the position that his wife should remain in the hospital for the remainder of her life.").

Third, HALT claims that PennEast has engaged in a "pattern of misleading plaintiffs," which itself amounts to irreparable harm. (Plfs. Br. 22.) This is untrue. As the England and Marx Affidavits confirm, PennEast has not engaged in any misleading conduct.[2]

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[2] The cases cited by HALT involve circumstances and contexts not remotely applicable here. Healthcare Corp. of America v. Data RX Management, Inc., No. 2:12-cv-2910, 2013 U.S. Dist.

Fourth, HALT claims that PennEast's conduct "threatens Plaintiffs' livelihoods and their safety and privacy in their home," which constitutes irreparable harm. (Plfs. Br. at 24.) This is simply a restatement of the argument that the fear of future trespasses amounts to irreparable harm, which it does not. D'Ambrosio, 1991 U.S. Dist. LEXIS 7396, at *7 ("Fear, suspicion, or paranoia are not adequate grounds for the granting of injunctive relief."). As for the overview flights, PennEast ceased conducting those flights in July 2015. Any disturbance caused by flights over HALT's property is attributable to aircraft operated by (a) the several flying schools in the vicinity of HALT' property; (c) independent contractors who intend to bid on the Project; or (d) organized groups that are opposed to the Project. (Fansler Cert., Ex. 11, 3/11/2016 letter from PennEast to FERC, p.2.) None of these third parties is under PennEast's control.[3]

In short, the absence of "immediate, irreparable harm is fatal to [HALT's] application for preliminary injunctive relief." Confident Care Corp. v. Amerigroup N.J. Inc., No. BER-C-114-15, 2015 N.J. Super. LEXIS 1166, at *24 (Ch. Div. May 18, 2015).

LEXIS 46092, at *20-21 (D.N.J. March. 28, 2013) (observing, in the context of discussing the kind of reputational harm that might support preliminary injunctive relief, that "the misleading use of the plaintiff's trademarks . . . is routinely recognized as irreparable harm"); Krumholz v. TRW, Inc., 142 N.J. Super. 80, 82, 88 (App. Div. 1976) (observing, in the context of discussing a credit reporting agency's qualified privilege defense in an action for damages resulting from false reports of judgments, that "a false report may have a substantial and irreparable adverse impact on the subject thereof").

[3] Once again, the cases relied on by Plaintiffs are completely inapposite. TEVA Pharms. USA, Inc. v. Stop Huntingdon Animal Cruelty USA, No. BER-C-63-05, 2005 WL 1010454, at *2 (Ch. Div. Apr. 1, 2005) (defendants verbally and physically harassed pharmaceutical company's employees, threatened them, threatened violence, uttered violent epitaphs at employees while in their respective homes, threatened various unlawful acts of violence, broke and entered into employees' homes, and stole); Kacmarski v. Eppehimer, No. 1:13-cv-07522, 2014 U.S. Dist. LEXIS 178040, at *5-6 (D.N.J. Dec. 30, 2014) (plaintiff established that his website business was in imminent danger of being squandered by defendant who made voluminous personal purchases using corporate accounts and threatened to purge the company's finances and plaintiff established that defendant had grossly mismanaged the company into a dire financial state that required immediate attention in order to save its internet-based model).

B. There Are Material Facts In Dispute And Plaintiffs Are Unlikely To Succeed On The Merits Of Their Trespass And Nuisance Claims.

Injunctive relief is not appropriate unless the movant demonstrates that "the material facts are uncontroverted and demonstrate[s] a reasonable probability of ultimate success on the merits." LifeCell, 2015 N.J. Super. Unpub. LEXIS 1608, at *7. The Verified Complaint contains two claims: trespass (Count I) and private nuisance (Count II). As to each claim, there are material facts in dispute. Indeed, the England and Marx Affidavits indisputably establish that HALT's factual allegations are false. Moreover, HALT is unlikely to succeed on the merits of either claim.

1. Trespass

In Count I of the Verified Complaint, Plaintiffs are apparently asserting a claim for intentional trespass, as defined in the Restatement (Second) Torts ("Restatement") § 158. (See Plfs. Br. at 15 (citing FiberMark N. Am, Inc. v. State, No. A-6201-08T1, 2011 N.J. Super. Unpub. LEXIS 2121, at *22 (App. Div. Aug. 5, 2011) (citing Restatement 2d Torts, § 158 (2nd 1979))). Restatement § 158 defines intentional trespass as follows:

> One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally
>
> (a) enters land in the possession of the other, or causes a thing or a third person to do so, or
>
> (b) remains on the land, or
>
> (c) fails to remove from the land a thing which he is under a duty to remove.

Restatement § 158.

HALT does not allege that PennEast itself intentionally entered their property, remains on their property, or failed to remove from their property a thing which PennEast was under a duty to remove. Instead, they allege that PennEast's agents, Western Land Services and UGI Energy, entered their property for the purposes of conducting surveys on behalf of PennEast. (Verified

Compl., ¶¶ 45, 46, 48, 49, 51, 58, 53, 63-65, 67, 69.) With respect to causing entry of a third person on another's property, Comment *j* to Restatement § 158 provides, in pertinent part:

> If, by any act of his, the actor ***intentionally*** causes a third person to enter land, he is as fully liable as though he himself enters. Thus, if the actor has commanded or requested a third person to enter land in the possession of another, the actor is responsible for the third person's entry if it be a trespass. This is an application of the general principle that one who intentionally causes another to do an act is under the same liability as though he himself does the act in question. . . .

Restatement § 158, cmt. *j* (emphasis supplied). HALT has not presented any clear and convincing evidence that PennEast intentionally caused its surveyors to enter their property. Absent evidence that the surveyors' presence on HALT's property was caused by any act on the part of PennEast or by a failure on its part to perform a duty, PennEast cannot be held liable as a trespasser. Restatement § 158, cmt. *f*. Any unauthorized entries upon HALT's property by PennEast's surveyors was not intended by PennEast. Nor were any such entries caused by any negligence on the part of PennEast. To the contrary, as PennEast explained in its March 11, 2016 to FERC, which is attached as Exhibit 11 to the Fansler Affidavit:

> PennEast has a zero tolerance policy for trespass and has established procedures to review survey plans, including review of all survey permissions and denials. If any PennEast employee or contractor fails to follow established procedures regarding survey permissions and denials, they will be relieved of their duties and will not be allowed to work on the Project.

(Fansler Cert., Ex. 11, 3/11/2016 letter from PennEast to FERC, p.1.) Under such circumstances, PennEast cannot be held liable as a trespasser. See Restatement 2d Torts, § 166 (2nd 1979) ("an unintentional non-negligent entry on land in the possession of another, or causing a thing or third person to enter the land, does not subject the actor to liability to the possessor . . . .").

2. Private Nuisance

Count II of the Verified Complaint asserts a claim for private nuisance. New Jersey courts have adopted the standard of Restatement 2d Torts § 822 to assess liability for private nuisance.

Ross v. Lowitz, 222 N.J. 494, 506 (2015). Section 822 identifies the elements of a cause of action for private nuisance as follows:

> 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 of land, 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 § 822; see also Ross, 222 N.J. at 505.

HALT claims that "PennEast's aerial surveys intentionally and unreasonably interfere with Plaintiffs' use and enjoyment of their properties" so as to amount to a private nuisance. (Verified Compl., ¶ 118). As the England Affidavit makes clear, none of the flights enumerated in the Verified Complaint were even made by or on behalf of PennEast. Nor would they constitute a nuisance or a violation of any other law or regulation if they had been. (Fansler Cert., Ex. 10-10, 1/14/2016 letter from FAA to Jacqueline Evans ("The statements and photographs submitted to us did not meet the evidentiary requirements supporting a finding of violation sufficient for us to proceed with any FAA action.")

C. The Balancing Of Hardships Weighs Against Granting Injunctive Relief

The final Crowe factor requires the Court to consider "the relative hardship to the parties in granting or denying relief." Crowe, 90 N.J. at 134. Plaintiffs would suffer no hardship if the Court were to deny their request for injunctive relief because PennEast is not conducting surveys without prior landowner consent and has not conducted aerial surveys. Plaintiffs clearly brought this lawsuit because they are opposed to the PennEast Pipeline and hope that this lawsuit will derail the project.

D. The Proposed Pipeline Project Is A Matter Of Significant Public Importance

Even if the Court were to find that Plaintiffs satisfied each of the Crowe factors, it should deny Plaintiffs' request for injunctive relief because it would interfere with the FERC application process, which is a matter of "significant public importance." See Garden State, 216 N.J. at 321; Paul Otto, 2016 N.J. Super. Unpub. LEXIS 806, at *22. As PennEast explains on its website, "natural gas is at the heart of the quality of life for most Americans" as it provides energy to heat homes and fuels the electricity that powers lights and charges smartphones. (http://penneastpipeline.com/overview/.) The proposed PennEast Pipeline will assist utilities in delivering this affordable energy source to families and business in New Jersey and Pennsylvania. (Id.) The proposed PennEast Pipeline will reduce energy costs and support thousands of jobs with clean-burning, American energy. (Id.). Once the Project is complete, natural gas and electric consumers will realize significant savings from lower transportation costs associated with locally produced, abundant natural gas. (Id.) HALT's attempt to interfere with FERC's ability to determine whether the proposed pipeline furthers the public convenience and necessity under the guise of an application for injunctive relief should be turned away.

II. FERC HAS EXCLUSIVE JURISDICTION OVER THIS DISPUTE AND THE COURT LACKS AUTHORITY TO INTERFERE WITH THE FERC PROCEEDINGS

As discussed above, PennEast is in the process of applying for a Certificate of Public Convenience and Necessity from FERC to allow it to build and operate the proposed PennEast Pipeline. According to HALT, "FERC has directed PennEast to acquire landowner permission for any and all surveys PennEast conducts" in connection with this process. (Verified Compl., ¶ 36.) In this lawsuit, HALT asserts that PennEast obtained survey data by trespassing on their properties and by aerial surveys that caused a nuisance. HALT seeks injunctive relief preventing PennEast from using survey data obtained through site visits and aerial surveys in any filings with FERC or

other state and federal agencies as well as an Order compelling PennEast to turn over all their survey data to HALT. (Verified Compl., ¶¶ 115, 116, 132.) HALT also seeks a declaratory judgment that PennEast committed trespass when it entered each of the HALT properties without consent and that any data from unlawfully obtained trespasses is [in]admissible in any civil proceedings." (Id., Relief Requested, ¶ 3.) As this dispute arises from PennEast's application for a Certificate of Public Convenience and Necessity, it is clearly within the exclusive jurisdiction of FERC.

The National Gas Act "confers upon FERC exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale." Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300-301 (1988). It is beyond dispute that this exclusive jurisdiction encompasses the issuance of a Certificate of Public Convenience and Necessity for the construction and operation of a pipeline. American Energy Corp. v. Rockies Express Pipeline LLC, No. 2:09-cv-284, 2009 U.S. Dist. LEXIS 59972, at *7-8 (S.D. Ohio July 14, 2009) (citing cases). Indeed, FERC has promulgated "extensive and detailed regulations concerning applications for certificates." Colorado Interstate Gas Co. v. Wright, 707 F. Supp. 2d 1169, 1177 (D. Kan. 2010) (citing 18 C.F.R. Part 157, Subpart A).

In connection with PennEast's application for a Certificate, FERC will consider survey data as part of its investigation of the environmental consequences of the proposed PennEast Pipeline. The issue as to whether FERC should consider survey data that was allegedly obtained from site visits without first obtaining landowner consent in contravention of FERC's direction to PennEast to do so, and from aerial surveys that allegedly caused a nuisance, falls squarely within the exclusive jurisdiction of FERC. In fact, these very allegations of trespassing and disturbing flights are already before FERC. Landowners filed with FERC comments making these

allegations, leading PennEast to file with FERC a Response to the comments on March 11, 2016.[4] In that response, PennEast explains that it has a zero tolerance policy for trespass and that it was not responsible for the flights allegedly disturbing landowners. Accordingly, because this dispute is within the exclusive jurisdiction of FERC, it should be dismissed. See Begay v. PSC of N.M., 710 F. Supp.2d 1161, 1174 (D.N.M. 2010) (granting motion to dismiss claims regarding ejectment, removal of pipeline, and trespass because FERC has exclusive jurisdiction over claims involving interstate gas pipelines); Gulf Oil Corp. v. Tenneco, Inc., 608 F. Supp. 1493, 1498 (E.D. La. 1985) ("A dispute that falls within an agency's exclusive jurisdiction can, as the term indicates, only be resolved by the agency.").[5]

Moreover, a declaration by this Court that the survey data is inadmissible in the FERC proceeding or any other federal proceeding would undermine the authority of FERC and impermissibly contravene the Supremacy Clause of the United States Constitution (Art. VI, cl. 2). Arkansas La. Gas. Co. v. Hall, 453 U.S. 571, 581-82 (1981) (The Supremacy Clause will not permit a state court to usurp a function that Congress has assigned to a federal regulatory body); County of Stanislaus v. Pacific Gas & Elec. Co., 114 F.3d 858, 862 (9th Cir. 1997) (finding that to permit recovery under state law for antitrust claims arising out of the importation of natural gas "would impermissibly contravene the Supremacy Clause"); Washington Fed. Sav. & Loan Ass'n

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[4] PennEast's March 11, 2016 Response to Comments is part of HALT' application for injunctive relief. (Fansler Cert., Ex. 11, 3/11/2016 letter from PennEast to FERC).

[5] If FERC ultimately considers the survey data and issues the Certificate, then HALT may challenge the propriety of the Certificate upon an application for rehearing with FERC pursuant to 15 U.S.C. §717r(a). See Alliance, 2012 U.S. Dist. LEXIS 185443, at *21. If HALT is unsuccessful at the rehearing, they may appeal that ruling to a United States Court of Appeals pursuant to 15 U.S.C. §717r(b). See id.

v. Balaban, 281 So.2d 15, 16 (Fla. 1973) ("state court was without authority to interfere with a hearing called by and before a Federal agency regulated by Federal law").[6]

CONCLUSION

For the foregoing reasons, HALT's application for a TRO should be denied with costs.

Dated: May 9, 2016

Respectfully submitted,

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[6] In the event the Court finds that FERC does not have exclusive jurisdiction over this dispute, the Court should defer to FERC's primary jurisdiction and refer the dispute to FERC for resolution. See Muise v. GPU, Inc., 332 N.J. Super. 140 (App. Div. 2000) ("Primary jurisdiction is defined as the circumstance in which a court declines original jurisdiction and refers to the appropriate body those issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.") (quotation marks omitted). Given the baseless nature of this application, such a referral should not be necessary.