SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

HELENE FORST, JACK FORST, FRED BUTTI, MICHAEL FORST, AMY FORST, BARRY WAYNE, LARRY PENNY, BETH MORAN, DAVID GRESHAM, SABRINA PAGANI, THOMAS A. PIACENTINE, FOUAD CHARTOUNI, RICHARD DOTY, JOHN MCGUIRK, NANCY MCGUIRK, REBECCA SINGER, STEPHEN BRADBURY, ROBERT BARRON, EDOUARD DEJOUX, ANDREA MAMMANO and other members of the class similarly situated with the named Plaintiffs,

Plaintiffs,

-against-

LONG ISLAND POWER AUTHORITY (LIPA) and PUBLIC SERVICE ELECTRIC AND GAS COMPANY LONG ISLAND (PSEGLI),

Defendants.

Index No.: 010675/2014

Hon. Carmen Victoria St. George

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION (i) TO PERMIT THE TOWN OF EAST HAMPTON TO INTERVENE; (ii) TO AMEND THE FIRST AMENDED COMPLAINT TO ASSERT ADDITIONAL CLAIMS; (iii) AMENDING THE CAPTION TO REMOVE CERTAIN NAMED INDIVIDUAL PLAINTIFFS AND TO ADD THE TOWN OF EAST HAMPTON; (iv) FOR CLASS CERTIFICATION; AND (v) TO FACILITATE NOTICE TO THE CLASS

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The named individual plaintiffs (the "Individual Plaintiffs"), on behalf of themselves and all others similarly situated individuals (the "Putative Class Members"), bring this motion jointly with the Town of East Hampton (the "Town") (the Individual Plaintiffs, Putative Class Members and the Town are collectively referred to herein as "Plaintiffs") seeking an Order: (i) allowing the Town to intervene as an additional named Plaintiff in this action as of right because the Town has a real and substantial interest in the outcome of this proceeding (or alternatively, by the Court's permission because the Town's claims and Plaintiffs' claims in this action have common questions of law and fact), pursuant to CPLR 1012 and 1013; (ii) permitting Plaintiffs to amend the First Amended Complaint to assert a claim of fraud on behalf of the Town, and claims for violations of the Clean Water Act, Safe Drinking Water Act, and Resource Conservation and Recovery Act on behalf of all Plaintiffs; (iii) amending the caption to remove certain named individual plaintiffs and to add the Town of East Hampton; (iv) certifying this case as a class action, pursuant to Article 9 of the CPLR; (v) to facilitate notice to the class; and (vi) granting such other or further relief as the Court deems just and proper.

SUMMARY OF ARGUMENT

Defendants Long Island Power Authority ("LIPA") and Public Service Electric and Gas Company of Long Island ("PSEGLI") (LIPA and PSEGLI are collectively hereinafter "Defendants") sought to upgrade the power grid of eastern Long Island by construction of the East Hampton to Amagansett transmission line and expansion of the Amagansett substation project (the "Project"). (*See* the July 23, 2015 decision of the Honorable Andrew G. Tarantino, Jr. ("July 23 Dec."), at 1-2.)[1] The Project included the installation of 267 new utility poles along

[1] The July 23 decision was corrected by the January 22, 2016 decision (the "Jan. 22 Dec.") of the Honorable Martha Luft, which added two lines to page 6. True and correct copies of the July 23

an approximately six-mile route (the "Route")[2] within the Town, to carry increased electrical power lines between two electrical substations, one in East Hampton and the other in Amagansett. (*Id*., at 2.)

As was required to assess the environmental impact from the Project, to comply with the New York State Environmental Quality Review Act ("SEQRA"), LIPA retained AKRF, Inc., to complete an Environmental Assessment ("EA") and prepare the October 2, 2013 Environmental Assessment Form ("EAF"). (*See id*. at 2.) The EA was completed on September 25, 2013. (*See* September 28, 2015 Affidavit of Nicholas Lizanich ("Lizanich Aff."), ¶ 5.)[3]

The new utility poles carry a high voltage line that emits dangerous electromagnetic energy, and the poles were saturated with Pentachlorophenol ("Penta") (*see* Defendants' September 28, 2015 memorandum of law in support of summary judgment ("Def. SJ Mot."), at 22), a toxic substance known to cause serious injury to humans if its fumes are inhaled or ingested. (*See* Plaintiffs' November 6, 2014 First Amended Complaint at 1-2.) Defendants, nevertheless, placed these poisonous utility poles into the ground along the Route, contaminating the air and soil, which continues to leach into the soil and contaminate the groundwater. (*Id*.) The poles were also significantly larger than the poles they replaced and buried at greater depths.[4]

Dec. and Jan. 22 Dec. are attached to the accompanying Affirmation of Peter Guirguis ("Guirguis Aff.") as Exhibits 1 and 2.

[2] The 6.2-mile route travels down Cove Hollow Road, Buells Lane Extension, Toilsome Lane, Gingerbread Lane, King Street, McGuirk Street, Cooper Lane, Cedar Street, North Main Street, Collins Avenue, Old Accabonac Road, Town Lane and Springs-Amagansett Road, as well as some smaller streets. *See* July 23 Dec. at 2.

[3] A true and correct copy of the Lizanich Aff. is attached to the accompanying Guirguis Aff.

[4] The old utility poles ranged in height from between 35 and 45 feet tall. *See* September 25, 2013 LIPA letter from Michael Deering to Nicholas J. Lizanich, at 2 (AR 003-4); *see also* Administrative Record at 36. The newly installed utility poles were between 50 and 61 feet tall.

The Town wishes to join this action to pursue claims against Defendants LIPA and PSEGLI, which arise from the exact same transactions and occurrences as those claims already asserted by the Individual Plaintiffs in the First Amended Complaint – specifically, to redress harm caused by Defendants' installation of an overhead high voltage line on 267 Penta contaminated utility poles that pollute the soil and groundwater of the Town. Indeed, no prejudice will inure to Defendants by permitting the Town to join the action, as discovery has yet to proceed. Moreover, a judgment in this action could affect the Town's property rights. Further, judicial efficiency is well-served by allowing the Town to intervene, as multiple suits require additional judicial resources and could result in inconsistent judgments. Finally, the Individual Plaintiffs previously asserted a fraud claim in this action, which was dismissed specifically because the Town was not a party to the lawsuit. (*See* July 23 Dec.) If the Town is permitted to intervene as a party, the basis by which the fraud claim was dismissed will no longer apply.

Leave to amend the First Amended Complaint should also be freely granted because Plaintiffs seek to add additional claims, but are not asserting new facts to which Defendants may claim ignorance or surprise. Nor has discovery progressed substantially. As a result, no prejudice should flow from the proposed amendment. Defendants have been on notice of the underlying facts since the inception of this litigation. Amendment of the Complaint will allow Plaintiffs to reinstate the fraud claim dismissed solely because of the absence of the Town as a party. Plaintiffs also seek to amend the Complaint to add claims under the Clean Water Act, Safe Drinking Water Act, and Resource Conservation and Recovery Act.

(AR 001-4). A true and correct copy of the Administrative Record is attached to the Guirguis Aff. as Exhibit 3.

Lastly, Plaintiffs bring this motion seeking certification of this case as a class action and to facilitate notice to the putative class members. The facts support certification of a class under the requisite factors. *See* CPLR 901(a).

The Putative Class is numerous. There are more than 300 home owners along the Route and many town residents whose soil and groundwater may be polluted, such that joinder of all members of the Putative Class is impracticable. The same facts and questions of law predominate because all Putative Class Members seek to redress the same wrongs arising from the same event (*i.e.*, the installation of high voltage utility poles contaminating the soil and underground water). The claims of the representative Individual Plaintiffs are typical of the claims of the Putative Class Members. The Individual Plaintiffs have been and will continue to fairly and adequately protect the interests of the Putative Class Members. Each Putative Class Member filing their own action could result in hundreds of separate litigations, which would be wildly inefficient. This forum is desirable for all Putative Class Members, as the injuries and properties are in the town of East Hampton, and the Putative Class Members are residents or property owners in the town of East Hampton. This class action is efficient because each Putative Class Member is redressing the identical, or nearly identical, wrong. Simply put, a class action is the superior and efficient option to redress the substantial harms imposed upon the Putative Class Members by Defendants.

FACTS AND PROCEDURAL HISTORY

LIPA sought to upgrade its transmission and distribution system by upgrading its transmission lines between the East Hampton and Amagansett substations (the "Project"). (*See* July 23 Dec. at 1–2.) LIPA assigned responsibility for the operation of its electrical system to

PSEGLI. (*See id*. at 2.) Part of the Project involved the installation of a high voltage transmission line on 267 new, larger wood utility poles along the Route. (*See id*. at 2.)

Defendants Fraudulently Misrepresented and Hid Their Project

To comply with SEQRA, LIPA retained AKRF, Inc., to complete an EA and prepare the October 2, 2013 EAF. (*See id*. at 2). The EA was completed on September 25, 2013. (*See* Lizanich Aff., ¶ 5.)

Also on September 25, 2013, Michael Deering, LIPA's Vice President of Environmental Affairs, sent a memorandum to Nicholas Lizanich, LIPA's Vice President of Transmission and Distribution Operations, requesting that the EA be approved and that Mr. Lizanich issue a negative declaration (the "Negative Declaration") of the proposed Project. (*See* July 23 Dec. at 2.) That same day, Mr. Lizanich then issued a Negative Declaration[5] finding that, pursuant to SEQRA, because the Project will not have a significant environmental impact an Environmental Impact Statement ("EIS") would not be prepared. (*See id*., at 2.)

LIPA determined that the Project was an "unlisted" action under SEQRA. (*See* Defendants' March 24, 2016 reply memorandum of law in further support of motion for summary judgment ("SJ Reply"), at 2–3.) Defendants took the position that because LIPA is a quasi-governmental agency, to comply with SEQRA, rather than publicly filing the EAF, LIPA simply "filed" the Negative Declaration, the EA and the EAF in LIPA's own legal file room in

[5] The Negative Declaration is entitled "State Environmental Quality Review NEGATIVE DECLARATION Notice of Determination of Non-Significance." (*See* Lizanich Aff., ¶ 4.) On September 25, 2013 Mr. Lizanich also signed a document entitled "East Hampton to Amagansett Transmission Line and Expansion of the Amagansett Substation Project – SEQRA Negative Declaration and Other Determinations." (*See* Lizanich Aff., ¶ 2.) On September 25, 2013 Mr. Lizanich also signed the "Authorization to Carry Out – East Hampton to Amagansett Transmission Line and Expansion of the Amagansett Substation Project." (*Id*.)

its own offices. (*See* Lizanich Aff., ¶ 8. *See also* SJ Reply at 3.) In other words, they stuck the memo in one of their own drawers and declared it "filed."

The EAF falsely stated that: (1) there were no pesticides involved in the Project (*see* EAF number 18, AR 12); (2) the groundwater level was deeper than it actually is and that the poles would not be able to reach the groundwater (*see* EAF number 8, AR 10); (3) none of the Project is located within a 100 year flood plain (*see* EAF number 15, AR 11); (4) the Project will not produce odors (*see* EAF number 19, AR 12 and EAF 17, AR 18); (5) the Project will not affect any water body (*see* EAF number 3, AR 15); (6) the Project will not affect surface or ground water quality or quantity (*see* EAF number 5, AR 15); (7) the Project will not affect air quality (*see* EAF 7, AR 16); (8) the Project will not affect aesthetic resources (*see* EAF 11, AR 17); (9) the Project will not affect public health and safety (*see* EAF 18, AR 19); (10) Project will not affect the character of the existing community (*see* EAF 19, AR 19); (11) the Project is not likely to cause public controversy over potential adverse environmental impacts (see EAF 20, AR 19); and (12) the Project will not impact the exceptional or unique characteristics of a critical environmental area (*see* EAF 14, AR 18) (collectively, the "False Representations"). **Each and every one of these statements was false.**

Thereafter, Defendants initiated commencement of the Project in late January 2014. A publicly available audit of Defendants' practices recently concluded that Defendants regularly fail to provide the public with adequate notice or detail of proposed projects. The Legislature also recently took action by passing a law requiring much more thorough disclosures by LIPA in connection with utility pole projects. (*See* Guirguis Aff., Ex. 4.)

Procedural History

On May 27, 2014, the Individual Plaintiffs filed this action. On or about August 29, 2014, Defendants filed a motion to dismiss the complaint. The parties agreed that Defendants' motion to dismiss would be applied to the First Amended Complaint. (*See* July 23 Dec. at 3.)

On July 23, 2015, Judge Andrew G. Tarantino, Jr. issued the July 23 Decision, granting dismissal of several claims, including dismissal of the Individual Plaintiffs' fraud claim, but Judge Tarantino refused to dismiss the Individual Plaintiffs' claims for Private Nuisance, Trespass, Negligence and SEQRA. (*See* July 23 Dec.)

In dismissing the Individual Plaintiffs' fraud claim, Judge Tarantino held that the alleged misrepresentation made by Defendants misled the Town, then a non-party. (*See* July 23 Dec. at 5.)

On September 28, 2015, Defendants filed and served their answer to the First Amended Complaint and simultaneously sought summary judgment, essentially re-arguing that the SEQRA claim was untimely and that the nuisance, negligence and trespass claims should be dismissed as collateral attacks on their SEQRA determination. (*See* the April 5, 2017 decision of Judge Martha Luft (the "April 5 Dec.") at 2.)

On April 5, 2017, the Court denied the Defendants' motion for summary judgment, including the portion of that motion which sought dismissal of the SEQRA claim. The Court determined the motion to dismiss to be an impermissible second pre-answer motion to dismiss pursuant to CPLR 3211(e), and denied the portion of the motion to dismiss the Article 78 SEQRA claim as untimely, because it was effectively a motion to renew Defendants' prior motion to dismiss, which was denied by the Court's January 22, 2016 order (and the July 23 Decision). (*See* April 5 Dec. at 2.) The Court denied dismissal of the nuisance, trespass and

negligence claims, finding that the claims were not a collateral attack on Defendants' SEQRA determination, but rather, claims resulting from the interference with the Individual Plaintiffs' use and enjoyment of their property resulting from the poisonous toxins leaching onto their property and into the ground water, and the EMF emanating from the transmission lines. (*See* April 5 Dec. at 3.)

On or about June 1, 2017, Defendants filed a motion to re-argue the denial of their motion to for summary judgment seeking to dismiss the SEQRA claim.

On or about October 5, 2017, Justice Martha Luft issued a decision reversing her prior April 5 Decision denying dismissal of the SEQRA claim, thereby dismissing the SEQRA claim. (*See* October 5, 2017 Decision on Motion to Reargue (the "Oct. 5 Dec.")). On January 24, 2018, the Court entered judgment on the Oct. 5 Dec., without prejudice. (*See* January 24, 2018 Judgment entered by the Honorable Martha A. Luft (the "Jan. 24 Judgment").) Plaintiffs filed a motion to reargue the dismissal of the SEQRA claim. (Mot. Seq. No. 4.) That motion was denied on or about October 10, 2018. Plaintiffs chose not to pursue their appeal of the SEQRA determination because the legislature recently passed a bill requiring LIPA to give detailed public notice of any proposed above-ground transmission line project to the affected community, including elected officials, local governments, and residents. Such notice is required before a determination of environmental significance can be made under SEQRA. The bill's sponsors explained that "Recent electric transmission projects initiated by LIPA and PSEG-LI have failed to provide for adequate public notice or community involvement. The lack of public involvement has resulted in controversy and costly litigation." A true and correct copy of New York State Senator Kenneth P. Lavalle's June 26, 2018 press release is attached to the accompanying Guirguis Aff. as Exhibit 5.

ARGUMENT

POINT I

THIS COURT SHOULD PERMIT THE TOWN OF EAST HAMPTON TO JOIN THE INSTANT ACTION BECAUSE THE DISPOSITION OF THIS ACTION INVOLVES A CLAIM OF DAMAGE AND INJURY TO THE PROPERTY OF THE TOWN OF EAST HAMPTON AND ITS RESIDENTS, ALL OF WHOM MAY BE ADVERSELY AFFECTED BY A JUDGMENT IN THIS ACTION

The Court should permit the Town of East Hampton to intervene in this action as an additional named plaintiff as a matter of right, or in the alternative by permission, because it is aggrieved in the same manner as each of the Individual Plaintiffs and seeks to redress the same wrongs arising from the same injuries and properties as those referenced in the complaint and First Amended Complaint. Indeed, the Court has already stated that plaintiffs' fraud claim had to be dismissed because it was actually a claim that belongs to the Town. (*See* the January 22 Decision (Tarantino, J.) at page 5 (dismissing fraud claim because that claim would have to be brought by the Town).)

a) The Court Should Permit East Hampton to Intervene as of Right

The Court should permit the Town to intervene in this action as of right.

CPLR 1012 states:

> Upon timely motion, any person shall be permitted to intervene in any action … (a)(3) when the action involves the disposition or distribution of, or the title or claim for damages for injury to, property and the person may be affected adversely by the judgment.

CPLR 1012(a)(3).

Generally, "intervention should be permitted where the proposed intervenor has a real and substantial interest in the outcome of the proceeding." *Osman v. Sternberg*, 168 A.D.2d 490 (2d Dept. 1990) (*citing Partech Hous. v. Conlan*, 74 A.D.2d 920 (2d Dept. 1980)); *see also Osarczuk v. Associated Universities, Inc.*, 130 A.D.3d 592, 595 (2d Dept. 2015); 2 Weinstein-

Korn-Miller, N.Y. Civ. Prac. ¶ 1012.05. Intervention should, however, be restricted if the outcome of the matter will needlessly be delayed, the prospective intervenor's rights are already adequately represented, and there is a substantial question concerning whether the proposed intervenor has any real interest in property subject to the dispute. *Id*. (citing *Reurs v. Carlson*, 66 Misc.2d 968 (Sup. Ct. West. Cty. 1971)); *see also Rent Stabilization Ass'n of New York City v. State Div. of Housing and Community Renewal*, 252 A.D.2d 111, 116 (3d Dept. 1998).

The Town has a "real and substantial" interest in the outcome of this proceeding. All of the alleged injuries that are the subject of this action took place within the Town, either on Town-owned property or on the property owned by the Town's residents and taxpayers. Intervention should not be restricted because any judgment in this action directly affects property rights of the Town and the rights of its unnamed residents.

Moreover, permitting the Town to intervene in this action is unlikely to cause any significant delay or prejudice. The factual allegations set forth in the First Amended Complaint do not change by permitting intervention. The Individual Plaintiffs alleged the same facts that the Town now wishes to adopt. Nor has discovery proceeded in any meaningful way; although the parties exchanged document requests over a year ago, no party has responded to those requests or engaged in any other type of discovery.

The benefit to be gained by intervention and the harm avoided by the Town far exceeds any hypothetical delay that may result from permitting intervention. *See Osman*, 168 A.D.2d at 490. Accordingly, the Court should permit the Town to intervene in this Action as a matter of right.

b) If East Hampton is Not Permitted to Intervene as of Right, the Court Should Nonetheless Permit East Hampton to Intervene.

The Court may exercise its discretion to permit intervention where a common question of law or fact exists.

CPLR 1013 states:

> Any person may intervene … when the person's claim or defense and the main action have a common question of law or fact.

CPLR 1013.

One of the most important considerations is whether the intervenor has a "real and substantial interest in the outcome of the proceedings." *Berkoski v. Board of Trustees of Incorporated Village of Southampton*, 67 A.D.3d 840, 843 (2d Dept. 2009); *see also Osarczuk v. Associated Universities, Inc.*, 130 A.D.3d 592, 595 (2d Dept. 2015). The Court should also consider whether such intervention will unduly delay a determination of the action or prejudice substantial rights of any other party. *See Kaczmarek v. Schoffstall*, 119 A.D.2d 1001 (4th Dept. 1986); *see also Rent Stabilization Ass'n of New York City v. State Div. of Housing and Community Renewal*, 252 A.D.2d 111, 116 (3d Dept. 1998).

Here, the underlying factual allegations are identical. Defendants installed large, Penta contaminated utility poles, carrying dangerous high voltage wires deep enough to reach the water table, thereby poisoning the soil and underground water, and damaging the air and scenic vistas within the Town. The contaminated property is within the Town. The Putative Class are residents of the Town. Further, no prejudice to Defendants will occur. Although the action has been pending for more than three years, discovery has hardly begun.

Finally, forcing the Town to initiate a separate action to assert the same or similar claims would be a waste of judicial resources, considering its claims are intertwined with the Individuals Plaintiffs' claims. *See Ellsworth v. Joseph R. Wunderlich, Inc.,* 161 A.D.2d 978, 979

(3d Dept. 1990) ("not only is a claim of prejudice or surprise on plaintiff's part unpersuasive, but, as defendant notes, forcing defendant to commence a separate action on this claim would be a waste of judicial resources considering how intertwined the opposing claims are.").

Accordingly, the Court should grant the Town's request to intervene in this Action, whether as of right, or as a matter of the Court's discretion.

POINT II

THE COURT SHOULD GRANT PLAINTIFFS' MOTION TO AMEND THE FIRST AMENDED COMPLAINT, PURSUANT TO CPLR 3025(b)

The Court should permit Plaintiffs to amend the First Amended Complaint to add additional causes of action. "A party may amend his or her pleading . . . at any time by leave of court or by stipulation of all parties." CPLR 3025(b). "It is well established that leave to amend a pleading is freely given 'absent prejudice or surprise resulting directly from delay.'" *Anoun v. City of New York*, 85 A.D.3d 694, 694 (1st Dept. 2011) (*quoting Fahey v. County of Ontario*, 44 N.Y.2d 934, 935 (1978)).

Indeed, even if this request was "late," lateness alone is not enough to deny an amendment. Rather, the lateness must accompany significant prejudice to the other side. *See Edenwald Contracting Co., Inc. v. City of New York*, 60 N.Y.2d 957 (1983). If a proposed amendment does not add new facts to the case, but rather, only sets forth new or additional grounds or theories to support an existing claim, the amendment is more likely to be granted. *See Rife v. Union College*, 30 A.D.2d 504, 505 (3d Dept. 1968); *see also Yonkers Lodging Partners, LLC v. Selective Ins. Co. of Am.*, 158 A.D.3d 732, 735 (2d Dept. 2018); *Eng v. DiCarlo*, 79 A.D.2d 1018 (2d Dept. 1981); *Brewster v. Baltimore & Ohio R.R. Co.*, 185 A.D.2d 653 (4th Dept. 1992) (granting leave to add new causes of liability on the eve of trial).

Here, Plaintiffs seek to amend the First Amended Complaint but are not adding any substantial facts, and no facts that should come as a surprise to Defendants. Defendants were on notice of the fraud claim from the outset of this action, and as such, there cannot be any prejudice. Moreover, there is no prejudice flowing just because this Action was initiated in 2014, because discovery has yet to be conducted.

Plaintiffs also seek to amend the complaint to assert claims under the Clean Water Act, Safe Drinking Water Act, and the Resource Conservation and Recovery Act, arising from Defendants' injection of Penta contaminated utility poles into the Town's groundwater.

The Clean Water Act, 33 U.S.C. § 1251, et seq., regulates the discharge of pollutants into United States waters, and surface water quality standards. (*See* https://www.epa.gov/laws-regulations/summary-clean-water-act.) The Safe Drinking Water Act, 42 U.S.C. § 300f, et seq., protects drinking water quality from any source actually or potentially used for drinking. (*See* https://www.epa.gov/laws-regulations/summary-safe-drinking-water-act.) The Resource Conservation and Recovery Act, 42 U.S.C. § 6901, et seq., governs the disposal of hazardous waste. (*See* https://www.epa.gov/laws-regulations/summary-resource-conservation-and-recovery-act.) These claims must be permitted under the relevant standard because they are far from "wholly devoid of merit," and Defendants cannot possibly meet the heavy burden of showing enough prejudice or surprise regarding the addition of these claims. *See, e.g., Yonkers Lodging Partners, LLC*, 158 A.D.3d at 735 (noting leave to amend a complaint rests within the Court's discretion, and leave should be freely granted absent prejudice or surprise that results from delay unless the proposed amendment is "patently devoid of merit."); *Sassone v. Town of Queensbury,* 157 A.D.2d. 891, 892 (3d Dept. 1990) ("Absent prejudice or surprise resulting

directly from any delay, it is an abuse of discretion, as a matter of law, to deny a motion for leave to serve an amended pleading.").

While courts regularly permit amendment on the eve of trial, here discovery has not proceeded past an initial exchange of document requests. Moreover, these claims arise from the same central allegations in the Complaint that Defendants are contaminating the air, soil and water of the Town.

Accordingly, the Court should permit Plaintiffs to file and serve the proposed Second Amended Complaint.[6]

POINT III

THIS COURT SHOULD ISSUE AN ORDER GRANTING CERTIFICATION OF THIS ACTION TO PROCEED AS A CLASS ACTION, PURSUANT TO ARTICLE 9 OF THE CPLR, AND TO FACILITATE NOTICE TO THE CLASS

The Court should grant Plaintiffs' motion to certify this Action as a class action and permit Plaintiffs to facilitate notice to the putative class or plaintiffs because Plaintiffs satisfy the prerequisites to proceed as a class set forth in CPLR 901 and 902.

a) New York Favors Class Actions

Class actions, governed by Article 9 of the CPLR, have the express purpose of "enabling individuals injured by the same pattern of conduct by another to pool their resources and collectively seek relief." *See* Alexander, CPLR 901 Practice Commentaries C901:1 (quoting Governor's Mem. of Approval, Laws of 1975, ch. 207, McKinney's N.Y. Sess. Laws 1748). It is well established within New York that "CPLR article 9, which authorizes and sets forth the

[6] Plaintiffs also seek to amend the First Amended Complaint and the caption of this action to remove Fouad Chartoni and Robert Barron as Plaintiffs in this Action. This Court should permit these named plaintiffs to be removed from the caption because these Individual Plaintiffs have indicated they no longer wish to continue as named Plaintiffs.

criteria to be considered in granting class action certification, is to be liberally construed." *Argento v. Wal-Mart Stores, Inc.*, 66 A.D. 3d 930, 933 (2d Dept. 2009) (citing *Beller v. William Penn Life Ins. Co. of N.Y.,* 37 A.D.3d 747, 748 (2d Dept. 2007) (same)); *see Tosner v. Town of Hempstead*, 12 A.D.3d 589, 589 (2d Dept. 2004) ("CPLR Article 9 … must be liberally construed"); *Global Surgical Supply v. Geico Ins. Co.,* 59 A.D.3d 129, 135 (2d Dept. 2008) (same); *Wilder v. May Dept. Stores Co.*, 23 A.D.3d 646, 649 (2d Dept. 2005) (same). The New York legislature patterned Article 9 after Rule 23 of the Federal Rules of Civil Procedure, which is also liberally construed. *See Brandon v. Chefetz*, 106 A.D.2d 162, 168 (1st Dept. 1985) ("CPLR Article 9 is modeled on rule 23 of the Federal Rules of Civil Procedure…[t]he policy of this rule is to favor the maintenance of class actions and for a liberal interpretation."). Indeed, appellate courts throughout New York repeatedly have held that, to effectuate the remedial purpose of CPLR 901, it is to be broadly construed in favor of class certification.

In *Friar v. Vanguard Holding Corp.,* the Second Department explained "these criteria should be broadly construed not only because of the general command for liberal construction of all CPLR sections (*see* CPLR 104), but also because it is apparent that the Legislature intended Article 9 to be a liberal substitute for the narrow class action legislation which preceded it." 78 A.D.2d 83, 91 (2d Dept. 1980). The *Friar* court further stated that Article 9 was enacted to "infuse the pertinent law with a measure of practical flexibility and to accommodate pressing needs for an effective yet 'balanced group remedy in vital areas of social concern.'" *Id*. (quoting The Survey of New York Practice, Article 9 – Class Actions, 50 St. John's L. Rev. 189, 190); *see also Pruitt v. Rockefeller Ctr. Props., Inc.*, 167 A.D.2d 14, 21 (1st Dept. 1991) ("Appellate courts in this State have repeatedly held that the class action statute should be liberally

construed… 'any error, if there is to be one, should be . . . in favor of allowing the class action'").

Moreover, class action determination is a procedural one, and as such, the Court should not consider the merits of the underlying action in determining the class certification motion. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) ("we find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."). To the extent a court is inclined to inquire as to the merits of the action, the inquiry should be limited to a determination of whether the causes of action, on the surface, are neither spurious nor a sham. *Simon v. Cunard Line, Ltd.*, 75 A.D.2d 283, 288 (1st Dept. 1980); *see also Eisen*, 417 U.S. at 178 ("In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met"). These questions have already been answered in this case because almost all of Plaintiffs' claims have survived Defendants' motion for dismissal.

Questions about whether Article 9 requirements are met are interpreted in favor of granting class status. *Lauer v. New York Telephone Co.*, 231 A.D.2d 126, 129 (3d Dept. 1997) (quoting *Pruitt*, 167 A.D.2d at 14 ("any error, if there is to be one, should be in favor of allowing the class action.")). Article 9 buttresses this rule by providing the court with broad flexibility, including that the order granting class certification is not a final order and may be revisited or amended as the litigation proceeds. *See* CPLR 902; *see also Lauer*, 231 A.D.2d at 130. Here, the Court has already rejected Defendants' motion to dismiss the three remaining causes of action for private nuisance, negligence and trespass and initially denied Defendants' motion for summary judgment on Plaintiffs' SEQRA claim. Those claims are equally valid for the Putative

Class Members, who should be given notice of this action and an opportunity to resolve their claims together as a class.

As set forth in more detail below, this case is ideal for class certification pursuant to CPLR 901 and 902.

b) This Court Should Find Plaintiffs Satisfy CPLR 901 Requirements

CPLR 901 states that one or more members of a class may sue as a representative party on behalf of all if: (i) the class is so numerous that joinder of all members, whether otherwise required or permitted is impracticable; (ii) there are questions of law and fact which predominate; (iii) the claims of the representative parties are typical of the claims of the class; (iv) the representative parties are more than fairly and adequately protecting the interests of the class. CPLR 901; *see also Ackerman v. Price Waterhouse*, 252 A.D.2d 179, 191 (1st Dept. 1998). Each of these requirements is met in this case.

i) The Class is so Numerous That Joinder of All Members is Impracticable

The hundreds or thousands of members of the Putative Class that the Individual Plaintiffs and the Town seek to represent satisfy CPLR 901's numerosity requirement within each Putative Subclass. A class of forty members or more is presumed to satisfy the "numerosity" requirement of CPLR 901(a)(1). *See Amalfitano v. Sprint Corp.*, 4 Misc.3d 1027(A) (Sup. Ct. Kings Cty. May 14, 2004) ("Since 'numerosity is presumed at a level of 40 members' (*see Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995)), the number of proposed plaintiffs herein exceeds the threshold and numerosity is therefore satisfied"); *In re Nigeria Charter Flights Contract Litig.*, 233 F.R.D. 297, 301-02 (E.D.N.Y. 2006) (citing *Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995)) ("A class of forty or more people is

presumed to meet the numerosity requirement in the Second Circuit."). Here, Plaintiffs propose two subclasses, each of which is of sufficient size to independently comprise a class.

Proposed Subclass One consists of all Town residents that reside along the Route. Hundreds of Town residents live directly along the Route. Accordingly, Subclass One meets CPLR 901's numerosity requirement.

Proposed Subclass Two consists of all Town residents whose source of drinking water is the Town's groundwater. The Town's sole source of drinking water is derived from the Town's groundwater. As such, almost every resident relies upon the safety of the Town's drinking water. There are thousands of residents within the Town. Accordingly, Subclass Two meets CPLR 901's numerosity requirement.

ii) *Common Questions of Law and Fact Predominate*

This questions of law and fact which the Individual Plaintiffs seek to establish in advancing their individual claims are nearly identical to those questions of law and fact which must be established to advance the claims of the subclasses. All Putative Class members seek to redress the same wrongs arising from the same actions of the Defendants – the installation of unsightly poisonous utility poles.

CPLR 901(a)(2) requires that questions of law or fact common to the class predominate over individual questions. The issue is whether the complaint seeks to remedy a common legal grievance. *Friar v. Vanguard Holding Corp.*, 78 A.D.2d 83, 96 (2d Dept. 1980). Whether common issues predominate hinges on "whether the use of a class action would 'achieve economies of time, effort and expense, and promote uniformity of decision as to persons similarly situated.'" *In re: Coordinated Title Ins. Cases*, 2 Misc.3d 10007(A), *4 (Sup. Ct. Nassau Cty. 2004) (quoting *Friar*, 78 A.D.2d at 97).

Class members do not need to be identically situated; rather, the existence of some factual differences between them does not defeat the commonality requirement. *McAnaney v. Astoria Financial Corp.*, No. 04 Civ. 1101 (JFB) (WDW), 2006 WL 2689621, at *4 (E.D.N.Y. Sept. 19, 2006) (citing *Coco v. Inc. Vill. of Belle Terre*, 233 F.R.D. 109, 114 (E.D.N.Y. 2005)) ("that some factual differences between class members may exist does not defeat the commonality requirement."). In particular, the need to determine each individual class member's damages does not justify denying a motion for class certification. *Id*. (citing *Coco* at 114).

Two hundred and sixty-seven (267) Penta saturated utility poles were erected upon the Town's soil along the six and two tenths (6.2) mile Route, buried at depths of eight (8) feet below ground level in close proximity to, if not direct contact with, the water table. The Penta has leached and continues to leach throughout the soil and into the groundwater. The poles carry harmful high voltage wires with powerful electromagnetic waves. These allegations are identical for each of the residents along the Route and comprise the allegations of Subclass One. The allegation that the drinking water is contaminated is also identical for each of the residents within the Town and comprise the allegations of Subclass Two.

The Court can efficiently consider whether (i) the soil and groundwater were contaminated by installation of the utility poles; (ii) the Putative Class members' use and enjoyment of their property was infringed upon; (iii) the Putative Class members' property was devalued; (iv) installation of the contaminated utility poles constitutes a nuisance or trespass; (v) Defendants were negligent in the installation of the poles; (vi) the resulting damages from such conduct; (vii) the leeching of the Penta into the soil and groundwater is a continuing wrong; and (viii) other legal and factual issues that may arise that affect the Putative Class.

Accordingly, CPLR 901's requirement that the Putative Class share the same or similar questions of law or fact is satisfied.

iii) The Claims of the Representative Parties Are Typical of the Claims of the Class, if Not Identical

The claims of the representative Individual Plaintiffs are typical, if not identical to, the claims of the Putative Class. For all the reasons set forth in subsection two, immediately above, this prong of CPLR 901's requirements is also satisfied. CPLR 901(a)(3) requires that the representative plaintiff's claims be typical of the class. This requirement is met when the plaintiffs' claims "derive[] from the same practice or course of conduct that gave rise to the remaining claims of other class members and [are] based upon the same legal theory." *Friar,* 78 A.D.2d at 99. The typicality requirement is "not highly demanding," *Dziennik v. Sealift, Inc.*, No. 05 Civ. 4659 (DLI) (MDG), 2007 WL 1580080, at *4 (E.D.N.Y. May 29, 2007), and is "'satisfied when each class member's claim arises from the same course of events and each class member makes similar legal arguments to prove … defendants' liability.'" *Id.* at *4 (quoting *Robidoux v. Celani*, 987 F.2d 931, 936 (2d Cir. 1993)). "[T]he typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims." *Robidoux*, at 937. Here, the claims arise from identical fact patterns.

iv) The Representative Parties are more than Fairly and Adequately Protecting the Interests of the Class

The representative Plaintiffs in this action are, and will continue to be, more than fairly and adequately protective of the Putative Class's interests as required by CPLR 901(a)(4). Adequacy involves three considerations: (i) the class representative's familiarity with the lawsuit; (ii) the class representative's interests are not antagonistic to the class; and (iii) class counsel is experienced and competent. *See Ackerman v. Price Waterhouse,* 252 A.D.2d 179, 202

(1st Dept. 1998) ("The factors to be considered in determining adequacy of representation are whether any conflict exists between the representative and the class members, the representative's familiarity with the lawsuit and his or her financial resources, and the competence and experience of class counsel."); *see also Cox v. Microsoft Corp.*, 10 Misc.3d 1055(A), at *3 (Sup. Ct. N.Y. Cty. 2005) ("[P]laintiffs' interests are aligned with the interests of other class members because the same alleged conduct has injured the plaintiffs and all class members."); *Brandon v. Chefetz*, 106 A.D.2d 162, 170 (1st Dept. 1985) (the class representative must have a general awareness of the claims and be available to assist class counsel). Each requirement is readily satisfied here.

From the outset of this litigation, the Individual Plaintiffs have sought to protect the interests of the class by seeking to enjoin Defendants and compel Defendants to remove the contaminated utility poles, remediate the soil, and bury the transmission lines. The Individual Plaintiffs' primary interest in pursuing this action are the same: to compel Defendants to remove the high voltage line and remove Penta contaminated utility poles, and to remediate the polluted soil and groundwater.

Moreover, the Individual Plaintiffs and the Town are currently represented by experienced attorneys serving as co-counsel, including Steven G. Mintz of Mintz & Gold LLP and Leon Friedman. This law firm and these attorneys have experience with class actions and environmental matters. And, proceeding as a class is far superior and efficient than proceeding with over 300 litigations that would unnecessarily tax the Court's resources and could result in inconsistent and unfair judgments.

v) A Class Action is the Only method for Fair and Efficient Adjudication of the Controversy

A class action is the only fair and efficient manner by which to adjudicate this action.

CPLR 901(a)(5) requires that a class action must be "superior to other available methods for the fair and efficient adjudication of the controversy." This requirement is easily satisfied where, as here, no feasible alternative method exists. As a matter of efficiency, a procedural device that allows a single action to do the work of many "must be considered 'superior.'" *Friar*, 78 A.D.2d at 100 (quoting Siegel, New York Practice, § 141, p. 180). Conversely, "prosecuting a large amount of claims individually instead of deciding the matter of liability once is simply not efficient." *In re: Coordinated Title Ins. Cases*, 2 Misc.3d 10007(A), *16 (Sup. Ct. Nassau Cty. 2004). Here, the injuries of the putative subclass members are nearly identical, if not precisely identical, and a single action is plainly superior to the alternative.

c) <u>The Court Should Find Plaintiffs Satisfy CPLR 902 Requirements</u>

In making the determination as to whether Plaintiffs should be permitted to proceed as a class, pursuant to CPLR 902, a Court must consider:

> (1) the interests of members of the class in individually controlling the prosecution or defense of separate actions;
> (2) the impracticability or inefficiency of prosecuting or defending separate actions;
> (3) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
> (4) the desirability or undesirability of concentrating the litigation of the claim in the particular forum;
> (5) the difficulties likely to be encountered in the management of the class action.

CPLR 902(1) – (5). *See also Ackerman*, 252 A.D.2d at 191.

i) <u>The Members of the Class Have Little Interest in Individually Controlling the Prosecution of This Separate Action</u>

The Court should determine that Plaintiffs have properly prosecuted this Action against Defendants, which members of the class will not individually prosecute. Defendants inserted the contaminated utility poles into the ground along the Route sometime in late January of 2014.

(*See* Oct. 5 Dec.; *see e.g.*, the January 27, 2016 Affidavit of Michael Brown at ¶5.) On or about May 27, 2014, the Individual Plaintiffs commenced a class action against Defendants seeking to enjoin Defendants and compel them to remove the poles and bury the lines. In the four-plus years since, no other actions have been filed seeking to redress Defendants' illegal conduct. The Town has recently chosen to join this action to redress Defendants' illegal conduct on behalf of its approximately 94,000 residents, rather than initiating its own action. Simply put, the Individual Plaintiffs have acted in the interests of all putative class members and the putative members of the class not named as Individual Plaintiffs in this action do not seek to control the prosecution of separate actions rather than proceed as a class.

ii) It is Impractical and Inefficient to Prosecute 300 or More Cases Arising from the Same Transactions or Occurrences

The instant action seeks to redress the contamination of soil and groundwater caused by Defendants' installation of 267 new Penta saturated utility poles along the 6.2-mile Route. This action seeks to redress injuries to numerous Plaintiffs that are all nearly identical in fact and law and can be efficiently resolved by one class action litigation, rather than 300-plus separate trials concerning the same actions, injuries and Defendants. Indeed, there are more than three hundred people that live along the Route and thousands more that live within the Town and rely on its groundwater as their sole source of drinking water.

Specifically, Plaintiffs seek to redress Defendants' installation of 267 Penta saturated utility poles that were submerged in the Town's soil along the Route, buried at depths of eight feet below ground level in close proximity, if not direct contact with, the water table. The Penta has leached and continues to leach throughout the soil and into the groundwater and the electromagnetic waves from the transmission line continue to injure individuals and damage the properties along the Route.

iii) This Forum is Desirable Because it is Where the Injuries Occurred, Where the Plaintiffs Reside, and Where Defendants Engaged in the Project and Conducted Business

The Court should consider this forum desirable and retain jurisdiction of this matter as a class action. The Town is within the geographic boundaries of the Court. The transactions and occurrences complained of occurred along the 6.2-mile Route within the Town and within the Court's jurisdiction. Defendants conduct in installing the infected utility poles contaminated soil and groundwater within East Hampton. The injuries resulting from Defendants' conduct affected and continues to affect the residents of East Hampton. The property damaged because of Defendants' conduct is within East Hampton. In over four years since the commencement of this action, Defendants have not challenged the forum. Retaining this action in this forum is the most desirable, efficient and practical way to proceed.

iv) Proceeding as a Class Action Will Not Be Difficult to Manage Because the Facts, Claims, Damages, and Defenses Are Primarily Identical for All Parties

As set forth at length above, proceeding as a class action will not cause undue delay or be overly complicated. Rather, proceeding as a class action will permit this Court to resolve the same or nearly identical issues on behalf of the entire Putative Class (and all subclasses), rather than resolving the same issues multiple times.

Specifically, in this action the Court will have to consider whether the transmission lines impermissibly radiate dangerous electromagnetic waves and whether the soil and/or groundwater was contaminated by installation of the unsightly, oversized, Penta contaminated utility poles on behalf of putative class members of Subclasses One.

The Court will also have to consider whether, under the law, (i) such contamination interfered with the Putative Class members' use and enjoyment of their property; (ii) such

contamination devalued their property; (iii) installation of the contaminated utility poles constitutes a nuisance or trespass; (iv) Defendants were negligent in the installation of the poles; (v) there are resulting damages; and (vi) the leaching of the Penta into the soil and groundwater is a continuing wrong.

All the aforementioned issues arise from the same transactions or occurrences and affect the entire class. Accordingly, managing this class action will be relatively simple as compared to more complicated class actions throughout the country.

d) The Court Should Find Good Cause to Permit the Individual Plaintiffs to File for Class Certification Beyond the 60 Day Requirements of CPLR 902

The Court should find good cause exists to permit the Individual Plaintiffs permission to seek class certification to represent the Putative Class members and facilitate notice beyond the 60-day deadline requirements of CPLR 902 to file for class certification. The CPLR 902 requirement that class action certification be sought no later than 60 days after time to serve all responsive pleadings expires is designed to promote the early determination of whether class action relief is appropriate. *See O'Hara v. Del Bello*, 47 N.Y.2d 363, 368 (1979). "Although prompt resolution of the certification issue is the desired goal," (Alexander, CPLR 902 Practice Commentaries, C902:1), pursuant to CPLR 2004, upon good cause shown this Court has discretion to extend the 60–day deadline either prospectively or retroactively. CPLR 2004 ("Except where otherwise expressly prescribed by law, the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed."); *see DeLuca v. Tonawanda Coke Corp.*, 134 A.D.3d 1534, 1535 (4th Dept. 2015) (quoting *Rodriguez v. Metropolitan Cable Communications*, 79 A.D.3d 841, 842 (2d Dept. 2010)); *see also Galdamez v. Biordi Constr. Corp.*, 50 A.D.3d 357, 358 (1st Dept. 2008); *Caesar*

v. Chemical Bank, 118 Misc.2d 118, 121 (Sup. Ct. N.Y. Cty. 1983), *aff'd* 106 A.D.2d 353 (1st Dept. 1984), *mod. on other grounds*, 66 N.Y.2d 698 (1985).

As the Court is well aware, since filing the action on or about May 27, 2014, Plaintiffs' prosecution of this class action has been delayed by a series of both pre-answer and pre-discovery motions seeking to dismiss causes of action in this litigation.[7] Nonetheless, Defendants were placed on notice of Plaintiffs' intention to seek class certification upon the initial filing of this action. Indeed, discovery in this action was delayed as follows:

- On or about August 29, 2014 Defendants responded with a pre-answer motion to dismiss.
- On or about November 6, 2014, Plaintiffs filed the First Amended Complaint, and the motion to dismiss was applied to that complaint. *See* July 23 Dec., p. 3.
- On July 23, 2015, Judge Tarantino issued a decision dismissing several causes of action, but refusing to dismiss Plaintiffs Private Nuisance, Trespass, Negligence and SEQRA causes of action. *See* July 23 Dec.
- On or about September 28, 2015 Defendants answered the First Amended Complaint and simultaneously sought summary judgment to dismiss Plaintiffs' SEQRA cause of action, arguing that Plaintiffs failed to timely challenge the Article 78 SEQRA notice, and therefore it must be dismissed.
- On April 5, 2017 this Court denied Defendants' motion for summary judgment seeking to dismiss the SEQRA claim (Count 9). *See* April 5 Dec.
- On or about May 12, 2017 Defendants sought reconsideration/renewal of their motion for summary judgment.
- On October 5, 2017 this Court rendered a decision on Defendants' motion reconsideration/renewal and reversed itself, thereby dismissing the SEQRA claim. *See* October 5 Dec.
- The parties then exchanged proposed judgments related to the October 5 Decision and submitted a proposed judgment to the Court on November or about November 15, 2017.
- On January 24, 2018 this Court executed the proposed judgment dismissing, without prejudice, the SEQRA claim. As such, the claims with which Plaintiffs are permitted to pursue in discovery (Private Nuisance, Trespass and Negligence) were not defined until January 24, 2018. *See* Jan. 24 Judgment.
- The parties then engaged in lengthy but failed settlement discussions.

[7] Plaintiffs filed a motion for reconsideration and a notice of appeal of the January 24, 2018 judgment (of the October 5 Decision) granting summary judgment against Plaintiffs' ninth cause of action for purported untimeliness, in May 2018.

Because of these delays no discovery has been conducted with respect to the parties' document demands. Neither party has responded to the other party's demands, no interrogatories have been served, neither party has conducted depositions and no non-party discovery has been conducted.

Accordingly, the Court should find that, as a result of the extensive pre-discovery motion practice that has been conducted in this action, good cause exists to permit Plaintiffs to file for class certification beyond the 60-day deadline under CPLR 902.

Plaintiffs further submit that, upon certification, notice be given by publication. The publication shall include an address that putative plaintiffs, may, by mail, affirmatively opt-out of the class.

CONCLUSION

Plaintiffs respectfully request that this Court enter an Order: (i) allowing the Town to intervene as an additional named Plaintiff in this action as of right because the Town has a real and substantial interest in the outcome of this proceeding (or alternatively, by the Court's permission because the Town's claims and Plaintiffs' claims in this action have common questions of law and fact), pursuant to CPLR 1012 and 1013; (ii) permitting Plaintiffs to amend the First Amended Complaint to assert a claim of fraud on behalf of the Town, and claims for violations of the Clean Water Act, Safe Drinking Water Act, and Resource Conservation and Recovery Act on behalf of all Plaintiffs; (iii) amending the caption to remove certain named individual plaintiffs and to add the Town of East Hampton; (iv) certifying this case as a class action, pursuant to Article 9 of the CPLR; (v) facilitating notice to the class; and (vi) granting such other or further relief as the Court deems just and proper.

Dated: New York, New York
October 16, 2019

Respectfully submitted,

By: /s/ Steven G. Mintz

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