SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FOURTH DEPARTMENT

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,

Petitioners-Appellants,

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, GREENIDGE PIPELINE, LLC, GREENIDGE PIPELINE PROPERTIES CORPORATION and LOCKWOOD HILLS, LLC,

Respondents-Respondents.

Docket No. CA 18-00648

Yates County Supreme Court
Index No. 2016-0165

REPLY MEMORANDUM OF LAW IN SUPPORT OF THE GREENIDGE RESPONDENTS' MOTION TO DISMISS THE APPEAL AND IN OPPOSITION TO PETITIONERS-APPELLANTS' MOTION FOR TEMPORARY INJUNCTIVE RELIEF

BARCLAY DAMON, LLP

Attorneys for Greenidge Generation, LLC, Greenidge Pipeline, LLC, Greenidge Pipeline Properties Corporation and Lockwood Hills, LLC
Office and Post Office Address
80 State Street
Albany, New York 12207-2543
Telephone: (518) 429-4200

Yvonne E. Hennessey, Esq.
of Counsel

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PRELIMINARY STATEMENT

Greenidge Generation, LLC, Greenidge Pipeline, LLC, Greenidge Pipeline Properties Corporation and Lockwood Hills, LLC (collectively, the "Greenidge Respondents") respectfully submit this Reply Memorandum of Law along with the Reply Affirmation of Yvonne E. Hennessey, dated July 13, 2018 ("Hennessey Reply Aff."), and the Reply Affidavit of Dale Irwin, dated July 12, 2018 ("Irwin Reply Aff."), in further support of their Motion to Dismiss this Appeal brought by Petitioners-Appellants Sierra Club, Committee to Preserve the Finger Lakes, and Coalition to Protect New York (collectively, "Petitioners-Appellants") and in opposition to Petitioners-Appellants' Motion for Temporary Injunctive Relief, the latter of which is patently frivolous and procedurally improper on multiple, independent grounds.

Petitioners-Appellants all but fail to respond to the Greenidge Respondents' Motion and, indeed, effectively concede that this Appeal (and the underlying action) is moot. To start with, Petitioners-Appellants never explain, let alone mention, their nine-month delay in perfecting this Appeal or their failure to seek temporary injunctive relief during this time despite Greenidge Station's consistent and ongoing operations. They also admit that they are not seeking to enjoin construction or operation of the Greenidge Project (the relief sought in the Amended Verified Petition) but, rather, are seeking only to require the New York State Department of Environmental Conservation ("NYSDEC") to undertake a new environmental review concerning options to reduce the Facility's water intake and to require the installation of the proper equipment to do so. This, however, is not what this Appeal or the underlying action (collectively, "*Greenidge I*") is about.

Thus, in a last ditch effort to save their Appeal, Petitioners-Appellants attempt to interject their second Article 78 action against Respondents-Respondents ("*Greenidge II*"), which remains pending before Supreme Court and is not before this Court. Specifically, Petitioners-

Appellants seek to enjoin the Greenidge Respondents from installing equipment required under the Greenidge Station's State Pollutant Discharge Elimination System renewal permit ("SPDES Permit") that was issued ten months ago. Because such relief was never sought below or even requested in the Amended Verified Petition, it is patently improper for Petitioners-Appellants to seek it now in order to purportedly save this Appeal from mootness. Moreover, despite their claims challenging the SPDES Permit in *Greenidge II*, Petitioners-Appellants have not once asked Supreme Court for temporary injunctive relief enjoining implementation of, or compliance with, the SPDES Permit.

Further, as Petitioners-Appellants repeatedly represented to Supreme Court in *Greenidge II*, this action does not concern the SPDES Permit. It is, therefore, quizzical and, quite frankly, dishonest and frivolous that they seek to have this Court enjoin the Greenidge Respondents' compliance with that permit as part of this Appeal.

Moreover, even *assuming arguendo* that Petitioners-Appellants brought their motion in the proper action, before the proper court and in a timely fashion, it would be improper. The relief requested by Petitioners-Appellants, if granted, would leave the Greenidge Respondents with the Hobson's choice of complying with this Court's order or complying with the terms of its SPDES Permit. Such an absurdity cannot be permitted. And, if that was not reason enough to deny their request for temporary injunctive relief, Petitioners-Appellants wholly fail to establish by clear and convincing evidence, through any evidentiary proof, their entitlement to injunctive relief.

Accordingly, this Court should grant the Greenidge Respondents' Motion, dismiss this Appeal and deny Petitioners-Appellants' request for temporary injunctive relief.

STATEMENT OF RELEVANT FACTS

A full recitation of the relevant facts are set forth in the Greenidge Respondents' Motion to Dismiss, which was filed with this Court on June 22, 2018. Additional facts are provided here in response to Petitioners-Appellants' Memorandum of Law in Opposition to Greenidge Respondents' Motion to Dismiss the Appeal and in Support of Petitioners-Appellants' Motion for Temporary Injunctive Relief ("Petitioners-Appellants MOL").[1]

Greenidge II

By Notice of Petition, Petitioners-Appellants filed a second action against Respondents-Respondents challenging the Greenidge Project on November 8, 2017. *Matter of Sierra Club, et al. v. New York State Dep't of Environmental Conservation*, Yates County Index No. 2017-0232 ("*Greenidge II*"). *See* Hennessey Reply Aff., Exh. A (Petitioners-Appellants Verified Petition in *Greenidge II*).

In *Greenidge II* Petitioners-Appellants again challenged NYSDEC's environmental review and permitting of the Greenidge Project. Specifically, they brought four claims for relief: (1) violation of the Water Resources Protection Law in issuing an initial water withdrawal permit for the Greenidge Station; (2) violation of the State Environmental Quality Review Act ("SEQRA") in characterizing the initial water withdrawal permit as a Type II action; (3) failure to impose appropriate terms and conditions in the SPDES Permit or, more particularly, failure to require closed-cycle cooling as Best Technology Available ("BTA") for Greenidge Station; and (4) violation of SEQRA in issuing the SPDES Permit. *See generally id.*

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[1] Petitioners-Appellants' response to the Greenidge Respondents' Motion to Dismiss was not timely filed with this Court by July 6, 2018, as agreed to in the Stipulation signed by the parties and filed with this Court by letter dated June 29, 2018. Instead, Petitioners-Appellants mailed their response to the Court via United States Postal Service on July 6, 2018.

In their Memorandum of Law in Support of their Verified Petition filed with Supreme Court in *Greenidge II*, Petitioners-Appellants distinguished the present appeal from *Greenidge II*:

> Petitioners ... contend that DEC violated the requirements of the applicable permitting statutes and the State Environmental Quality Review Act ("SEQRA") in failing to impose required terms and conditions in *the GGLLC withdrawal and discharge permits* or to conduct adequate SEQRA reviews of the permit applications.
>
> This is the second case Petitioners have filed challenging permits DEC has issued to GGLLC for operation of Greenidge Station. Petitioners CPFL and CPNY filed an Article 78 proceeding on October 28, 2016 in Yates County Supreme Court *challenging GGLLC's air permits and DEC's review of the environmental impacts of issuing the air permits under SEQRA*. Sierra Club was added as the lead petitioner on December 6, 2016. On April 21, 2017, this court issued an order granting Respondents' motion to dismiss the petition. Sierra Club, CPFL and CPNY are currently perfecting their appeal to the Appellate Division Fourth Department.

See Hennessey Reply Aff., Exh. B (Petitioners' Memorandum of Law in Support of the Verified Petition), p. 1 (emphasis added); *see also id.*, Exh. D (The Greenidge Respondents' Memorandum of Law in Opposition to the Verified Petition, dated March 2, 2018), Point I(A) (arguing that Petitioners-Appellants' SEQRA claims, as opposed to their permitting claims in their first and third causes of action, were barred by *res judicata*).

Both the State and Greenidge Respondents answered the Verified Petition in *Greenidge II* on or about March 2, 2018 and the State Respondents filed and served the full administrative return. *Id.*, ¶ 12. Together with their Answer, the Greenidge Respondents asserted as an Objection in Point of Law that Petitioners-Appellants were precluded from bringing their second and fourth causes of action under SEQRA in *Greenidge II* because these claims were previously dismissed by Supreme Court in this action. *Id.*, ¶ 13; *see also id.*, Exh. C (Greenidge Respondents' March 2, 2018 Verified Answer and Objections in Point of Law), p. 14.

The Greenidge Respondents did not argue that Petitioners-Appellants' non-SEQRA claims concerning the permitting requirements associated with the Facility's initial water withdrawal or SPDES Permit were barred. *See id.*, ¶ 14; *see also id.*, Exh. D (The Greenidge Respondents' Memorandum of Law in Opposition to the Verified Petition, dated March 2, 2018), Point I(A) (arguing that Petitioners-Appellants' SEQRA claims, as opposed to their permitting claims in their first and third causes of action, were barred by *res judicata*).

In response to the Greenidge Respondents' Objection in Point of Law based on *res judicata*, Petitioners-Appellants argued to Supreme Court:

> Petitioners' claims are not barred by the doctrine of res judicata or claim preclusion. There has been no prior decision involving the claims Petitioners raise in this proceeding. Petitioners' claims regarding the water withdrawal permit and the modified SPDES permit issued to GGLLC on September 11, 2017 were not addressed in the earlier case between Petitioners and Respondents, *Matter of Sierra Club v. DEC* ("*Greenidge I*"), Yates County Supreme Court, Index No. 2016-0165, currently on appeal to the Fourth Department. *Greenidge I* involves Petitioners' claims regarding the Title IV and Title V air emission permits issued to GGLLC on September 8, 2016. Because the claims in the earlier proceeding involved different permits, and because Petitioners could not have raised their claims regarding the water withdrawal permit and the modified SPDES permit in the earlier proceeding, the doctrine of *res judicata* does not apply.

See Hennessey Reply Aff., Exh. E (Petitioners' Reply Memorandum of Law), Point IV.

Oral argument was held before the Honorable William F. Kocher, A.C.J.S. on May 22, 2018. *Id.*, ¶ 16. Counsel for Petitioners-Appellants addressed the Greenidge Respondents' *res judicata* argument during oral argument and, in doing so, again represented to Supreme Court that the two actions were separate and distinct as this Appeal concerns the Facility's air permits and *Greenidge II* concerned the Facility's initial water withdrawal permit and SPDES Permit. *See id.*, ¶ 17.

A decision has not yet been issued in *Greenidge II*. *Id.*, ¶ 18

Greenidge Generation SPDES Permit

NYSDEC renewed Respondent-Respondent Greenidge Generation's SPDES Permit for the Facility on September 11, 2017, with an effective date of October 1, 2017. *See* Irwin Reply Aff., ¶ 11; Affidavit of Rachel Treichler, dated July 6, 2018 ("Triechler Aff."), Exh. A.

The SPDES Permit includes certain requirements associated with the best technology available ("BTA") for cooling water intake structures requirements. *Id.*, ¶¶ 12-14; Triechler Aff., Exh. A; *see also* 33 U.S.C. § 1326(b); 6 N.Y.C.R.R. § 704.5. NYSDEC's BTA determination for Greenidge Station includes the installation of variable speed drives ("VSD") on the cooling water pumps to reduce flow and the installation of cylindrical wedgewire screens ("CWWS"). Irwin Reply Aff., ¶¶ 12-14; Treichler Aff., Exh. A.

The installation of this type of BTA equipment is specific to a particular facility, and requires significant preparatory work before the equipment can actually be installed. It, therefore, requires significant engineering, as well as a biological pilot study and an analysis of alternatives. *See* Treichler Aff., Exh. A, pp. 13-14. As a result, the Facility's SPDES Permit requires several defined steps to be completed before the VSDs and the CWWS are installed. *See* Irwin Reply Aff., ¶¶ 13-14.

While not required by the SPDES Permit, Greenidge Station currently manages its cooling water flow by turning off pumps when possible, which reduces flow. *See id.*, ¶ 15. In addition, Greenidge Generation has already completed several of the BTA requirements of its SPDES Permit. *Id.*, ¶¶ 17-20. As part of this, Greenidge Generation hired engineers to complete the VSD analysis, report, and drawings, which were submitted to NYSDEC as required by the SPDES Permit. *Id.*, ¶¶ 17-19. It also hired a consultant to develop and implement the CWWS Pilot Study Plan, which was submitted to NYSDEC in accordance with the SPDES Permit's requirements. *Id.*, ¶¶ 17-18, 20.

In order to submit these deliverables to NYSDEC, Greenidge Generation has incurred significant expense compensating the Greenidge Consultants for analyzing, engineering, and drafting the VSD Report and the CWWS Pilot Study Plan. *Id.*, ¶ 21. Greenidge Generation also utilized significant employee time and incurred legal fees with respect to issues associated with the VSD Report, the CWWS Pilot Study Plan, and implementation of the BTA requirements. *Id.*, ¶ 22.

ARGUMENT

POINT I

PETITIONERS-APPELLANTS CONCEDE THEIR APPEAL IS MOOT

A. Petitioners-Appellants Fail To Oppose The Greenidge-Respondents' Motion To Dismiss The Appeal

Petitioners-Appellants wholly failed to respond to the Greenidge Respondents' Motion to Dismiss the Appeal on mootness grounds. The Greenidge Respondents moved this Court to dismiss this Appeal as moot – an argument that is separate and distinct from whether the claims before Supreme Court in this matter were properly determined to be moot.

Because the Greenidge Project was completed over a year ago at a cost of almost $13 million, and another $1.5 million has been spent since that time on capital costs as well as over $2 million on employee wages and benefits, this Appeal is moot. *See* Affidavit of Dale Irwin, dated June 21, 2018 ("Irwin Aff."), ¶¶ 25, 46-48. Greenidge Station has been operating and producing electricity since the Spring of 2017 and cannot unilaterally cease doing so. *Id.*, ¶ 42-45 & p. 9, n. 1. Despite this, during this entire time, Petitioners-Appellants delayed their pursuit of this Appeal.

At the outset, Petitioners-Appellants do not dispute or offer any explanation for why they waited almost one year from the date of Supreme Court's Decision denying their request for a preliminary injunction, and almost nine months to the day from when they filed their Notice of Appeal, to perfect their Appeal with the filing of their Brief and the Record on Appeal. [R. 3-4; 14-20]. Likewise, Petitioners-Appellants do not address why, up until their recent filing in response to the Greenidge Respondents' Motion to Dismiss, they never sought any temporary injunctive relief after Supreme Court denied their request to enjoin construction of the Greenidge Project and dismissed the Amended Verified Petition. It is Petitioners-Appellants' consistent

delay and failure to maintain the status quo, along with the completion of construction and resumption of operations, at a significant cost to the Greenidge Respondents, that has rendered this Appeal moot.

Furthermore, the relief requested by Petitioners-Appellants sought to prohibit the Greenidge-Respondents from "taking steps to repower the Greenidge Generating Station or construct a gas pipeline to the generating station. . ." *See* Amended Verified Petition, ¶ 3 & Relief Requested [R. 56, 78]; Notice of Motion for Temporary Injunctive Relief [R. 82]. Not only have both of these activities been completed, facts that Petitioners-Appellants do not contest, but Petitioners-Appellants now concede that they "are not seeking to have undone work that has already been done[.]" *Compare* Petitioners-Appellants MOL, p. 7 ("the work already done by the Greenidge Respondents does not need to be undone in order to grant Petitioners the relief they are seeking in this matter."); *with* Amended Verified Petition, ¶ 3 & Relief Requested [R. 56, 78] (seeking to prohibit the Greenidge-Respondents from "taking steps to repower the Greenidge Generating Station or construct a gas pipeline to the generating station . . . ."). They also have never requested that operations be halted and do not do so now. *See, generally,* Amended Verified Petition [R. 54-80]; Petitioners-Appellants MOL; Petitioners-Appellants Notice of Motion for Temporary Injunctive Relief, dated July 6, 2018.

The clear result is that this Appeal is moot.[2]

B. Petitioners-Appellants' Underlying Claims Are Also Moot

Rather than addressing the Greenidge Respondents' Motion, Petitioners-Appellants focus on the merits of this Appeal; namely whether their claims were moot before Supreme Court. While not relevant to the Greenidge Respondents' Motion, Petitioners-Appellants assertions fail

[2] At the very least, Petitioners-Appellants' appeal of Supreme Court's denial of their Motion for Temporary Injunctive Relief is moot. *See* Notice of Appeal, dated July 19, 2017 [R. 3-4].

– their claims were moot before Supreme Court as well. *See* Greenidge Respondents' Brief on Appeal, pp. 14-18.

Rather than focusing on the actions underlying their claims in the Amended Verified Petition, Petitioners-Appellants focus on the timing of approvals for the Greenidge Project from a different state agency – the New York State Public Service Commission ("NYSPSC"). *See* Petitioners-Appellants MOL, p. 6 (arguing that, following NYSPSC's September 16, 2016 issuance of a Certificate of Convenience and Public Necessity and October 17, 2016 authorization to proceed with construction of the Greenidge Pipeline, they "did not delay in filing their case and immediately took steps to preserve the status quo by seeking a preliminary injunction."). Petitioners-Appellants, however, ignore the fact that the determination at the heart of their underlying claims is NYSDEC's June 28, 2016 Amended Negative Declaration – that was issued four months before they filed their Verified Petition. [R. 54-80]. They also selectively fail to explain their delay despite having actual knowledge of the Greenidge Respondents intent to commence construction and resume operations as soon as possible. *See, e.g.*, Affirmation of Yvonne E. Hennessey, dated June 22, 2018, ¶ 25; *see also* Petitioners-Appellants MOL, p. 2 (detailing their active involvement in the proceedings before NYSDEC and NYSPSC relative to the Greenidge Project).

Likewise, Petitioners-Appellants do not address their two month delay in commencing this action following NYSDEC's September 8, 2016 issuance of the final Title IV and V air permits also being challenged in this action. Petitioners-Appellants cannot rewrite history or simply ignore the fact that they sat back and waited months after the challenged NYSDEC approvals were issued, and after construction commenced, to file their Verified Petition and then waited another week to serve the Greenidge Respondents. Irwin Aff., ¶ 9.

Petitioners-Appellants then point to their Verified Petition dated October 28, 2016 and Order to Show Cause dated October 31, 2016 to further represent that they did not delay in filing their case or seeking temporary injunctive relief. However, their Verified Petition, which was not served until November 3, 2016, did not seek to preserve the status quo during the pendency of the action. *See* Verified Petition [R. 21-46]. Rather, their Order to Show Cause sought only the relief that was sought in the Verified Petition, not any temporary injunctive relief. *See* Order to Show Cause [R. 48-49].

And, even assuming Petitioners-Appellants are correct, they then filed their Amended Verified Petition on December 6, 2016 by Notice of Amended Petition, which effectively supplanted their Order to Show Cause. *See* Notice of Amended Petition [R. 52-53]. Furthermore, Petitioners-Appellants themselves recognized they had not previously sought temporary injunctive relief, as they subsequently filed a Notice of Motion for Temporary Injunctive Relief, not just a memorandum of law in support, nearly two months later on December 23, 2016. *See* Notice of Motion for Temporary Injunctive Relief [R. 82-84].

Furthermore, looking at the date Petitioners-Appellants served the Greenidge Respondents in this action, the Greenidge Project was substantially complete at a cost of well over 3 million dollars, all of which was completed under authority of law, and at that point, could not have been undone without substantial hardship to the Greenidge Respondents and landowners along the pipeline right-of-way. *See* Irwin Aff., ¶¶ 9, 26-38. As such, even focusing on the date urged by Petitioners-Appellants for purposes of assessing the timeliness of their underlying claims, they fail on mootness grounds.

Petitioners-Appellants' reliance on *Dreikausen v. Zoning Bd. of Appeals of City of Long Beach*, 98 N.Y.2d 165 (2002), is misplaced. Admittedly, the Court of Appeals did recognize that

"relief remains as least theoretically possible even after completion of the project." 98 N.Y.2d at 172. However, the Court's recognition was premised on its observation that "structures changing the use of property most often can be destroyed." *Id.* That, however, is not the case here where construction of a 4.6 mile underground natural gas pipeline has been completed and operations have resumed at the Greenidge Station and cannot be stopped without a full year's prior notice to the New York Independent Systems Operator ("NYISO") and, thereafter, NYISO would have to complete additional studies on the impact on reliability before operations could terminate. Irwin Aff., ¶ 44 & p. 9, n. 1.

Further, even in *Dreikausen* where the private respondent had only demolished an existing marina and started pouring foundation at the time of the lower court's decision (98 N.Y.2d at 171), the court found that the petitioners' failure to timely seek a preliminary injunction rendered their claims moot. *Id.* at 174. In doing so, the court noted that even though the petition was filed less than two weeks from the Board's issuance of the challenged variance (significantly, more expeditious than here), the petitioners failed to move for a preliminary injunction until five months after they filed their petition. *Id.* at 171. Accordingly, contrary to Petitioners-Appellants' assertions, *Dreikausen* actually supports the Greenidge Respondents' mootness argument as Petitioners-Appellants waited until two months after they filed their Verified Petition, which itself was filed well after the approvals challenged in this case were issued and construction has already commenced, to seek temporary injunctive relief or otherwise preserve the status quo during the pendency of the litigation.

In short, not only is this Appeal moot , but so too are Petitioners-Appellants' underlying claims.

C. Petitioners-Appellants Cannot Interject Claims from *Greenidge II* Into This Action

In a poor and belated attempt to show that the present Appeal is not moot, Petitioners-Appellants are now trying to save this Appeal by attempting to interject *Greenidge II* into this action. *See, generally,* Petitioners-Appellants MOL, Point I(B)-(D). Specifically, Petitioners-Appellants argue that their Appeal is not moot because the BTA equipment required by the SPDES Permit has not yet been installed. *Id.* Such an assertion by Petitioners-Appellants is wholly irrelevant and patently improper.

The Greenidge SPDES Permit, and the appropriateness of the BTA requirements that NYSDEC included in the SPDES Permit, are the precise issues that are pending in *Greenidge II*, not here. Hennessey Reply Aff. ¶ 10. The Amended Verified Petition in this action does not seek *any* relief relative to the Facility's SPDES Permit as it was not even issued at the time that action was brought or decided by Supreme Court. *See* Amended Verified Petition [R. 54-80]; Irwin Reply Aff., ¶ 11 (noting that SPDES Permit was issued on September 11, 2017). Therefore, whether the BTA technologies required by the SPDES Permit are installed or not, cannot save this Appeal (or the underlying claims) from mootness.

Furthermore, Petitioners-Appellants' attempt to bring in the SPDES Permit flies in the face of Petitioners-Appellants' arguments made to Supreme Court in *Greenidge II*, and their own Amended Verified Petition, that this proceeding was limited to challenging the "Title IV and Title V *air permits* issued by [DEC.]" [R. 54] (emphasis added); *see also* Hennessey Reply Aff., ¶¶ 11, 15, 17; Irwin Reply Aff., ¶10.

It is entirely inappropriate for Petitioners-Appellants to change their story and re-characterize their challenge and the relief they sought below in an attempt to save their case from mootness. This Court has rejected a similar attempt to re-characterize the relief sought in

an attempt to avoid mootness. *Matter of Graf v. Town of Livonia*, 120 A.D.3d 944, 944 (4th Dep't 2014) (proceeding moot where petitioner failed to preserve status quo and project was complete); *see also Matter of Many v. Village of Sharon Springs Bd. of Trustees*, 234 A.D.2d 643, 644 (3d Dep't 1996), *leave denied*, 89 N.Y.2d 811 (1997) (concluding that the proceeding was moot, the court rejected petitioner's assertion that "it is the operation of the facility, not its construction per se, that poses a risk to the environment").

Accordingly, Petitioners-Appellants' attempt to re-characterize their claims and relief, to avoid mootness, by interjecting issues currently pending before Supreme Court in *Greenidge II* are disingenuous (at best) and should not be entertained.

POINT II

PETITIONERS-APPELLANTS ARE NOT ENTITLED TO TEMPORARY INJUNCTIVE RELIEF

Petitioners-Appellants' Motion for Temporary Injunctive Relief seeks to enjoin the Greenidge Respondents "from taking any further steps to construct and install equipment to prevent fish impingement and entrainment at Greenidge Generating Station pending the resolution of this proceeding . . ." *See* Petitioners-Appellants Notice of Motion for Temporary Injunctive Relief, p 1. Such a request is improper on multiple, independent grounds and must be seen for what it is – a last ditch effort to save this Appeal (and their underlying claims) – and outright rejected. Petitioners-Appellants' request fails as it was brought in the wrong action, before the wrong court and in an untimely fashion. It also falls woefully short of meeting Petitioners-Appellants' burden of entitlement to such relief and would cause substantial harm to the Greenidge Respondents if granted.

A. Petitioners-Appellants Have No Basis to Request Injunctive Relief Enjoining Compliance with the SPDES Permit

At no time during this proceeding (including before Supreme Court) did Petitioners-Appellants bring any request for relief, including temporary injunctive relief, regarding the SPDES Permit, nor could they have. Petitioners-Appellants certainly cannot do so now, before this Court.

It is "well established that absent the assertion of a claim that provides a jurisdictional predicate for the issuance of injunctive relief under CPLR 6301, the court is without the power to grant preliminary injunctive relief to a moving party." *Huntington Vill. Dental, PC v. Rathbauer*, 38 Misc. 3d 1213(A), at *4 (Sup. Ct. Suffolk County Jan. 18, 2013); *see also BSI, LLC v. Toscano*, 70 A.D.3d 741, 741 (2d Dep't 2010) ("Supreme Court properly denied that branch of the defendant's motion which was for a preliminary injunction since the defendant did not interpose a counterclaim which would provide a jurisdictional predicate for the preliminary injunction.").

As Petitioners-Appellants have stated several times, they did not challenge the SPDES Permit in this action, they challenged the Facility's SPDES Permit in *Greenidge II*, which was filed by Petitioners-Appellants on November 8, 2017 in Yates County Supreme Court, and remains pending. Hennessey Reply Aff. ¶ 10.

As explained by Petitioners-Appellants themselves in *Greenidge II*,

> Petitioners' claims regarding the water withdrawal permit and the modified SPDES permit issued to GGLLC on September 11, 2017 were not addressed in the earlier case between Petitioners and Respondents, *Matter of Sierra Club v. DEC* ("*Greenidge I*"), Yates County Supreme Court, Index No. 2016-0165, currently on appeal to the Fourth Department. *Greenidge I* involves Petitioners' claims regarding the Title IV and Title V air emission permits issued to GGLLC on September 8, 2016.

See Hennessey Reply Aff., Exh. E (Petitioners' Reply Memorandum of Law), p. 15; *see also id.* (further acknowledging that "Petitioners could not have raised their claims regarding the water withdrawal permit and the modified SPDES permit in" *Greenidge I*).

Moreover, Petitioners-Appellants' Verified Petition in Greenidge II confirms this:

> [In this action,] Petitioners .... contend that DEC violated the requirements of the applicable permitting statutes and the State Environmental Quality Review Act ("SEQRA") in failing to impose required terms and conditions in *the GGLLC withdrawal and discharge permits* or to conduct adequate SEQRA reviews of the permit applications.
>
> This is the second case Petitioners have filed challenging permits DEC has issued to GGLLC for operation of Greenidge Station. Petitioners CPFL and CPNY filed an Article 78 proceeding on October 28, 2016 in Yates County Supreme Court *challenging GGLLC's air permits and DEC's review of the environmental impacts of issuing the air permits under SEQRA*. Sierra Club was added as the lead petitioner on December 6, 2016. On April 21, 2017, this court issued an order granting Respondents' motion to dismiss the petition. Sierra Club, CPFL and CPNY are currently perfecting their appeal to the Appellate Division Fourth Department.

See Hennessey Reply Aff., Exh. B (Petitioners' Memorandum of Law in Support of the Verified Petition), at p. 1.

As such, there can be no doubt that the relief Petitioners-Appellants now seek is not available in this action. It also is not available on appeal as Petitioners-Appellants never sought such relief from Supreme Court as part of the underlying action. Tellingly, even in *Greenidge II*, Petitioners-Appellants have never sought their requested temporary injunctive relief from Supreme Court despite the NYSDEC's issuance of the Facility's SPDES Permit on September 11, 2017 (ten months ago) and pendency of that action for well over 8 months.

Accordingly, there is simply no basis for Petitioners-Appellants to make their request for temporary injunctive relief in this action from this Court. For these reasons alone, Petitioners-Appellants' Motion for Temporary Injunctive Relief should be denied in its entirety.

B. Petitioners-Appellants Have Failed to Establish Their Entitlement to the Temporary Injunctive Relief They Seek

Even if this Court were the appropriate venue for Petitioners-Appellants to request temporary injunctive relief enjoining the Greenidge Respondents from complying with the BTA requirements of the SPDES Permit, Petitioners-Appellants fail to satisfy any of the three necessary requirements to establish an entitlement to preliminary injunctive relief.

To establish entitlement to a preliminary injunction, a party must show by "*clear and convincing evidence,* . . . three separate elements: '(1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provision relief is withheld; and (3) a balance of equities tipping in the moving party's favor." *Delphi Hospitalist Servs. LLC v. Patrick*, No. CA 18-00146, Slip Op. at p. 2 (4th Dep't July 6, 2018) (emphasis added) (internal citations omitted); *Eastman Kodak Co. v. Carmosino*, 77 A.D.3d 1434, 1435 (4th Dep't 2010) (citing *Nobu Next Door, LLC v. Fine Arts Hous., Inc.*, 4 N.Y.3d 839 (2005)); *Emerald Enters. v. Chili Plaza Assoc.*, 237 A.D.2d 912, 912 (4th Dep't 1997).

Clear and convincing evidence must be provided to support each and every element. *Sutherland Global Servs.* v. Stuewe, 73 A.D.3d 1473, 1474 (2010). Otherwise, the request for injunctive relief must be denied. *Id.*; *see also Delphi Hospitalist Servs. LLC* ("Here, contrary to plaintiff's contention, the court did not abuse its discretion in denying plaintiff's motion for a preliminary injunction inasmuch as plaintiff failed to establish, 'through the tender of evidentiary proof' that 'the harm to plaintiff from denial of the injunction as against harm to defendant from granting it' tips in plaintiff's favor") (internal citations omitted). Conclusory statements and unsupported assertions are patently insufficient to establish entitlement to a preliminary injunction. *Fricano v. Georgeades*, 147 A.D.2d 940, 940 (4th Dep't 1989).

First, Petitioners-Appellants have completely failed to establish a likelihood of success on the merits. Rather than focusing on their likelihood of succeeding on their claims, Petitioners-Appellants instead focus on their arguments on appeal that Supreme Court's Decision dismissing their claims was procedurally infirm. This, however, is not the point. Petitioners-Appellants must establish that they are likely to succeed on their underlying claims which challenge NYSDEC's environmental review of the Greenidge Project under SEQRA and its issuance of air permits to allow the Facility to commence in-plant construction and, once completed, resume operations. Not only can they not do this, they make no attempt to even do so in their motion papers. *See* Greenidge Respondents Brief of Appeal, dated July 6, 2018, Point I (detailing why Petitioners-Appellants' claims were moot before Supreme Court such that Supreme Court properly granted Respondents-Respondents' Motions to Dismiss) & Point II (addressing Petitioners-Appellants' failure to state any cognizable SEQRA claim); *see also* Point I(B), *supra*. Nor do Petitioners-Appellants attempt to claim that they are likely to succeed on their appeal with respect to the SPDES Permit and the Facility's BTA they seek to enjoin compliance with in their motion—an omission that is inevitable given that the *Greenidge I* petition does not challenge the Facility's SPDES Permit at all, nor could it have as the SPDES Permit was issued 5 months after Supreme Court's Decision, appealed from here, dismissed the Amended Verified Petition.

Second, Petitioners-Appellants fail to establish they will be irreparably harmed if their request is not granted. Rather, Petitioners-Appellants focus instead on the argument that their underlying claims could become moot if the requested temporary injunctive relief is not granted, and that there is potential harm to the public's interest in not obtaining an adequate environmental review. *See* Petitioners-Appellants MOL, p. 12. These baseless allegations of

harm are non-existent since this Appeal has nothing to do with the SPDES Permit Petitioners-Appellants seek to have enjoined. *See* Points I(C), II(A), *supra.*

Further, Petitioners-Appellants alleged harms are not immediate or imminent, as required. *See Rochester v. Sciberras*, 55 A.D.2d 849 (4th Dep't 1976). They also are not supported by any evidentiary proof as not a single affidavit is provided in support of Petitioners-Appellants' request. Moreover, any alleged "information injury" arising out of the public's alleged interest in further environmental review, is insufficient to establish irreparable harm. Informational injury has never been recognized in New York as sufficient to establish irreparable harm or even standing for that matter. Moreover, in the one federal case where this claimed type of injury in a National Environmental Policy Act ("NEPA") context has been analyzed for purposes of standing, the court rejected informational injury as contrary to established principles of NEPA. *Atlantic States Legal Found. v. Babbit*, 140 F. Supp. 2d 185, 192-93 (N.D.N.Y. 2001).[3]

Lastly, the balancing of equities tips in favor of the Greenidge Respondents. Petitioners-Appellants offer only unsupported allegations regarding the weight of the alleged public interest. In contrast, Greenidge Generation has already completed several of the BTA requirements contained in the Facility's SPDES Permit. *See* Irwin Reply Aff., ¶¶ 17-20. Greenidge Generation hired engineers to complete the VSD analysis, report and drawings, which were submitted to NYSDEC as required by the SPDES Permit. *Id.*, ¶¶ 17-19. It also hired a

[3] Also of note, Petitioners-Appellants' allegations of harm self-servingly ignore that the Greenidge Project was subjected to a full environmental review under SEQRA and permit evaluation by NYSDEC as well as part of the Article VII approval process conducted by NYSPSC. [R. 15-18]. That they disagree with the results of that environmental review does not negate its existence. The Amended Negative Declaration and completed environmental assessment does provide the public with a description of the potential environmental impacts of the Greenidge Project. [R. 89-106].

consultant to develop and implement the CWWS Pilot Study Plan, which was submitted to NYSDEC in accordance with the SPDES Permit's requirements. *Id.*, ¶¶ 17-18, 20.

In order to submit these deliverables to NYSDEC, Greenidge Generation has incurred significant expense compensating the Greenidge Consultants for analyzing, engineering, and drafting the VSD Report and the CWWS Pilot Study Plan. *Id.*, ¶ 21. Greenidge Generation also utilized significant employee time and incurred legal fees with respect to issues associated with the VSD Report, the CWWS Pilot Study Plan and implementation of the BTA requirements. *Id.*, ¶ 22.

Further, if Petitioners-Appellants' injunctive relief were granted it would put Greenidge Generation in the untenable position of following the Court's Order and violating its SPDES Permit, or complying with its SPDES Permit and violating the Court's Order. Violation of SPDES Permit requirements could subject Greenidge Generation to significant penalties, up to $37,500 per day per violation, and potential criminal liability. *See* NY ECL § § 71-1929, 71-1933; 6 N.Y.C.R.R. § 750-2.4. The potential for this precarious situation alone tips the balancing of the equities in favor of the Greenidge Respondents.

In short, Petitioners-Appellants have altogether failed to meet their burden in establishing any of the three conditions necessary to show entitlement to temporary injunctive relief. Therefore, even *assuming arguendo* that their Motion for Temporary Injunctive Relief was brought in the proper action, in the proper court, and in a timely fashion, it must be denied.

CONCLUSION

Based on the foregoing and the arguments detailed in their opening memorandum of law and supporting papers, the Greenidge Respondents respectfully request that the Court dismiss this Appeal as moot and deny Petitioners-Appellants' Motion for Temporary Injunctive Relief.

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BARCLAY DAMON LLP

By: Yvonne E. Hennessey
Yvonne E. Hennessey

Attorneys for Respondents-Respondents Greenidge Generation, LLC, Greenidge Pipeline, LLC, Greenidge Pipeline Properties Corporation and Lockwood Hills, LLC
80 State Street
Albany, New York 12207
Telephone: (518) 429-4293

TO: Mark W. Bennett, Clerk of the Court
Appellate Division, Fourth Department
M. Dolores Denman Courthouse
50 East Avenue
Rochester, New York 14604

Rachel Treichler, Esq.
Attorneys for Petitioners-Appellants
7988 Van Amburg Road
Hammondsport, New York 14840
treichlerlaw@frontiernet.net

Richard J. Lippes, Esq.
Attorneys for Petitioners-Appellants
1109 Delaware Avenue
Buffalo, New York 14209-1601
rlippes@lippeslaw.com

Claiborne E. Walthall, Esq.
Attorney for State Respondents
The Capitol
Albany, New York 12224
Claiborne.walthall@ag.ny.gov