IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ADAM BRIGGS, PAULA BRIGGS, his wife, JOSHUA BRIGGS, and SARAH BRIGGS	:	**Civil No. 3:21-cv-520**
Plaintiffs,	:	**(Judge Mariani)**
v.	:	**(Magistrate Judge Carlson)**
SOUTHWESTERN ENERGY PRODUCTION COMPANY, a/k/a SWN PRODUCTION COMPANY, LLC	:	
Defendant.	:	

REPORT AND RECOMMENDATION

I. Introduction

It is said that doing the same thing over and over again and expecting different results is a form of human folly. So it is here.

In March 2021, the plaintiffs, Adam Briggs, his wife Paula Briggs, Joshua Briggs, and his wife Sarah Briggs, filed this action against the defendant, Southwestern Energy Production Company ("SWN") in the Pennsylvania Court of Common Pleas in Susquehanna County. (Doc. 1-2, Ex. A). On March 22, 2021, SWN filed a notice of removal of the action to federal court. (Doc. 1). Before the court is SWN's motion to dismiss arguing that the plaintiffs' claims are barred by claim preclusion, and thus, the plaintiffs fail to state a claim for which relief can be

granted. SWN asserts that claim preclusion should bar the plaintiffs' current claims because the current lawsuit involves the same tort claims, the same land, and the same alleged injury as a previous lawsuit that the plaintiffs' filed against the defendant in state court, which was decided in favor of SWN at the summary judgment stage. We agree with SWN, and for the reasons that follow, we recommend that SWN's motion to dismiss be granted.

II. Statement of Facts and of the Case

The factual background of this case is taken from the allegations set forth in the plaintiffs' complaint (Doc. 1-2, Ex. A), which this court must accept as true when deciding a motion to dismiss. The plaintiffs own land in Harford Township, Susquehanna County, Pennsylvania. (Id., ¶ 4). Specifically, the plaintiffs' property is 11.07 acres of land and is not subject to a natural gas lease. (Id., ¶¶ 6-7). Adjacent and parallel to the plaintiffs' land is a natural gas unit, "SWN Folger Gas Unit," on land that is not owned by the plaintiffs. (Id., ¶ 8). Within this gas unit there are separate natural wells, such as "Folger 5H." (Id., ¶ 9).

The plaintiffs allege that the defendant has been and continues to extract natural gas from a Marcellus Shale formation located under the plaintiffs' land. (Id., ¶ 11). According to the plaintiffs, the defendant accomplishes this through a process known as hydraulic fracturing (fracking). (Id.) Specifically the gas from the plaintiffs' land is extracted through bore holes of gas wells such as Folger 5H. (Id.)

The complaint details the fracking process step by step which SWN has allegedly been using to extract gas from a Marcellus Shale formation located under the plaintiffs' land. (Id., ¶ 11). One step of this process involves the use of fluid and proppants that are forcibly propelled and injected into the plaintiffs' land. (Id., ¶ 12.6). The fluid pressure creates cracks in the Marcellus Shale formation and subsequently the fluid is drained, and the cracks remain held open by proppants. (Id., ¶ 12.5). This provides for natural gas to flow from beneath the plaintiffs' land to SWN's well bore holes located on the Folger Gas Unit. (Id., ¶ 12.10). The plaintiffs allege the proponents remain in the Marcellus Shale formation to allow for the continued extraction of natural gas from below the plaintiffs' land. (Id., ¶ 12.11).

The plaintiffs filed the instant suit on March 2, 2021, in the Pennsylvania Court of Common Pleas in Susquehanna County. (Doc. 1-2, Ex. A). The complaint contains three claims: trespass (Count I), conversion (Count II), and punitive damages (Count III). (Doc. 2-1, Ex. 1). On March 22, 2021, SWN filed a notice of removal of the action to federal court. (Doc. 1).

This is the second state court lawsuit involving this set of facts that the plaintiffs have pursued. Prior to commencing the current lawsuit in March of 2021, the plaintiffs filed suit against the defendant on November 5, 2015, also in the Pennsylvania Court of Common Pleas in Susquehanna County alleging the same three claims: trespass (Count I), conversion (Count II), and punitive damages (Count

III). (Doc. 2-1, Ex. 1). Both complaints concern the same 11.07 acres of land in Harford Township, Susquehanna County, Pennsylvania, owned by the plaintiffs. (Doc. 1-2, ¶¶ 4-6; Doc. 2-1, ¶¶ 4-6). Both complaints also revolve around the defendant's alleged extraction of natural gas from Marcellus Shale under the plaintiffs' land via hydraulic fracturing. (Doc. 1-2, ¶¶ 11-12.11; Doc. 2-1, ¶¶ 10-11). The primary difference between the two complaints is that the second compliant contains significantly more detail regarding the hydraulic fracturing process. Namely, that the process involves the use of fluid and proppants that are forcibly propelled and injected into the plaintiffs' land constituting a "physical intrusion." (Id., ¶ 12.8).

In the first lawsuit that was commenced on November 5, 2015, the Court of Common Pleas granted SWN's motion for summary judgment. (Doc. 2-2; Ex. 2); Briggs v. Sw. Energy Prod. Co., 2017 WL 10605836 (Pa. Com. Pl. Civil Div. 2017). The plaintiffs appealed the decision, and a two-judge panel of the Superior Court reversed the decision. (Doc. 2-3; Ex. 3); Briggs v. Sw. Energy Prod. Co., 184 A.3d 153 (Pa. Super. 2018). The defendant appealed, and the Supreme Court of Pennsylvania reversed the Superior Court's decision. (Doc. 2-4; Ex. 4); Briggs v. Sw. Energy Prod. Co., 224 A.3d 334 (Pa. 2019). On remand, the Superior Court affirmed the Common Pleas Court's judgment, reinstating the trial court's order granting summary judgment in the defendant's favor, and the action was dismissed.

(Doc. 2-5; Ex. 5); Briggs v. Sw. Energy Prod. Co., 2020 WL 7233111 (Pa. Super. 2020).

The Superior Court explained:

> Appellants' Complaint does not specifically allege that Southwestern engaged in horizontal drilling that extended onto their property, or that Southwestern propelled fracturing fluids and proppants across the property line. See Briggs, 224 A.3d at 352-53 (explaining that the word "trespass" does not necessarily include all essential facts to establish the cause of action, and stating that a plaintiff "must use at least *some* words alleging physical intrusion...." (emphasis in original)). Accordingly, in light of the Supreme Court's guidance, we are constrained to reinstate the trial court's Order granting summary judgment in favor of Southwestern.

Id. at *4.

Following this ruling by the Superior Court, the plaintiffs filed the current action. In the action before this court, the plaintiffs allege the same claims as they alleged in the previous compliant, although now the complaint contains additional detail about the fracking process including the element of "physical intrusion." SWN filed a notice of removal of the action to federal court and subsequently filed the pending motion to dismiss. (Docs. 1, 2).

In the defendant's motion to dismiss, it asserts that the plaintiffs' complaint should be barred by claim preclusion or *res judicata*, and therefore, the plaintiffs have failed to state a claim upon which relief can be granted. (Doc. 2, ¶ 4). The defendant explains that doctrine of *res judicata* is applicable because the plaintiffs assert the same causes of action they did in their previous complaint, and the

additional facts they include in their new complaint could have been included in their first complaint. (Id., ¶ 3). In opposition to the defendant's motion to dismiss, the plaintiffs argue that their complaint is not barred by the doctrine of *res judicata* because the previous state court action was not decided "on the merits" and the issues were not "actually litigated." (Doc. 10, at 1-2, 5). For the reasons that follow, we conclude that the doctrine of *res judicate* does bar the claims in the plaintiffs' complaint, and we recommend that the defendant's motion to dismiss be granted.

III. Discussion

A. Motion to Dismiss – Standard of Review

A motion to dismiss tests the legal sufficiency of a complaint. It is proper for the court to dismiss a complaint in accordance with Rule 12(b)(6) of the Federal Rules of Civil Procedure only if the complaint fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). With respect to this benchmark standard for the legal sufficiency of a complaint, the United States Court of Appeals for the Third Circuit has aptly noted the evolving standards governing pleading practice in federal court, stating that:

> Standards of pleading have been in the forefront of jurisprudence in recent years. Beginning with the Supreme Court's opinion in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), continuing with our opinion in Phillips [v. County of Allegheny, 515 F.3d 224, 230 (3d Cir. 2008)], and culminating recently with the Supreme Court's decision in Ashcroft v. Iqbal, -U.S.-, 129 S. Ct. 1937 (2009), pleading standards have seemingly shifted from simple notice pleading to a more

> heightened form of pleading, requiring a plaintiff to plead more than the possibility of relief to survive a motion to dismiss.

Fowler v. UPMC Shadyside, 578 F.3d 203, 209-10 (3d Cir. 2009).

In considering whether a complaint fails to state a claim upon which relief may be granted, the court must accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom are to be construed in the light most favorable to the plaintiff. Jordan v. Fox, Rothschild, O'Brien & Frankel, Inc., 20 F.3d 1250, 1261 (3d Cir. 1994). However, a court "need not credit a complaint's bald assertions or legal conclusions when deciding a motion to dismiss." Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997). Additionally, a court need not "assume that a . . . plaintiff can prove facts that the . . . plaintiff has not alleged." Associated Gen. Contractors of Cal. v. California State Council of Carpenters, 459 U.S. 519, 526 (1983). As the Supreme Court held in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), in order to state a valid cause of action, a plaintiff must provide some factual grounds for relief which "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of actions will not do." Id., at 555. "Factual allegations must be enough to raise a right to relief above the speculative level." Id.

In keeping with the principles of Twombly, the Supreme Court has underscored that a trial court must assess whether a complaint states facts upon which relief can be granted when ruling on a motion to dismiss. In Ashcroft v. Iqbal,

556 U.S. 662 (2009), the Supreme Court held that, when considering a motion to dismiss, a court should "begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." Id. at 679. According to the Supreme Court, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. at 678. Rather, in conducting a review of the adequacy of a complaint, the Supreme Court has advised trial courts that they must:

> [B]egin by identifying pleadings that because they are no more than conclusions are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Id. at 679.

Thus, following Twombly and Iqbal, a well-pleaded complaint must contain more than mere legal labels and conclusions; it must recite factual allegations sufficient to raise the plaintiff's claimed right to relief beyond the level of mere speculation. As the United States Court of Appeals for the Third Circuit has stated:

> [A]fter Iqbal, when presented with a motion to dismiss for failure to state a claim, district courts should conduct a two-part analysis. First, the factual and legal elements of a claim should be separated. The District Court must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions. Second, a District Court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a "plausible claim for relief." In other words, a complaint must do more than allege the plaintiff's

> entitlement to relief. A complaint has to "show" such an entitlement with its facts.

Fowler, 578 F.3d at 210-11.

As the Court of Appeals has observed:

> The Supreme Court in Twombly set forth the "plausibility" standard for overcoming a motion to dismiss and refined this approach in Iqbal. The plausibility standard requires the complaint to allege "enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570, 127 S. Ct. 1955. A complaint satisfies the plausibility standard when the factual pleadings "allow[ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 129 S. Ct. at 1949 (citing Twombly, 550 U.S. at 556, 127 S. Ct. 1955). This standard requires showing "more than a sheer possibility that a defendant has acted unlawfully." Id. A complaint which pleads facts "merely consistent with" a defendant's liability, [ ] "stops short of the line between possibility and plausibility of 'entitlement of relief.' "

Burtch v. Milberg Factors, Inc., 662 F.3d 212, 220-21 (3d Cir. 2011), cert. denied, 132 S. Ct. 1861 (2012).

In practice, consideration of the legal sufficiency of a complaint entails a three-step analysis:

> First, the court must "tak[e] note of the elements a plaintiff must plead to state a claim." Iqbal, 129 S. Ct. at 1947. Second, the court should identify allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth." Id., at 1950. Finally, "where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief."

Santiago v. Warminster Twp., 629 F.3d 121, 130 (3d Cir. 2010) (quoting Iqbal, 129 S. Ct. at 1950).

In considering a motion to dismiss, the court generally relies on the complaint, attached exhibits, and matters of public record. Sands v. McCormick, 502 F.3d 263, 268 (3d Cir. 2007). The court may also consider "undisputedly authentic document[s] that a defendant attached as an exhibit to a motion to dismiss if the plaintiff's claims are based on the [attached] documents." Pension Benefit Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir. 1993). Moreover, "documents whose contents are alleged in the complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered." Pryor v. Nat'l Collegiate Athletic Ass'n, 288 F.3d 548, 560 (3d Cir. 2002); see also U.S. Express Lines, Ltd. v. Higgins, 281 F.3d 382, 388 (3d Cir. 2002) (holding that "[a]lthough a district court may not consider matters extraneous to the pleadings, a document integral to or explicitly relied upon in the complaint may be considered without converting the motion to dismiss in one for summary judgment"). However, the court may not rely on other parts of the record in determining a motion to dismiss, or when determining whether a proposed amended complaint is futile because it fails to state a claim upon which relief may be granted. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994).

Consistent with these legal benchmarks, it is clear that issues of *res judicata* and claims preclusion may properly be raised as bars to litigation through a motion to dismiss at the outset of a lawsuit.

B. The Plaintiffs' Claims are Barred By Res Judicata.

In this case the defendant asserts that the plaintiffs' claims in this litigation should be barred by the doctrines *res judicata* and claim preclusion because "[t]his lawsuit is the second attempt by Plaintiffs . . . to sue [SWN] for the same torts, involving the same land, and resulting in the same alleged injury." (Doc. 6, at 5). We agree that the *res judicata* doctrine applies here and compels dismissal of the complaint.

A Pennsylvania state court issued the initial judgment in this matter; therefore, this court must follow Pennsylvania preclusion law to determine the effect of the prior state court judgment on the instant case. Gregory v. Chehi, 843 F.2d 111, 116 (3d Cir. 1988). "A federal court applying preclusion principles is bound by the Full Faith and Credit statute, 28 U.S.C. § 1738, and must give a prior state judgment the same effect as would the adjudicating state." Id. (citing Davis v. United States Steel Supply, 688 F.2d 166, 170 (3d Cir.1982)). Regarding, Pennsylvania preclusion law, the Third Circuit has explained that:

> Pennsylvania applies *res judicata*—claim preclusion—only after a final judgment on the merits. Even after judgment, "[i]t is well settled that for the doctrine of *res judicata* to prevail there must be a concurrence of four conditions: 1) identity of issues, 2) identity of causes of action, 3) identity of persons and parties to the action, and 4) identity of the quality or capacity of the parties suing or sued."

Harris v. Pernsley, 755 F.2d 338, 342 (3d Cir. 1985) (quoting Safeguard Mutual Ins. Co. v. Williams, 463 Pa. 567, 345 A.2d 664, 668 (1975)) (citing Bearoff v. Bearoff Bros., Inc., 458 Pa. 494, 327 A.2d 72 (1974)).

According to the Supreme Court of Pennsylvania, claim preclusion bars the following: !

> [A] later action on all or part of the claim which was the subject of the first action. Any final, valid judgment on the merits by a court of competent jurisdiction precludes any future suit between the parties or their privies on the same cause of action. *Res judicata* applies not only to claims actually litigated, but also to claims which could have been litigated during the first proceeding if they were part of the same cause of action.

Balent v. City of Wilkes–Barre, 542 Pa. 555, 669 A.2d 309, 313 (1995) (citing Allen v. McCurry, 449 U.S. 90, 94, 101 S.Ct. 411, 414, 66 L.Ed.2d 308 (1980)).

The plaintiffs argue that the doctrine of *res judicata* does not bar the claims they are now asserting in federal court because the state court action was not "actually litigated" and was not decided "on the merits." (Doc. 10). Specifically, the plaintiffs assert:

> [T]he record in Briggs I demonstrates, the Supreme Court of Pennsylvania, followed by the Superior Court of Pennsylvania on remand, determined that the very first document filed in Briggs I, the compliant, failed to contain an essential allegation: 'physical intrusion'; thereby resulting in the dismissal of the action on that basis alone, *not on the merits.*

(Doc. 10, at 2) (emphasis added).

We do not find the plaintiffs' arguments availing. As we previously stated, the Supreme Court of Pennsylvania has explained that: "*Res judicata* applies… *to claims which could have been litigated during the first proceeding if they were part of the same cause of action*." Balent, 669 A.2d at 313 (Pa. 1995) (citing Allen, 449 U.S. at 94 (1980). Here, the plaintiffs are attempting to not only bring claims arising out of the same set of facts as the first proceeding, but they are also alleging precisely the same causes of action that they brought in the first proceeding. (Doc. 1-2, Ex. A; Doc. 2-1, Ex. 1).

Admittedly, the complaint in the present matter contains more factual allegations around the defendant's natural gas extraction process. In the complaint before this court, the plaintiffs detail the process of hydraulic fracturing (fracking), notably including allegations that the process of fracking results in a "physical intrusion" into the plaintiffs' land by the defendant. In our view, the addition of these facts to the complaint does not circumvent the doctrine of *res judicata*, especially since these facts could have been pled in the first complaint in state court.

In the Superior Court's opinion on remand, the court made note of the following: "We observe that the Supreme Court's holding leaves open for future plaintiffs the possibility of litigating trespass claims based on hydraulic fracturing, so long as they specifically plead that hydraulic fracturing resulted in a physical invasion of their property." Briggs v. Sw. Energy Prod. Co., 245 A.3d 1050, at *4

n.4 (Pa. Super. 2020). This statement by the Superior Court was clearly directed to "future plaintiffs" and in our view was not an invitation for the plaintiffs to have a second attempt at litigating this matter by filing a new complaint specifically pleading "physical intrusion."

Additionally, the plaintiffs' presentation of the same claims with the additional facts to demonstrate a "physical intrusion" can be viewed as presenting these claims under a different legal theory. On this score, as the defendants aptly highlight: "Pennsylvania courts have held that the mere advancement of a different legal theory does not necessarily give rise to a different cause of action." Turner v. Crawford Square Apartments III, L.P., 449 F.3d 542, 549 (3d Cir. 2006) (citing McArdle v. Tronetti, 426 Pa. Super. 607, 627 A.2d 1219, 1222 (1993)); see also Gregory, 843 F.2d at 118 ("Moreover, claim preclusion may not be evaded simply by adding allegations of conspiracy to the very same activity challenged in the first action. In Riverside Memorial Mausoleum, the court held that the plaintiff could not defeat preclusion by asserting a civil conspiracy when the state court had already adjudicated the validity of a claim based on the same activity").

Also, we conclude that the previous state court action was clearly decided "on the merits," contrary to the plaintiffs' assertion. The state court action was decided at the summary judgment stage, and dismissals for failing to state a claim under the Federal Rules of Civil Procedure are recognized as judgments "on the merits." See

Federated Dept. Stores, Inc. v. Moitie, 452 U.S. 394, 399 n.3 (1981) (citing Angel v. Bullington, 330 U.S. 183, 190, 67 S.Ct. 657, 661, 91 L.Ed. 832 (1947); Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946)). Once again, the addition of the factual allegations surrounding the process of hydraulic fracturing, namely the physical intrusion into the plaintiff's land allegation, does not evade the doctrine of *res judicata*. In our view, we cannot conclude that a summary judgment ruling was not a decision "on the merits."

Having concluded that there was a final judgment on the merits, we will briefly address whether the four conditions required to preclude a claim under Pennsylvania's *res judicata* law are satisfied. We will address each condition in turn.

As to the first condition—identity of issues—the Third Circuit in Gregory v. Chehi, 843 F.2d 111 (3d Cir. 1988) explained that: "Isolating the alleged wrongful act is critical to the first requirement." Id. at 116. The alleged wrongful act in both complaints is that the defendant extracted natural gas from under the plaintiffs' property. Although the first complaint does not explain that the defendant extracted the gas through a fracking process that involved a physical intrusion into the plaintiffs' land, the alleged wrongful act was still the same in both complaints. The inclusion of additional facts in the complaint does not change the reality of what occurred. We conclude this first condition is met.

The second condition—the identity of the causes of action—is "determined by considering the similarity in the acts complained of and the demand for recovery as well as the identity of the witnesses, documents and facts alleged." Dempsey v. Cessna Aircraft Co., 653 A.2d 679, 681 (Pa. Super. Ct. 1995) (citing McArdle v. Tronetti, 426 Pa. Super. 607, 612 (1993); In Re Jones & Laughlin Steel Corp., 328 Pa. Super. 442, 450–451 (1984)). Additionally, when evaluating the identity of causes of action, "rather than resting upon the specific legal theory invoked, *res judicata* generally is thought to turn on the essential similarity of the underlying events giving rise to the various legal claims" In re Jones & Laughlin Steel Corp., 328 Pa. Super. at 450–51.

We conclude that this second condition is satisfied. In both actions the plaintiffs assert claims for trespass and conversion. (Doc. 1-2, Ex. A; Doc. 2-1, Ex. 1). In both actions these claims arise from defendant's alleged taking of gas from beneath the plaintiff's property. Moreover, the demand for recovery in the current action and the previous state action are the same. (Doc. 1-2, Ex. A; Doc. 2-1, Ex. 1). Also, we agree with the defendant that the plaintiffs would rely on the same evidence as they needed to in the first lawsuit. (Doc. 6, at 20).

The third and fourth conditions—identity of parties to the action, and identity of the quality or capacity of the parties—are also clearly met. The same four plaintiffs that were named in the complaint before state court are named in the

present complaint, and SWN is the only defendant listed in both complaints. (Doc. 2-1, Ex. 1; Doc. 1-2, Ex A). It appears that the plaintiffs sued in their individual capacities in both complaints, and SWN was sued in the same capacity. (Id.)

Accordingly, we conclude the four conditions that must be present for *res judicata* to apply under Pennsylvania law are satisfied. On this score we note that Pennsylvania courts have in the past relied upon *res judicata* when rejecting similar efforts to recast, refile and resubmits trespass claims that have previously been fully adjudicated. See Tobias v. Halifax Twp., 28 A.3d 223, 226 (Pa. Commw. Ct. 2011). Therefore, we recommend that the plaintiffs should be precluded from bringing their claims of trespass and conversion against SWN and the complaint should be dismissed with prejudice.

IV. Recommendation

For the foregoing reasons, IT IS RECOMMENDED THAT the defendants' motion to dismiss (Doc. 2) be GRANTED.

The parties are further placed on notice that pursuant to Local Rule 72.3:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which

objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Submitted this 20th day of June 2023.

/s/ Martin C. Carlson
Martin C. Carlson
United States Magistrate Judge