UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SIMON V. KINSELLA

Plaintiff,

v.

BUREAU OF OCEAN ENERGY MANAGEMENT and in their official capacities, Director ELIZABETH KLEIN,[1] Environment Branch for Renewable Energy ("OREP") Chief MICHELLE MORIN, OREP Program Manager JAMES F. BENNETT, OREP Environmental Studies Chief MARY BOATMAN, Economist EMMA CHAIKEN, Economist MARK JENSEN, Biologist BRIAN HOOKER, and JENNIFER DRAHER; and DEB HAALAND, Secretary of the Interior, U.S. Department of the Interior; LAURA DANIELS-DAVIS, in her official capacity as Principal Deputy Assistant Secretary, Land and Mineral Management; and MICHAEL S. REGAN, Administrator, U.S. Environmental Protection Agency;

Defendants,

and

SOUTH FORK WIND, LLC,

Defendant-Internevor.

Case No. **2:23-cv-02915**

(Block, J.)
(Tiscione, M.J.)

REPLY TO DEFENDANT-INTERVENOR SOUTH FORK WIND LLC'S OPPOSITION TO PLAINTIFF'S MOTION TO FILE A SECOND AMENDED COMPLAINT

[1] U.S. Bureau of Ocean Energy Management ("BOEM") Director was Amanda Lefton when filing the complaint on July 20, 2022, but Ms. Lefton resigned effective January 19, 2023.

I) PRELIMINARY STATEMENT

Defendant-Intervenor South Fork Wind's Memorandum in Opposition to Plaintiff's Motion to File a Second Amended Complaint *and* Motion to Dismiss both rest on whether Plaintiff's injury is plausible. As is explained in detail (below and in the attached affidavit), the injury is ***nearly certain***— the infrastructure South Fork Wind installed underground *will* adversely impact and prolong PFAS contamination. *Please read* Kinsella Affidavit (Exhibit A).

II) ARGUMENT

a) Plaintiff's fraud claims are based on common-law fraud (*not* statutory or regulatory law).

SFW mischaracterizes Claims One, Two, and Three as if Plaintiff based his claims on statutory and regulatory violations of the Outer Continental Shelf Lands Act ("OCSLA") and the Coastal Zone Management Act ("CZMA"). Plaintiff did *not.* The cause of action for the SAC's first three claims against SFW is fraudulent misrepresentation (Plaintiff's references to statutory and regulatory violations are merely ***the subject*** of SFW's fraudulent misrepresentations). Plaintiff states the grounds and relief sought under each claim. S*ee* SAC, Claim One (¶¶ 265-268), Claim Two (¶¶ 315-318), and Claim Three (¶¶ 370-373).

b) Plaintiff did not delay in filing claims against South Fork Wind (SFW)

When Plaintiff filed his (original) Complaint in the District of Columbia (on July 20, 2022) against *Federal Defendants* (*not* SFW), the case concerned "a U.S. *federal* agency that turned a blind eye to a private developer's transgressions and permitted it to profit from its wrongdoing, causing harm to the public [including Plaintiff] … this case does not challenge the project; it challenges the federal agency review of the project …" (*see* ECF 50-1, at 14-15, PDF 18-19). When Plaintiff filed his Complaint, he could not file claims against SFW because it had no nexus to the forum, the District of Columbia.

SFW claims that "Plaintiff *could have* filed" his "second amended complaint—filed a year

ago— include[ing] similar purported allegations of fraud against SFW … with his first complaint [in November 2022] but failed to do so" (emphasis added) (ECF 103, at 4, PDF 10). However, Ms. Schneider's statement is demonstrably false.

On November 2, 2022, Plaintiff filed his First Amended Complaint ("FAC"), but, again, he could *not* include claims against SFW because it delayed intervening until November 5, 2022 (ECF 40), ***three days after*** Plaintiff had filed his FAC,[2] and five days after that, the U.S. District Court for the District of Columbia concurrently accepted Plaintiff's FAC and transferred the case to this Court (ECF 49) (on November 10, 2022). The Appeals Court for the D.C. Circuit order transferring the case to the U.S. District Court for the Eastern District of New York (EDNY) became effective on June 7, 2023 (D.C. Cir., No. 22-5317, Doc. 1999608).[3]

Plaintiff could *not* have filed a second amended complaint with claims against SFW in the District Court for D.C. (because SFW has no connection to the forum), and as SFW knows, nor could he in the Appeals Court for the D.C. Circuit because SFW successfully challenged Plaintiff's attempt to do so (D.C. Cir., No. 22-5316, Docs. 1980154 and 1980866) (*dismissed as moot*). The first opportunity Plaintiff had to file claims against SFW arose on June 7, 2023, when the order transferring the case to the EDNY became effective. Nine days later (June 16, 2023), SFW filed an application requesting a pre-motion conference for a partial motion to dismiss" (ECF 66), which turned out to be a Motion to Dismiss *all* Plaintiff's claims that SFW filed ***four months later*** (October 19, 2023) (ECF 89). It would have been premature for Plaintiff to file a SAC *before* SFW had filed its Motion to Dismiss because Plaintiff would not have

[2] *See* Unopposed Motion of SFW to Intervene as a Defendant, filed November 5, 2022 (ECF 40). SFW delayed intervening from July 20, 2022 (when Plaintiff filed his initial complaint) (ECF 1) through to November 5, 2022 (when SFW intervened) (ECF 40).

[3] *See* Plaintiff-Petitioner's Petition for a Writ of Certiorari (Case No. 22-1251, at 9, PDF 19). Avaiable online at—www.SupremeCourt.gov/search.aspx?filename=/docket/docketfiles/html/public/22-1251.html. (last accessed Jan 13, 2024). *Also, see* Petition for a Writ of Mandamus (D.C. Cir., No. 22-5317, Doc. 1976909) challenging the transfer order (*denied*).

known what to amend to remedy any possible shortcoming in his FAC. It would have been a waste of everyone's time had Plaintiff filed a SAC *before* SFW's Motion to Dismiss only to file a *third* amended complaint after considering SFW's and Federal Defendants' respective motions to dismiss. Although Plaintiff was overseas, he responded to SFW's Motion to Dismiss ***six times more quickly*** (within nineteen days) (ECF 92) than SFW took to file its motion (four months). Plaintiff filed his Second Amended Complaint ("SAC") (ECF 101) according to the Court-approved schedule (by December 5, 2023) (ECF 102).

SFW fails to provide *any* evidence to support the claim that "Plaintiff unduly delayed filing this Motion" (ECF 103, at 16, PDF 22) or *any* motion. The only undue delays in the case were SFW's— its ***three-and-a-half-month delay*** intervening, preferring to wait until *after* Plaintiff had filed his FAC, its ***four-month delay*** in filing a motion to dismiss after requesting a pre-motion conference, and its ***one-and-a-half-year delay*** in filing a Motion to Dismiss that it should have filed in the District Court for D.C., but did not (without explanation). Had SFW intervened and filed a motion to dismiss in the District Court for D.C., it would have saved everyone, including the Court, a tremendous amount of time and expense.

Plaintiff has nothing to gain by delaying this case (it costs him more with each delay), but SFW had everything to gain— to finish construction and avoid having to answer the allegations.

c) Plaintiff's Second Amended Complaint will result in less expense and a quicker resolution.

SFW's claims that Plaintiff filed "*entirely new* claims for 'common-law fraud'" and introduced "*a new legal theory*" (emphasis added) (ECF 103, at 18, PDF 24) contradict its earlier statement that Plaintiff's "proposed second amended complaint—filed a year ago—included *similar purported allegations of fraud against SFW*" (emphasis added) (ECF 103, at 4, PDF 10). Plaintiff's claims cannot be both "*entirely new claims"* of fraud and also "*similar* [] *allegations*

of fraud." SFW does not identify the purported new legal theory (the same legal theory of fraud that SFW has been defending on behalf of Federal Defendants under the FAC).

Under the (prior) FAC, SFW had aggressively defended ***five fraud claims*** on behalf of Federal Defendants, but now, under the new SAC, it has only to defend ***three fraud claims*** that it admits are "similar" (*id.*). Under the (prior) FAC, SFW was defending ***five*** National Environmental Policy Act claims, ***three*** Outer Continental Shelf Lands Act claims, and ***four additional claims*** (one claim each for violating the Fourteenth Amendment's Due Process Clause, the Coastal Zone Management Act, Freedom of Information Act, and Executive Order 12898): ***seventeen claims in total***, but now, under the new SAC, it is defending ***only seven claims***. The SAC is forty pages shorter, and SFW admits that "[n]one of the claims in the proposed SAC is based on new facts or changed circumstances" (ECF 103, at 18, PDF 24). Still, SFW claims that it has "to expend additional resources to address Plaintiff's [unidentified] new legal theory" (ECF 103, at 18, PDF 24). SFW claims that the SAC will "significantly delay the resolution of this action" (*id.*) without explaining how *defending ten fewer claims* requires "additional resources" or precisely what exceptional "new legal theory" Plaintiff has introduced. There are now only seven claims and three issues in the case: water quality, project cost, and the SFW/Sunrise Alternative. The case is focused, shorter, and more concise. It will save *all* parties *and the court* time and expense and bring the case closer to resolution. Finally, it would be a waste of judicial resources if Plaintiff had to file yet another case alleging fraud against SFW (separately) and then consolidate the cases.

d) Plaintiff wrote his SAC so that it would survive a motion to dismiss; thus, it is not futile.

SFW claims that "[b]ecause none of Plaintiff's claims in the proposed SAC would survive a motion to dismiss, amendment would be futile, and the Motion should be denied" (ECF 103, at

7, PDF 13). The grounds for dismissal, so SFW argues, is due to Plaintiff's lack of standing.

In the District Court for the District of Columbia, Judge Cobb had already addressed Plaintiff's standing— "I just want to make clear, with respect to the first couple of paragraphs, I have not said anything about standing or suggested that you don't have standing to bring this motion. So I just want that to be clear." *See* Transcript of November 9, 2022, marked Exhibit B. The "first couple of paragraphs" to which Judge Cobb referred are as follows— "The Supreme Court, in rejecting the view that 'the injury-in-fact requirement had been satisfied by congressional conferral upon all persons' (*Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573 (1992)), noted an exception – 'a case where concrete injury has been suffered by many persons, as in mass fraud [emphasis added]' (*id.*). The SAC alleges that SFW engaged in mass fraud against the United States by fraudulently misrepresenting its Project *and* against Plaintiff. Nonetheless, Plaintiff still "allege[s] facts demonstrating each element" (*Spokeo, Inc. v. Robins,* 578 U.S. 330, 338 (2016). "'[T]o establish standing, a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief.' *TransUnion LLC v. Ramirez,*141 S.Ct. 2190, 2203 (2021) (citing *Lujan,*504 U.S. at 560-61)." *Kent v. Pooltogether, Inc.*, No. 21-CV-6025-FB-CLP, at *8-9 (EDNY June 7, 2023). SFW claims that Plaintiff "fails to properly allege *any* of these elements with respect to his 'fraud' claims against SFW" (ECF 103, at 8, PDF 14).

e) Injury in Fact

SFW repeats the same arguments it used in its motion to dismiss Plaintiff's FAC, ignoring that the FAC and SAC are different. Notably, in the SAC, ***SFW*** is the subject of three fraud claims (*not* BOEM). The difference is essential because BOEM, by its *own* admission, could

cite only one example in four years (from 2017 to 2021) where it spent time on the South Fork (3¾ hours on November 5, 2018). (ECF No. 25-1, at 2, ¶ 7).[4] On the other hand, SFW has been active on the South Fork since 2017, but SFW ignores Plaintiff's claims of injury from 2017 to February 2022, when SFW started pouring concrete into trenches into or near groundwater. SFW believes the only injuries to Plaintiff were from two-and-a-half miles of concrete in and at the capillary fringe of a highly contaminated sole-source aquifer in Plaintiff's neighborhood, but this is a case of fraud, which began on August 5, 2017, at a Wainscott Citizens' Advisory Committee ("WCAC") meeting. Plaintiff was a volunteer member of the WCAC, which had asked him to look into water quality and SFW. Plaintiff promised the WCAC he would do so. Due to SFW's continued misrepresentations regarding its Project's impact on water quality, Plaintiff still fulfills that promise to his community six-and-a-half years later.

At the WCAC's August 2017 meeting, SFW made the same false statements it continues to make today: that it would account for site-specific conditions and (legally) obtain appropriate regulatory permits, among other false representations. (SAC, ¶¶ 193-196, 256) Still, SFW failed to account for site-specific conditions by concealing its Project's impact on groundwater quality. *Please read* Kinsella Affidavit, marked Exhibit A (only six pages) (SAC 196). Consequently, Plaintiff has little confidence that SFW adequately tested its construction site for contamination or took adequate precautions and designed its underground infrastructure to minimize possible adverse impacts to his immediate environment near his home where he swims, sails, etc. SFW has neither delivered the (legally sufficient) "technical and environmental impact studies" it promised, nor has it been transparent, nor left the area in a better condition (SAC 196). The injury to Plaintiff includes everything that he would not have had to contend with but for SFW's

[4] According to the transcript, the meeting on November 5, 2018 went from 5 p.m. to 8:45 p.m. *See* transcipt at https://downloads.regulations.gov/BOEM-2018-0010-0115/attachment_1.pdf (last accessed Jan 17, 2024)

fraudulent representations and includes over six years of "anxiety, stress, loss of money (lots of it), emotional pain, suffering, inconvenience, frustration, mental anguish, loss of reputation, loss of quality and enjoyment of life, and an increased the risk of adverse effects to his health from excess exposure to PFOA, PFOS, and other PFAS contaminants … to which he would not otherwise have been exposed." (SAC, ¶ 264).

f) Plaintiff's injuries caused by SFW are specific to him; they are *not* generalized.

SFW's linchpin reason for claiming that Plaintiff's motion to file a SAC is futile (i.e., he lacks standing) is premised on SFW's claim that Plaintiff's fraud "allegations are, at very best, 'generalized grievances' insufficient to show injury-in-fact. *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 616 (1989)." (ECF 103, at 8, PDF 14). In *ASARCO*, "the association's contention [was] that the state law undermines 'the quality of education in Arizona.' … We cannot say with any certainty that this contention is even likely to be correct." *Id.* On the contrary, the opposite is true in the instance matter. The injury is specific to the Plaintiff.

For example, when Plaintiff was legally driving near his home along Beach Lane to view construction activities after being waved through by SFW's construction workers (on March 25, 2022), SFW bullied and harassed Plaintiff and filed a *false* police report against him. As a result, a police officer came to Plaintiff's home and, through no fault of the police officer, threatened Plaintiff with "possible criminal charges" based on the site foreman's false statements. *See* East Hampton Town Police Department Event Report (EHT-EV-2746-22) and Plaintiff's response (ECF 19-3). (SAC, ¶ 200, ¶ 260). If SFW's site foreman was willing to intimidate Plaintiff by filing a false police report once, then the next time Plaintiff drives down Beach Lane to visit friends or to go to the beach, SFW could just as easily file another false report but with more severe claims resulting in Plaintiff's arrest *on* "criminal charges" (albeit on fabricated 'facts').

Plaintiff took SFW's intimidation seriously. SFW demonstrated it would go to extreme lengths to make life difficult for him. At the time, Plaintiff was taking pictures of SFW's construction, and SFW's threat had the practical effect of restricting Plaintiff from taking photos (that day and going forward) of SFW's trenches so he could obtain evidence of groundwater, such as the picture of the transition vault (*see* ECF 1-2, at 6). SFW's intimidation helped conceal evidence of SFW's fraud, which is the subject of the SAC.

SFW states that "Plaintiff's allegation of harm rests upon unsupported and conclusory assertions that as a result of SFW's supposed 'fraud,' Plaintiff is 'uncertain' as to [the] extent of the SFEC-Onshore's alleged impacts to groundwater" (ECF 103, at 8). What SFW dismisses as "unsupported and conclusory assertions" is, *in fact,* a complete failure by SFW to acknowledge *any* groundwater PFAS contamination in its COP, which it submitted to BOEM for review and approval (that BOEM granted based on SFW's false representations). *See* Kinsella Affidavit (ECF 93, ¶¶ 8-39, ¶¶ 46-104 and ¶¶ 168-170). There is no genuine dispute that SFW falsely represented groundwater quality by omitting reports and test results (including its *own*) showing harmful levels of groundwater contamination where it proposed construction from its COP.

In 2003, this Circuit held that "plaintiffs adequately allege injury in fact when they aver they use the affected area and are persons `for whom the aesthetic and recreational values of the area will be lessened' by the challenged activity.' *Friends of the Earth v. Laidlaw Envtl. Servs.*,528 U.S. 167, 183, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) [internal citations removed]. We are persuaded that … ***allegations about the health effects*** of air pollution ***and of uncertainty*** as to whether the EPA's actions expose them ***to excess*** air pollution are sufficient to establish injury-in-fact, given that each lives near a facility [emphasis added] …." *See N.Y. Public Interest Research v. Whitman*, 321 F.3d 316, 325 (2d Cir. 2003). In the instant matter, SFW's fraudulent

misrepresentations of water quality concerning chemical contaminants in an aquifer used for drinking water, crop irrigation, and recreation are analogous to the air pollution in *N.Y. Public Interest Research*. Pollution in the air and groundwater are environmental contaminants that adversely affect human health. In *N.Y. Public Interest Research*, the allegations of injury concern "increased health-related uncertainty," mirroring Plaintiff's uncertainty regarding the degree to which SFW's Project will adversely impact groundwater and its possible health impacts. "[T]he distinction between an alleged exposure to excess air pollution [or in this case groundwater contamination] and uncertainty about exposure is one largely without a difference since both cause personal and economic harm. To the extent that this distinction is meaningful, it affects the extent, not the existence, of the injury. To be sure, an individual may well be more likely to live with uncertainty as opposed to certainty about exposure to excess levels of air pollution. But such marginal differences are not meaningful in assessing allegations of injury-in-fact since 'the injury-in-fact necessary for standing `need not be large, an identifiable trifle will suffice." *LaFleur,*300 F.3d at 270-71 (quoting *Sierra Club v. Cedar Point Oil Co.,*73 F.3d 546, 557 (5th Cir. 1996))." *See N.Y. Public Interest Research v. Whitman, 321 F.3d 316, 326 (2d Cir. 2003).* As SFW points out, "Plaintiff is 'uncertain' as to [the] extent of the SFEC-Onshore's alleged impacts to groundwater and that he, therefore, avoids swimming and sailing in Georgica Pond, has installed water filters in his home, and believes that his home has become 'less valuable.' [SAC] ¶¶ 21, 28, 257, 259, 284, 305-07, 344-54, 360-63." (ECF 103, 8).

g) Plaintiff's SAC contains sufficient factual matter to state a plausible claim to relief.

Plaintiff's SAC is long (101 pages) because it contains a ton of factual matter more than adequate to substantiate the claims for relief. Still, SFW claims Plaintiff's allegations against it are "not sufficient to state any of the[] elements of a common law fraud claim" required under

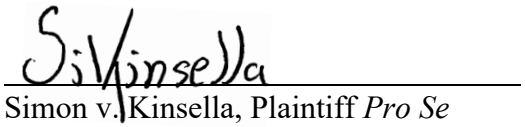
New York law, citing the following commonly accepted elements— (1) a material misrepresentation or omission of fact (*see* SAC, ¶¶ 154-161); (2) made by defendant with knowledge of its falsity (*see* SAC, ¶¶ 162-171); (3) and intent to defraud (*see* SAC, ¶¶ 172-192); (4) reasonable reliance on the part of the plaintiff (*see* SAC, ¶¶ 193-197); and (5) resulting damage to plaintiff (*see* SAC, ¶¶ 198-200). *In addition* to the general factual matter is specific facts relating to Claims One (¶¶ 239-270), Two (¶¶ 271-320) and Three (¶¶ 321-375).

Finally, SFW claims that "Plaintiff lacks standing to bring 'fraud' claims against SFW, having failed to identify a[n] … injury … that is fairly traceable to SFW's actions … that would be redressable by an order from this Court." SFW is the cause of its concrete infrastructure the approval for which it obtained by fraud. In *Simon Schuster v. Crime Victims Bd.*, the U.S. Supreme Court "recognized the 'fundamental equitable principle,' … that '[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity ...' " (502 U.S. 105, 119 (1991)). It is inconsistent with fundamental equitable principles for SFW "to profit by his own fraud" (*id.*), that is, the fraud when it knowingly omitted PFAS contamination from its COP that materially misrepresented groundwater quality to secure regulatory approval. The Court can order SFW to either take corrective measures to remedy the problems or, if it cannot, dismantle what it obtained by fraud.

III) CONCLUSION

For the reasons stated herein, Plaintiff respectfully requests that the Court grant his motion to file a Second Amended Complaint.

Respectfully submitted on this nineteenth day of January 2024,



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