

BARCLAY DAMON^{LLP}

Yvonne E. Hennessey
Partner

May 15, 2018

VIA UPS OVERNIGHT MAIL

Lois E. Hall
Yates County Clerk
Yates County Clerk's Office
417 Liberty Street – Suite 1107
Penn Yan, New York 14527

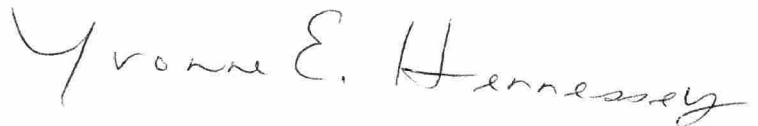
Re: Sierra Club, et al. v. NYSDEC, et al.
Yates County Supreme Court, Index No. 2017-0232

Dear Ms Hall:

Enclosed herein for filing please find original and one copy of Affirmation of Yvonne E. Hennessey in Support of State's Motion to Strike. Kindly date-stamp the copy and return to us in the enclosed stamped, self-addressed envelope.

Thank you for your attention to this matter.

Very truly yours,



Yvonne E. Hennessey

YEH/srm

Enclosures

cc: Nicholas Buttino, Esq. (via electronic and first class mail, with enclosure)
Rachel Treichler, Esq. (via electronic and first class mail, with enclosure)
Richard Lippes, Esq. (via electronic and first class mail, with enclosure)
Hon. William F. Kocher (via electronic mail, with enclosure)
Carol B. Winslow, Chief Clerk, Yates County Supreme Court (via UPS overnight mail, with enclosure)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF YATES

In the Matter of the Application of

SIERRA CLUB, COMMITTEE TO PRESERVE THE
FINGER LAKES by and in the name of PETER
GAMBA, its President, and COALITION TO PROTECT
NEW YORK by and in the name of KATHRYN
BARTHOLOMEW, its Treasurer, and SENECA LAKE
GUARDIAN, A WATERKEEPER AFFILIATE by and in
the name of YVONNE TAYLOR, its Vice President,

Petitioners,

For a Judgment Pursuant to Article 78 of the
Civil Practice Law and Rules

-against-

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION, BASIL
SEGGOS, COMMISSIONER, GREENIDGE
GENERATION, LLC and LOCKWOOD HILLS, LLC,

Respondents.

**AFFIRMATION OF
YVONNE E. HENNESSEY IN
SUPPORT OF STATE'S
MOTION TO STRIKE**

Index No. 2017-0232

BARCLAY DAMON, LLP

STATE OF NEW YORK)
) SS.:
COUNTY OF ALBANY)

Yvonne E. Hennessey, Esq. affirms, under the penalties of perjury pursuant to Rule 2106 of the Civil Practice Law and Rules (“CPLR”):

1. I am an attorney at law duly licensed to practice in the courts of the State of New York and a member of the firm of Barclay Damon LLP, attorneys for Greenidge Generation, LLC and Lockwood Hills, LLC (collectively, the “Greenidge Respondents”).

2. I make this Affirmation in support of the New York State Department of Environmental Conservation’s (the “Department”), and its Commissioner, Basil Seggos’s, (collectively, “the State Respondents”) motion to strike portions of the affidavits submitted by Petitioners as part of their Reply Memorandum of Law to Respondents’ Objections in Points of Law and Memorandums of Law.

3. On April 28, 2018, Petitioners submitted a Reply Memorandum of Law to Respondents' Objection in Points of Law and Memorandums of Law (the "Reply"). Petitioners also submitted eleven affidavits, along with supporting exhibits ("Petitioners' Affidavits"). One of these affidavits was a mere resubmission of an affidavit in the prior action between the parties concerning the Greenidge Project ("*Greenidge I*").

4. On May 11, 2018, the State Respondents submitted a Motion to Strike portions of Petitioners' Affidavits.

5. The State Respondents do not seek to strike the portions of the affidavits necessary to establish standing. Rather, the State Respondents object to and seeks to strike the new evidence submitted in Petitioners' Affidavits that is not related to the Petitioners' standing.

6. Under 22 NYCRR §202.8(c) and 22 NYCRR §202.9, Petitioners cannot submit affidavits offering new evidence as part of the Reply. Such evidence could only have been properly submitted at the time Petitioners filed their Petition.

7. In addition, Petitioners may not submit evidence that was not before the Department at the time it made the determination now challenged by Petitioners. Accordingly, as detailed by the State Respondents' Motion to Strike, certain portions of Petitioners' Affidavits should be stricken.

8. Here, as in *Greenidge I*, Petitioners have offered affidavits that go well above and beyond issues related to Petitioners' standing. Indeed, they have attempted to resubmit the exact same Affidavit of Gregory Boyer previously found by this Court to violate 22 NYCRR 202.8(c) and 202.9. And, in doing so, Petitioners conveniently waited to filed their affidavits until Respondents are no longer permitted under the rules to file responding papers.

9. Petitioners have done so even though this Court considered this exact same issue in *Greenidge I*. In doing so, the Court found that the technical aspects of Petitioners' affidavits violated 22 NYCRR 202.8(c) and 202.9 and ruled that it would "not consider the technical aspects of those

affidavit[s] including but not limited to the affidavit of Gregory Boyer[.]” See *Sierra Club v. New York State Department of Environmental Conservation et al*, Index No. 2016-0165, Slip. Op. at p. 6 (N.Y. Sup. Ct. Yates Co. Apr. 21, 2017).

10. This attempt by Petitioners to side-case the rules governing Article 78 proceedings began in *Greenidge I* and continues here, not just with the filings of affidavits in violation of the Uniform Rules.

11. As the Court may recall, Petitioners’ claims in this action seek to revisit this Court’s prior determination that the Department’s June 28, 2016 Amended Negative Declaration and underlying environmental review was proper. The mere fact that Petitioners now try to characterize their claims as concerning water (as opposed to air) permits for the Greenidge Facility misses the point and ignores the realities of their filings in *Greenidge I* as well as their recent briefing to the Fourth Department.

12. So, not only have Petitioners improperly attempted to get a second bite at the proverbial apple in this action regarding their claims under the State Environmental Quality Review Act, they now seek to reintroduce an affidavit this Court has already disregarded as well as to submit affidavits with unnecessary and unsupported technical information and assertions that flout the Uniform Civil Rules and well-established Article 78 practice.

13. This was only after filing their Petition on November 8, 2017, not only without any attempt to establish Petitioners’ standing, but also without any supporting Memorandum of Law, as also required by Part 202.

14. Respondents agreed to provide Petitioners time to file a supporting Memorandum of Law and, with this additional time, Petitioners yet again failed to file any affidavits attempting to establish Petitioners’ standing. Rather, they waited more than (5) months from the filing of their

Petition to attempt to establish standing and then to take the “opening” to try to sneak in new and spurious technical information.

15. Respectfully, this Court should not condone Petitioners’ pattern of disregard for the rules and this Court’s prior holdings in *Greenidge I*, which serves only to waste judicial resources and inexcusably burden the Greenidge Respondents and harm its business operations.¹

16. The Greenidge Respondents, therefore, fully support the State Respondent’s Motion to Strike, along with any other relief this Court determines to be appropriate.

Dated: May 15, 2018
Albany, New York


YVONNE E. HENNESSEY, ESQ.

BARCLAY DAMON, LLP

¹ Indeed, conduct such as Petitioners in their on-going litigation campaign against the Greenidge Project are admonished by the Uniform Rules which provide the Court with discretion to award reasonably incurred expenses and attorneys fees, and/or sanctions, against any party or attorney in any civil action or proceeding for engaging in frivolous conduct. 22 N.Y.C.R.R. § 130-1.1(a); *see also* 22 N.Y.C.R.R. § 130-1.1(c)(1), (2) (deeming frivolous conduct to include “action taken primarily to delay the litigation or harass or injure another[,]” as well as that which “is completely without merit in law”).

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COUNTY OF YATES

In the Matter of the Application of

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FINGER LAKES by and in the name of PETER
GAMBA, its President, and COALITION TO PROTECT
NEW YORK by and in the name of KATHRYN
BARTHOLOMEW, its Treasurer, and SENECA LAKE
GUARDIAN, A WATERKEEPER AFFILIATE by and in
the name of YVONNE TAYLOR, its Vice President,

AFFIDAVIT OF SERVICE

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Respondents.

STATE OF NEW YORK)
) SS.:
COUNTY OF ALBANY)

SHARON R. MADDALLA, being duly sworn deposes and says that:

1. I am not a party to the above-entitled action, am over 18 years of age and reside in the County of Rensselaer, New York.
2. On May 15, 2018, I served a true and correct copy of the within Affirmation of Yvonne E. Hennessey in Support of State's Motion to Strike, upon the following attorneys by mailing the same via first class mail to the business address of the addressee as follows:

Rachel Treichler, Esq.
7988 Van Amburg Road
Hammondsport, New York 14840

Nicholas C. Buttino, Esq.
Assistant Attorney General
Environmental Protection Bureau
New York State Office of the Attorney General
The Capitol
Albany, New York 12224-0341

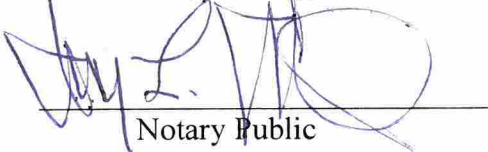
BARCLAY DAMON, LLP

Richard J. Lippes, Esq.
Lippes & Lippes
1109 Delaware Avenue
Buffalo, New York 14209-1601

by depositing a true and correct copy of the same, properly enclosed in a post-paid wrapper, in an official depository maintained and controlled by the United States Postal Service located in front of the United States Post Office on Hudson Avenue, Albany, New York.


SHARON R. MADDALLA

Subscribed and sworn to before me
this 15th day of May, 2018.


Notary Public

NANCY L. MILLER
Notary Public, State of New York
Qualified in Rensselaer County
No. 4957493
Commission Expires October 16, 2021

BARCLAY DAMON, LLP