UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MID-NEW YORK ENVIRONMENTAL AND SUSTAINABILITY PROMOTION COMMITTEE, INC. (d/b/a NYENVIRONCOM); ROBERT MAJCHER; GRACE WOODARD; and ALEX SCILLA,

Plaintiffs,

-against-

DRAGON SPRINGS BUDDHIST, INC.,

Defendant.

7:22-cv-00513 (VLB)(PED)

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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Plaintiffs Mid-New York Environmental and Sustainability Promotion Committee, Inc. d/b/a NYEnvironcom ("NYEnvironcom"), Robert Majcher ("Robert"), Grace Woodard ("Grace") and Alex Scilla ("Alex") (collectively "Plaintiffs") submit this memorandum of law in opposition to defendant Dragon Springs Buddhist, Inc.'s ("Dragon Springs") motion to dismiss the Amended Complaint.

PRELIMINARY STATEMENT

This action was commenced because Dragon Springs is discharging into Basher Kill and Neversink River fecal coliform in amounts greater than permitted by law or any permit in violation of the Clean Water Act ("CWA"). As alleged in the Amended Complaint, this discharge is occurring down a steep slope on Dragon Springs' property leading to the affected waters and has been confirmed by laboratory testing, including testing as recently as June of this year. Prior to answering, Dragon Springs moves to dismiss the Amended Complaint contending that the notice or intent ('NOI") sent prior to the commencement of this action was not sufficient, and the Amended Complaint does not state a cause of action. Dragon Springs' motion is without merit and should be denied in its entirety.

With regard to the NOI, the NOI provided to Dragon Springs set forth the date, location, nature of the violation, who was committing the violation, and was provided sixty days prior to this action being commenced. The NOI specified that fecal coliform was being discharged into the Basher Kill and Neversink River in amounts in excess of any amount permitted by law or permit, the discharge was ongoing, the discharge was occurring from Dragon Springs' property 600 to 1000 feet from the Galley Hill Road bridge, this illegal discharge was being done by Dragon Springs, and specified the dates of the discharge. Accordingly, the NOI complied with 33 U.S.C. 1365(b)(1).

As for the substance of the claims, the Second Cause of Action of the Amended Complaint alleges that there are discharges of wastewater from Dragon Springs' property containing fecal coliform in amounts greater than permitted by Dragon Springs' permits, and that the violation is ongoing, which fact is confirmed by testing done in June of this year. Dragon Springs asserts that its SPDES permit for the wastewater generated by its wastewater treatment plant only allows Dragon Springs to discharge wastewater into groundwater not surface water, and since it is alleged that the fecal coliform is being discharged into surface water, a claim has not been stated. However, if Dragon Springs' SPDES permit only allows it to discharge wastewater with fecal coliform into groundwater, then Dragon Springs discharging wastewater with fecal coliform into surface water violates its SPDES permit. Accordingly, the Second Cause of Action clearly states a CWA claim.

As for the First Cause of Action, Dragon Springs asserts that any storm water discharged from its property is governed by New York's General SPDES Permit or New York's General SPDES Permit for Construction Activity, neither of which are produced on this motion. As alleged in the Amended Complaint, these permits do not authorize the discharge of fecal coliform through storm water run-off and Dragon Springs does not contend otherwise, and the allegation that Dragon Springs is discharging fecal coliform by storm water runoff without a permit is a CWA violation. Accordingly, the First Cause of Action states a claim.

As for the pendent state law claim, it is factually related to the federal Clean Water Act claims because they arise from the same factual allegations. The CWA and the state nuisance claims both arise from the discharge of fecal coliform into the Basher Kill and Neversink River. Accordingly the pendent state law claim should not be dismissed.

The Amended Complaint alleges that there is a steep hill from the developed portion of the Dragon Springs' property to the affected waters and that wastewater and storm water runoff

from the Dragon Springs' property has dramatically increased the size of these waters. Further, testing of these waters adjacent to Dragon Springs property show extremely high levels of fecal coliform. Dragon Springs' contesting of these factual allegations is simply not the basis to dismiss the Amended Complaint on a pre-answer motion, and Dragon Springs' motion should be denied in its entirety.

ALLEGATIONS OF THE AMENDED COMPLAINT

As set forth in the Amended Complaint, Dragon Springs has constructed a large compound on approximately 393 acres of land in the unincorporated hamlet known as Cuddebackville, located in the Town of Deerpark, Orange County, New York ("Compound"). The Compound acts as the world headquarters of the Falun Gong movement that promotes traditional Chinese culture and is opposed to the Communist China government. The Compound also acts as the headquarters for the Shen Yun dance company. Amended Complaint, ¶ 1.

The Compound has numerous structures including a performing arts center and a wastewater treatment plant, and major construction activity has been ongoing since the spring of 2021. The Compound is located on Shawangunk Mountain, and Dragon Springs' property on the northeast side is a steep slope from the Compound to the immediately adjacent Basher Kill and Neversink River. Amended Complaint ¶ 2. The slope contains numerous gullies and other pathways from the Compound to these waters. Amended Complaint ¶ 2. These waterways are an integral part of the rural beauty of the area, and provide recreational resources to residents and visitors alike. Amended Complaint ¶ 2. Dragon Springs has been cited by the New York State Department of Environmental Conservation and the Town of Deerpark for a number of violations involving the construction activity at the Compound, as well as the operation of the wastewater treatment plant at the property. Amended Complaint, ¶ 2.

Beginning in 2020 and continuing to this day, Dragon Springs has been discharging from the Compound into the Basher Kill and Neversink River wastewater and storm water containing fecal coliform beyond the limits of any permits and applicable law. Amended Complaint ¶ 3. These discharges have been confirmed through water testing verified by a licensed laboratory. Amended Complaint ¶ 3. Upon information and belief, the discharge is the result of illegal construction activity and an improperly maintained and operated wastewater treatment plant. Amended Complaint, ¶ 3.

Plaintiffs assert violations of the Clean Water Act in connection with Dragon Springs' unlawful discharge of pollutants. Plaintiffs Robert and Grace also assert a state law private nuisance claim. Amended Complaint, ¶¶ 47-67.

RECENT TESTING

As set forth in the accompanying Affidavit of Alex Scilla sworn to on July 12, 2022 ("Scilla Affidavit"), in June of this year additional testing was done in the waters immediately adjacent to the Dragon Springs Compound. This is the same location as the prior testing and there are no other properties in the vicinity of these waters. This testing confirms that the fecal coliform levels exceeded 100 m. per thousand. *See* Exhibit 1 to the Scilla Affidavit. Accordingly, it is clear that Dragon Springs continues to discharge fecal coliform in violation of its permit and applicable law.

STANDARD OF REVIEW

Pursuant to Rule 12(b)(6), the Court is constrained to accept the factual allegations in the complaint as true, and draw all reasonable inferences in the plaintiff's favor. *See Roth v. Jennings*, 489 F.3d 499, 501 (2d Cir. 2007). "A complaint may not be dismissed pursuant to Rule 12(b)(6) unless it appears beyond doubt, even when the complaint is liberally construed, that 'the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'"

Global Network Commc'ns, Inc. v. City of New York, 458 F.3d 150, 154 (2d Cir. 2006), *aff'd*, 507 F. Supp.2d 365 (2d Cir. 2009) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). A pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Additionally, it must contain sufficient facts "to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint must allege enough facts to "nudge[ ] [the] claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. This plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678.

ARGUMENT

I. Plaintiffs' Clean Water Act Notice Is Sufficient To Provide Notice of the Alleged Violations to Dragon Springs and the Enforcement Agencies

Dragon Springs argues that Plaintiffs' claims should be dismissed for lack of subject matter jurisdiction resulting from purported deficiencies in the NOI. Specifically, Dragon Springs argues that Plaintiffs' NOI fails to: (1) provide notice of alleged storm water violations; and (2) identify a violation of any specific standard, limitation, or order. Dragon Springs' contentions are without merit.

Plaintiffs' Amended Complaint sets forth that the condition precedent of providing a NOI prior to the commencement of claims based on a violation of the CWA has been met. Amended Complaint, ¶8. Additionally, a review of the NOI demonstrates that it complies with the requirements of the CWA. The NOI sets forth the date, location, the violation and who is committing the ongoing violation. The NOI specified that fecal coliform was being discharged into the Basher Kill and Neversink River in excess of any amount permitted by law or permits,

that the discharge was occurring from Dragon Springs' property 600 to 1,000 feet from the Galley Hill Road Bridge, this illegal discharge was being done by Dragon Springs, and specifies the dates of the discharges.

The "Second Circuit refuse[s] to allow form to prevail over substance in considering the content required of [a notice] letter, and look[s] instead to what the particular notice given may reasonably be expected to accomplish. Thus, in determining whether a CWA plaintiff's notice letter is adequate, a court must consider whether the[] notice letter served the purpose that Congress intended." *City of Newburgh v. Sarna*, 690 F. Supp.2d 136, 147-148 (S.D.N.Y. 2010), *aff'd in part, dismissed in part on other grounds*, 406 Fed. App'x 557 (2d Cir. 2011) (internal quotations and citations omitted). "[S]ome of the more technical departures from the [CWA's] requirements could perhaps be forgiven if the notice requirements as a whole [are] substantially complied with." *Bettis v. Town of Ontario, New York*, 800 F. Supp. 1113, 1118 (W.D.N.Y. 1992).

Further, even if a NOI is insufficient to confer jurisdiction regarding some of the claims in a complaint, a NOI is sufficient for jurisdictional purposes for claims which are set forth in the NOI. *Natural Resources Defense Council v. Southwest Marine Inc.*, 236 F.3d 985 (9th Cir. 2000). In addition, a NOI does not have to specify every possible violation that may be asserted in a complaint. *See e.g., Public Interest Research Group of New Jersey, Inc. v. Hercules, Inc.*, 50 F.3d 1239, 1247 (3d Cir. 1995) ("The regulation [for a NOI] does not require that the citizen identify every detail of a violation"); *Waterkeepers Northern California v. AG Industrial Manufacturing Inc.*, 375 F.3d 913 (9th Cir. 2004) (plaintiffs are not required to set forth in a NOI every specific aspect or detail of a violation").

Dragon Springs contends that the NOI only describes an alleged discharge of fecal coliform bacteria, which it claims is only a wastewater related pollutant, but the Amended

Complaint alleges a claim for relief based on construction-related discharges of storm water. In support of its assertion, Dragon Springs relies on *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001). However, in *Catskill Mountains*, the Second Circuit held that plaintiff could not bring suit for discharges of mercury or lead because the NOI alleged violations based only on discharges of copper. In addition, the Second Circuit held that the pollutant cited in the NOI, in that case copper, could be the basis for a claim notwithstanding the Complaint's assertion of additional pollutants not referenced in the NOI.

In addition, in *City of Newburgh*, the Court distinguished *Catskill* and held that where the NOI clearly establishes the alleged pollutant, defendants "cannot credibly claim to have been confused about what they were accused of discharging in violation of their SPDES permit." 690 F. Supp.2d at 148. Here, the NOI states the specific pollutant being discharged – fecal coliform. The Amended Complaint then alleges that fecal coliform was being improperly discharged. Accordingly, unlike in *Catskill Mountains*, the Amended Complaint does not allege pollutants not contained in the NOI nor can Dragon Springs credibly claim they are confused about what they are accused of discharging.

Dragon Springs also argues that the NOI is improper because fecal coliform can *only* be a wastewater pollutant. While this is a factual assertion that can be raised as a defense to the claims in the Amended Complaint, it does not make the NOI deficient. The NOI describes the illegal discharge of the fecal coliform, so while Dragon Springs can argue that its illegal discharge could only be from wastewater coming from its property, this does not affect the validity of the NOI.

Dragon Springs also contends that Plaintiffs fail to include in the NOI a specific permit violation and describe such violation with particularity. In support of this contention, Dragon Springs cites to *Karr v. Hefner*, 475 F.3d 1192, 1203 (10th Cir. 2007). Although Plaintiffs' NOI

and the NOI in *Karr* similarly allege violations of 33 U.S.C. 1311, the *Karr* NOI was deficient for a multitude of reasons, including: failure to identify the waters affected, citing statutes that were inapplicable to defendants, citing to general statutes including not only 33 U.S.C. 1311, but 40 C.F.R. part 122, which contains four subparts, several dozen sections and 10 appendices.

This is not the case here. Dragon Springs does not set forth any other deficiencies as outlined in *Karr*. The NOI specifies the substance being discharged, specifically where it was being discharged, and that the amounts being discharge violate any applicable law or permit. This specifies the acts making up the violation and that it violated any permit held by Dragon Springs. Dragon Springs was clearly put on notice as to the acts complained of and because it was not in compliance with its permits it violated the CWA. The fact that Dragon Springs in response to the initial Complaint first disclosed the specific permits it has, which disclosure confirmed that Dragon Springs was violating those permits, does not render the NOI deficient. Dragon Springs has cited no authority that suggests that a NOI must set forth a specific permit to be effective and there appears to be none. This makes sense since the specific permit applicable to a property would be known by Dragon Springs, not necessarily the Plaintiffs. The case law makes clear that all that is required in a NOI is to put the defendant on notice of the violation being alleged. Here, the NOI sets forth that the violation being alleged is that fecal coliform is being discharged by Dragon Springs from its property and that discharge is not permitted by any permit.

Based on the foregoing, Dragon Springs' motion to dismiss for lack of subject matter jurisdiction should be denied as Plaintiffs' NOI is adequate. *See also California Sportfishing Protection Alliance v. Shiloh Group, LLC*, 268 F. Supp.3d 1029, 1050-1052 (N.D. Cal. 2017) (NOI stating that defendants discharged polluted storm water associated with industrial activities "and are therefore liable under the CWA for any unlawful discharges" held sufficient).

II. Plaintiffs Have Adequately Pled Their Clean Water Act Claims

The Second Cause of Action of the Amended Complaint alleges that "Dragon Springs discharged and continues to discharge wastewater from the Compound containing Fecal Coliform from point sources to the waters of the United States in excess of the amount authorized under its SPDES Permit." The Amended Complaint sets forth that Dragon Springs is improperly running its wastewater treatment plant, Dragon Springs has been cited for violations by New York State's DEC, and there is a steep hill running to the relevant adjacent waters and that wastewater with fecal coliform is being discharged. And, as indicated in the Scilla Affidavit and the exhibit thereto, testing undertaken in June of this year confirms that the discharge of fecal coliform is ongoing.

Urging dismissal of the CWA claims, Dragon Springs asserts that "there is no numerical limit for fecal coliform in Dragon Springs' storm water permit." Dragon Springs' Memorandum of Law P. 16. How this assertion is even relevant to the Second Cause of Action that does not involve storm water is not explained. Dragon Springs does acknowledge that attached as Exhibit E to the Declaration of Adam Stolorow is Dragon Springs SPDES permit which contains limits on the discharge of fecal coliform from the wastewater treatment plant.

Dragon Springs then contends that the Second Cause of Action should be dismissed because its SPDES permit only allows it to discharge fecal coliform to underground leach fields. Dragon Springs then denies that it is discharging fecal coliform to surface water so the Second Cause of Action should be dismissed. Dragon Springs Memorandum of Law P. 17. This is meritless. If the SPDES permit for the wastewater treatment plant only allows the discharge of wastewater with fecal coliform into groundwater, then Dragon Springs discharging wastewater

with fecal coliform into surface water violates that permit. And, that Dragon Springs denies the allegation doesn't make it so.

Dragon Springs also argues that plaintiffs did not test the waters upstream or on Dragon Springs' property so there is an absence of any "direct proof" that the fecal coliform is from Dragon Springs. Dragon Springs Memorandum of Law, P. 22. Initially, it is not hard to make the inference that the elevated levels of fecal coliform in the swelling waters immediately adjacent to Dragon Springs' property come from Dragon Springs when there is a steep hill with gullies on Dragon Springs' property running to those waters, where there are no other properties in the vicinity, and where Dragon Springs has been cited with violations in how it operated its wastewater treatment plant. In any case, this is not an issue to be decided on a pre-answer motion to dismiss. *See e.g., Highland CDO Opportunity Master Fund, L.P. v. Citibank, N.A., No. 12 CIV. 2827 NRB,* 2013 WL 1191895, at *11 (S.D.N.Y. Mar. 22, 2013) ("issues of fact [are] more appropriate for determination on a motion for summary judgment than on a motion to dismiss"); *Ostren v. Rockland County Sewer District*, 16 F. Supp.3d 294 (S.D.N.Y. 2014) (summary judgment denied where there is an issue of fact as to whether defendant was responsible for illegal discharge).

Dragon Springs is also disingenuous in asserting that plaintiffs did not do any testing on Dragon Springs' property. Dragon Springs Memorandum of Law, P. 7. How plaintiffs would be able to do such resting at the secluded Compound that is fenced in with security guards is not suggested. Again, this is not an issue to be resolved on a pre-answer motion to dismiss.

As for the First Cause of Action alleging discharge of fecal coliform from the run off of storm water, Dragon Springs alleges that the General Storm Water Permit, which it does not attach as an exhibit, does not address fecal coliform. If that is the case then Dragon Springs is discharging fecal coliform through storm water without a permit in violation of CWA. As for

the contention that discharge of fecal coliform never occurs through storm water runoff, that factual contention is not supported by any proof and is inappropriate on a motion to dismiss.

The Amended Complaint clearly alleges discharge from the Compound into the Basher Kill and Neversink River containing fecal coliform well beyond any amounts allowed under any permit and this discharge is the result of illegal construction activity and an improperly maintained and operated wastewater treatment plant. Amended Complaint, ¶ 3. The Amended Complaint states claims for relief under the CWA and it should not be dismissed.

III. The Court Should Not Take Judicial Notice of the Voluminous Extrinsic Evidence Set Forth by Dragon Springs

"The purpose of Rule 12(b)(6) is to test, in a streamlined fashion, the formal sufficiency of the plaintiff's statement of a claim for relief *without* resolving a contest regarding its substantive merits." *Global Network Commc'ns, Inc.*, *supra,* 458 F.3d at 155 (emphasis in original). Therefore, the Rule "assesses the legal feasibility of the complaint, but does not weigh the evidence that might be offered to support it." *Id.* (citations omitted).

Dragon Springs attempts to introduce facts and evidence beyond the Amended Complaint as if this was a summary judgment motion or trial. Dragon Springs has either referenced or attached as an exhibit in support of its motion to dismiss reports, plaintiff Alex's LinkedIn profile, a Basher Kill Fact Sheet, Dragon Springs' November 14, 2018 DEIS, Dragon Springs' wastewater permit, Dragon Springs' Notice of Intent for Coverage under Storm Water General Permit, links to the New York State Department of Environmental Conservation and Environmental Protection Agency, and Dragon Springs' Construction General Permit Notices of Intent, *See* Dragon Springs' Memorandum of Law P. 4, 7, 9, 10, 16, 22 and Stolorow Decl.

Fed. R. Evid. 201(a) limits the scope of judicial notice to "adjudicative facts," and "the tradition has been one of caution in requiring that the matter be beyond reasonable controversy."

Fed. R. Evid. 201(a) advisory committee's note. In order to determine whether to take judicial notice "[a] high degree of indisputability is the essential prerequisite." *McCormack v. Cheers*, 818 F. Supp. 584, 597 n. 14 (S.D.N.Y. 1993). Pursuant to Fed. R. Evid. 201(b), judicial notice encompasses facts that are either "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," or they are "generally known within the territorial jurisdiction of the trial court." *New Alliance Party v. New York State Bd. of Elections*, 861 F. Supp. 282, 288 (S.D.N.Y. 1994).

Here, Dragon Springs' attempt to use a purported LinkedIn page and selected links to other information on websites, the accuracy of which has not been established, is clearly outside the scope of judicial notice.

IV. The Court Should Exercise Supplemental Jurisdiction Over Plaintiffs' Nuisance Claim

The Court should exercise supplemental jurisdiction over Plaintiffs' nuisance claim because it derives from the facts supporting its Clean Water Act claims. A district court's exercise of supplemental jurisdiction is governed by 28 U.S.C. § 1367. Subsection (a) provides:

> (a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

28 U.S.C. § 1367(a).

For purposes of section 1367(a), a "state law claim forms part of the same controversy if it and the federal claim 'derive from a common nucleus of operative fact.'" *Briarpatch Ltd., L.P v. Phoenix Pictures, Inc.*, 373 F.3d 296, 308 (2d Cir. 2004) (citations omitted).

Here, the private nuisance claim and Clean Water Act claims clearly derive from a common nucleus of operative facts since they arise out of Dragon Springs' unlawful discharge of pollutants into the Basher Kill and Neversink River. Dragon Springs does not dispute the commonality of the claims as it admits that the private nuisance claim "restate the prior CWA allegations in the form of a state common law claim[.]" Dragon Springs' Memorandum of Law at p. 8.

Plaintiffs' private nuisance claim is based on the fact that they "have suffered injuries from the discharge of these pollutants greater than the public at large in that they are prevented from fully enjoying these waters adjacent or close to their property." Amended Complaint, ¶ 63. *See, e.g., Treglia v. Town of Manlius*, 313 F.3d 713, 723 (2d Cir. 2002) (exercise of supplemental jurisdiction was proper where plaintiff's state and federal claims arose "out of approximately the same set of events"). Where section 1367(a) is satisfied, "the discretion to decline supplemental jurisdiction is available only if founded upon an enumerated category of subsection 1367(c)." *Itar–Tass Russian News Agency v. Russian Kurier*, Inc., 140 F.3d 442, 448 (2d Cir. 1998).

Subsection (c) provides:

> The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—
>
> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c). 'In providing that a district court "may" decline to exercise such jurisdiction, [section 1367(c)] is permissive rather than mandatory.' *Shahriar v. Smith & Wollensky Rest. Grp., Inc.*, 659 F.3d 234, 245 (2d Cir. 2011) (citations omitted).

Subsection(c)(1) is not implicated because Plaintiffs' nuisance claim does not raise a "novel or complex issue of State law." The private nuisance claim is straight forward and the relevant facts are easily determined. Dragon Springs does not dispute that Robert and Grace are property owners immediately adjacent to the Compound or that they have suffered injuries from the pollutants in that they cannot fully enjoy the waters close to their property. The only issue that remains is whether Dragon Springs is liable for the discharge of pollutants from the Compound.

Subsection(c)(2) is not implicated because Plaintiffs' sole private nuisance claim does not "substantially predominate" over the two CWA claims. The private nuisance claim merely overlaps with the CWA claims as Plaintiffs seek an injunction and monetary damages based on the determination of issues tied to the CWA claims. *See Cayuga Const. Corp. v. United States,* No. 91 CIV. 4883 (LAP), 1993 WL 258738, at *2 (S.D.N.Y. July 6, 1993) (denying motion to dismiss counterclaims for lack of jurisdiction where such claims "do not substantially predominate over the interpleader action" and "overlap with the interpleader action in many respects and does not perceive the counterclaims as collateral baggage.").

Subsection (c)(3) has no bearing for the reasons set forth in Point II. Plaintiffs' have adequately stated claims for Dragon Springs' CWA violations.

Subsection (c)(4) also has no bearing here because the use of "exceptional circumstances" "indicates that Congress has sounded a note of caution that the bases for declining jurisdiction should be extended beyond the circumstances identified in subsections

(c)(1)-(3) only if the circumstances are quite unusual." *Itar-Tass*, 140 F.3d at 448 (internal quotation marks omitted).

Even if the Court finds one of the subsection (c) factors applicable, it

> should not decline to exercise supplemental jurisdiction unless it also determines that doing so would not promote the values articulated in [United Mine Workers of America v.] *Gibbs*, [383 U.S. 715, 726]: economy, convenience, fairness, and comity.

Jones v. Ford Motor Credit Co., 358 F.3d 205, 214 (2d Cir. 2004).

Here, it would be inconvenient to move Plaintiffs' state claim "to a separate court to proceed on a separate timeline." *Mendez v. K&Y Peace Corp.*, No. 16-CV-05562 (SN), 2019 WL 2223220, at *2 (S.D.N.Y. May 22, 2019) (retaining supplemental jurisdiction over state law claims even where the federal claims have been dismissed). Additionally, exercising supplemental jurisdiction over the state claim will serve judicial economy and promote an expeditious resolution.

For the foregoing reasons, this Court should exercise supplemental jurisdiction over Plaintiffs' private nuisance claim because it arises from a common nucleus of operative facts as the CWA claims.

V. Dragon Springs' References to Plaintiffs' Original Complaint is Irrelevant and Should be Struck or Ignored

It is a "cardinal rule of civil procedure" that an amended complaint supersedes the original complaint and "renders the original complaint of no legal effect. It is as though the original complaint was never served." *Lucente v. Int'l Bus. Machines Corp.*, 310 F.3d 243, 260 (2d Cir. 2002) (citing *In re Crysen/Montenay Energy Co.*, 226 F.3d 160, 162 (2d Cir. 2000)).

Dragon Springs' brief contains repeated references to Plaintiffs' original complaint and Dragon Springs' original motion to dismiss. *See, e.g.,* Dragon Springs' Memorandum of Law at 3, 6, 7, 8, 15. Indeed, Dragon Springs makes comparisons between the original and amended

pleadings in an effort to disparage the sufficiency of the Amended Complaint. *See, e.g.,* Dragon Springs' Memorandum of Law at 7 ("Neither the Complaint nor the Amended Complaint alleges any basis . . ."); at 8 ("Like the Complaint, the Amended Complaint . . ."); at 15 ("In Plaintiffs' original complaint, their first claim for relief was based on . . .").

On the basis of the authority that the Amended Complaint supersedes the original complaint, Plaintiffs respectfully request that the Court strike or ignore all references to Plaintiffs' original complaint and Dragon Springs' first motion to dismiss.

CONCLUSION

For the forgoing reasons, Dragon Springs' motion to dismiss the Amended Complaint pursuant to Rule 12(b)(6) and 12(b)(6)(1) should be denied in its entirety.

Dated: July 14, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 14th day of July 2022, a copy of the foregoing *Memorandum of Law in Support of Motion to Dismiss the Complaint* was served via the ECF system upon:

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