IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JEREMY MATTWAOSHSHE, *et al.*, Plaintiffs, v. UNITED STATES OF AMERICA, *et al.*, Federal Defendants, and NEXTERA ENERGY, INC., *et al.*, Defendants.	Civil Action No. 1:20-cv-01317-TSC

DEFENDANT SOLDIER CREEK WIND, LLC'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION TO STRIKE

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

INTRODUCTION

Plaintiffs' claims against Defendant Soldier Creek Wind, LLC ("Soldier Creek Wind") should be dismissed with prejudice.[1] Plaintiffs' opposition not only failed to address many of the fatal defects that Soldier Creek Wind identified—beginning, but certainly not ending, with the fact that Plaintiffs have not even shown that their claims are justiciable—but actually *conceded* that certain claims and allegations should be dismissed or struck. Plaintiffs' Amended Complaint asserted two claims against Soldier Creek Wind, for state-law negligence and private nuisance—both of which they purport to allege on a class-action basis. Now, Plaintiffs admit that their negligence claim should be dismissed and their class allegations are insufficient. *See* Aug. 13, 2020 Pls.' Opp'n Mem. to Defs.' Mots. to Dismiss (ECF No. 44) ("Opp'n") at 37. All that remains, then, is Plaintiffs' nuisance claim. That claim is also fatally flawed. The Court need not even reach the merits, because the claim is unripe and Plaintiffs lack standing under Article III to assert it. On top of that, Plaintiffs fail to address Soldier Creek Wind's arguments about the basic elements of a nuisance claim—that Plaintiffs have not plausibly alleged that Soldier Creek Wind *intended* a nuisance and have not identified any unreasonable interference with their land that has substantially harmed them. Those errors provide independent grounds for dismissal.

The fact that Plaintiffs are unhappy about the Soldier Creek Wind Project—a project poised to deliver clean energy to thousands of homes and consistent with both federal and Kansas renewable energy initiatives—does not entitle them to legal relief sounding in tort. The Amended Complaint fails as a matter of law and, accordingly, it should be dismissed with prejudice.

---

[1] For simplicity, this brief will refer only to Soldier Creek Wind, but the arguments apply with equal force to the other NextEra Defendants.

ARGUMENT

I. Plaintiffs Have Conceded That Their Negligence Claim Should Be Dismissed And Their Class Definition Should Be Stricken.

As a threshold matter, the briefing has narrowed the issues for this Court to decide. Plaintiffs concede that their negligence claim should be dismissed and that their class definition is inadequate. The only question on those matters, then, is whether Plaintiffs should receive a third bite at the apple.

A. Plaintiffs' Negligence Claim Should Be Dismissed With Prejudice.

There is no longer any dispute about whether Plaintiffs' negligence claim should be dismissed—Plaintiffs concede that it should, *see* Opp'n at 37 (acknowledging that Plaintiffs "cannot allege the type of damage a separate cause of action for negligence requires")—the only remaining question is whether dismissal should be with prejudice.

Dismissal with prejudice is appropriate where, as here, "the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Rollins v. Wackenhut Servs., Inc.*, 703 F.3d 122, 131 (D.C. Cir. 2012) (quoting *Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996)). Soldier Creek Wind pointed out numerous significant flaws in Plaintiffs' negligence claim, including their failure to plausibly allege that Soldier Creek Wind owed them any legal duty or that Soldier Creek Wind had breached any legal duty. *See* July 23, 2020 Soldier Creek Wind's Mot. to Dismiss (ECF No. 38-1) ("Mot. to Dismiss") at 16-20. Here, Plaintiffs have not attempted to address any of those flaws or explain how they could plausibly establish both that Soldier Creek Wind owed them a legal duty and had breached that legal duty. *See Gates v. United States*, 928 F. Supp. 2d 63, 70 (D.D.C. 2013) (dismissing a "plausible claim of negligence" with prejudice where plaintiff's opposition to defendant's motion to dismiss did

not address defendant's arguments). Accordingly, the dismissal of Plaintiffs' negligence claim should be with prejudice.[2]

B. The Court Should Strike Plaintiffs' Class Definition.

Similarly, there is no longer any dispute about whether the Court should strike Plaintiffs' class allegations: Plaintiffs have conceded that their proposed class is deficient. *See* Opp'n at 37. While Plaintiffs seek leave to "refine and supplement the exact language of the class allegations," *see id.*, the Court should deny that request because Plaintiffs' class allegations are fundamentally inconsistent with the factual allegations they have pled. Plaintiffs have simply borrowed the proposed class definition in another case, *Kohmetscher v. NextEra Energy, Inc.*, Case No. 9:19-cv-80281-RKA (S.D. Fla.) ("*Kohmetscher*"), and proposed a broad nationwide class of "all persons in the United States who currently reside on and lease or own property within three miles of a NextEra wind turbine in the final planning and/or construction phase." Aug. 3, 2020 Am. Compl. (ECF No. 43) ¶ 71. But all of Plaintiffs' factual allegations relate to only one NextEra wind facility (the Soldier Creek Wind Project) in only one state (Kansas). For the reasons set forth here as well as in Soldier Creek Wind's motion to dismiss and opposition to Plaintiffs' motion for class certification, Plaintiffs cannot meet the requirements of Rule 23 and their class allegations should be struck or dismissed. *See Abdul-Baaqiy v. Fed. Nat'l Mortg. Ass'n*, 149 F. Supp. 3d 1, 10-11 (D.D.C. 2015) (striking class allegations at pleading stage where Rule 23 requirements could

[2] If the Court finds that Plaintiffs' negligence claim should be dismissed without prejudice, Soldier Creek Wind requests that, as a condition of that dismissal, Plaintiffs be required to pay the fees and costs it incurred in defending against admittedly deficient claims. *See, e.g., Collins v. Baxter Healthcare Corp.*, 200 F.R.D. 151, 152-53 (D.D.C. 2001) (dismissing an action "without prejudice on the condition that plaintiff pay an amount that may be warranted to cover defendant's expenses"); *Combo v. Viacom Inc.*, No. 06-0226 (ESH), 2007 WL 39410, at *2-3 (D.D.C. Jan. 5, 2007) (ordering dismissal without prejudice "on the condition that plaintiff pay reasonable fees and costs incurred by defendant in defending this action").

not be met). The bottom line is that Plaintiffs have already amended their complaint, and should not be given leave yet again to "further refine and supplement" their proposed class definition, as they request. *See* Opp'n at 37.

II. The Only Remaining Claim As To Soldier Creek Wind—Plaintiffs' Nuisance Claim—Is Non-Justiciable, Lacking In Subject-Matter Jurisdiction, And Fails As A Matter Of Law.

The only remaining claim as to Soldier Creek Wind is nuisance. But this claim fails as a matter of law for numerous reasons: *first*, it is not justiciable under Article III; *second*, Plaintiffs have not established subject-matter jurisdiction; and *third*, Plaintiffs' claim suffers from fatal legal flaws under Kansas law.

A. Plaintiffs Have Not Alleged The Necessary Facts To Establish Article III Standing And Ripeness.

Article III of the U.S. Constitution requires a plaintiff litigating in federal court to prove that it "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Plaintiffs' Amended Complaint fails at the first step. Plaintiffs have not alleged the requisite "concrete" and "imminent" injury to satisfy Article III, *id.* at 1548, because they allege only they will be injured by the Solder Creek Wind Project at some point in the future in an undefined and as-yet-unknowable way. *See* Mot. to Dismiss at 6-11.

Plaintiffs' responses to this argument, while colorful, fail as a matter of black-letter law. For example, Plaintiffs argue that "the Amended Complaint states that the mere presence of hundreds of towering, intrusive, unnatural Washington Monument size structures arrayed in a 360 degree arc around their homesteads, is *in itself a massive and blighting nuisance upon them and their residences and properties regardless of whether they are currently operating or not*." Opp'n at 16-17 (emphasis added). But under U.S. Supreme Court precedent, that simply is not enough:

Plaintiffs must explain *why* the Project allegedly is a nuisance to pass Article III muster. *See Spokeo*, 136 S. Ct. at 1547. Plaintiffs speculate that at some point in the future they will have been subjected to "incessant noise, vibrations, shadow flicker and strobe lighting." Am. Compl. ¶¶ 74, 83; *see also* Mot. to Dismiss at 7-8. Those are not *factual* allegations—they are speculation about what might happen in the future. *See Spokeo*, 136 S. Ct. at 1549. Nor does it hold water for Plaintiffs to argue that these alleged harms are not actually speculative because the Soldier Creek Wind Project is certain to be completed. Opp'n at 16. The Article III problem is whether Plaintiffs' purported *injuries* will ever occur—not whether the Project itself is certain to be completed.[3]

Plaintiffs' effort to paint Soldier Creek Wind's arguments as being "unjust" also falls flat. Plaintiffs argue that, on one hand, Soldier Creek Wind claimed "the case is too late" in its TRO opposition but, in its motion to dismiss, argues on the other hand that damage is not "'imminent,'" Opp'n at 15. That distorts the record. The problem for Plaintiffs is that they have repeatedly pled speculation over factual allegation, and repeatedly argued hyperbole over reality. In their TRO papers, Plaintiffs remarkably made no factual showing whatsoever to support their claim for extraordinary injunctive relief—and so Soldier Creek Wind properly pointed out that Plaintiffs "wholly failed to 'provide some evidence of irreparable harm' and to 'substantiate the claim that irreparable injury is likely occur.'" June 2, 2020 Resp. in Opp'n to Pls.' Mot. for TRO/Prelim. Inj. (ECF No. 23) ("TRO Opp'n") at 11 (citations omitted). And in moving to dismiss Plaintiffs' Amended Complaint, Soldier Creek Wind again pointed out that Plaintiffs have failed to provide

[3] Nor can Plaintiffs point to pre-*Spokeo* cases to shore up their injury-in-fact allegations as a matter of law. *Contra* Opp'n at 17. Those cases do not and cannot address the concerns raised by the Supreme Court in *Spokeo* for the simple reason that they were decided decades—or even more than a century—prior to that decision.

plausible factual allegations of concrete injury, as Article III demands. There is nothing inconsistent about these arguments at all—Plaintiffs' pleading failures in their Amended Complaint are an extension of the evidentiary failures in their TRO motion.

For essentially the same reasons discussed above, Plaintiffs' claims also fail for lack of ripeness, as that doctrine prohibits federal courts from hearing "claims seeking relief for future injuries that are hypothetical and speculative." *Endeley v. United States Dep't of Def.*, 268 F. Supp. 3d 166, 175-76 (D.D.C. 2017); *see also* Mot. to Dismiss at 10-11. The simple truth is that the purported injuries Plaintiffs allege have not yet occurred and, in fact, *may never occur*. The injury-in-fact and ripeness requirements do not permit a plaintiff to hinge a suit on speculative assertions of potential future injuries—yet that is all Plaintiffs do here. Because the Amended Complaint fails to allege concrete, non-speculative injuries, this Court should dismiss the tort claims for lack of justiciability.[4]

B. Plaintiffs' Nuisance Claim Should Be Dismissed For Lack of Subject-Matter Jurisdiction.

Even absent the justiciability issues discussed above, Plaintiffs' nuisance claim suffers from an independent jurisdictional defect: Plaintiffs have alleged only supplemental jurisdiction over Soldier Creek Wind and the NextEra Defendants, and if the Court dismisses the claims against the Federal Defendants (as it should), Plaintiffs provide no compelling reason to exercise

[4] In passing, Plaintiffs attempt to "renew their yet pending motion for preliminary injunction to halt further construction and operation on the project until these matters are fully adjudicated." Opp'n 18. The Court should deny this request, as there are no grounds to revisit its prior, well-reasoned decision. Moreover, the *Kohmetscher* case upon which Plaintiffs rely actually supports Soldier Creek Wind. The magistrate judge in that case recently recommended that the plaintiffs' request for an injunction be *denied* after concluding that they had not established irreparable harm. *See Kohmetscher*, Dkt. 105 at 11-12, 15.

supplemental jurisdiction over the Kansas-law claims.[5] This Court should therefore dismiss those claims for lack of subject-matter jurisdiction under 28 U.S.C. § 1367(c).

Plaintiffs do not deny that they have alleged only supplemental jurisdiction over Soldier Creek Wind and the NextEra Defendants or that, if this Court grants the Federal Defendants' motion to dismiss, it also has discretion to dismiss the pendent claims against those entities. Instead, Plaintiffs argue that the Court should retain the case because "Kansas Courts regularly look to the Restatement of Torts for the well-established law of nuisance" and "[r]ather than being novel, if ever there were a basic tort case easy to analyze by a general legal education, and *not* requiring even consultation with a Kansas lawyer or judge, it is this one." Opp'n 32-33. But the fact that Plaintiffs assert "basic" Kansas-law torts against Solider Creek Wind and the NextEra Defendants is no reason for the Court to exercise jurisdiction when jurisdiction would otherwise be absent. *See* 28 U.S.C. § 1367(c)(1) (providing independent grounds to decline to exercise supplemental jurisdiction if "the claim raises a novel or complex issue of State law").

In fact, the D.C. Circuit has expressed "a clear preference for courts to exercise their discretion to *remand state claims* . . . once all federal questions have 'left the building.'" *Turpin v. Ray*, 319 F. Supp. 3d 191, 206-07 (D.D.C. 2018) (emphasis added) (quoting *Kyle v. Bedlion*, 177 F. Supp. 3d 380, 400 (D.D.C. 2016)); *see also Carnegie–Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988). There is no compelling rationale to depart from that rule. The "considerations of judicial economy, convenience and fairness to litigants" all counsel in favor of declining to exercise jurisdiction over the Kansas-law claims. *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966). This case was recently filed in this Court and, to date, the parties have engaged

[5] As stated in Soldier Creek Wind's Motion to Dismiss, it adopts the Federal Defendants' motion to dismiss in its entirety. *See* Soldier Creek Mot., ECF No. 38-1 at 11.

only in motions practice. Plaintiffs live, and Soldier Creek Wind operates, in Kansas. Therefore, "both as a matter of comity and to promote justice between the parties," the Court should avoid a "[n]eedless decision[] of state law" by declining to exercise jurisdiction over the pendant state-law claims. *Id.*

Finally, Plaintiffs are wrong to suggest they could keep the Kansas tort claims in this Court by amending their complaint (for a second time) and asserting diversity jurisdiction under 28 U.S.C. § 1332(a). Opp'n at 31-32. Plaintiffs cannot satisfy the requisite jurisdictional requirement of complete diversity because Defendant Westar Energy ("Evergy Kansas") is a citizen of Kansas—the same state in which Plaintiffs are domiciled. "For jurisdiction to exist under 28 U.S.C. § 1332, there must be complete diversity between the parties"—meaning, "the plaintiff may not be a citizen of the same state as any defendant." *Bush v. Butler*, 521 F. Supp. 2d 63, 71 (D.D.C. 2007); *see Simon v. Hofgard*, 172 F. Supp. 3d 308, 314-15 (D.D.C. 2016) (Chutkan, J.) (recognizing the "complete diversity" requirement). Here, Evergy Kansas is a Kansas citizen because it "is a Kansas Corporation with its principal place of business in Kansas." July 23, 2020 Evergy Kan. Mot. to Dismiss Pls.' Am. Compl. (ECF No. 40-1) at 4. And Plaintiffs are citizens of Kansas too. *See* Am. Compl. ¶ 8 ("Plaintiff Justin Stallbaumer resides in Kansas"); *id.* at ¶ 9 ("Plaintiff Jeremy Mattwaoshshe is a citizen of the Kickapoo Nation and Indian Tribe living on their sovereign land and federally recognized Native American Reservation that runs adjacent to the eastern edge of the huge Soldier Creek Wind LLC wind tower project."). Because Plaintiffs must establish diversity of citizenship to invoke jurisdiction under 28 U.S.C. § 1332(a), their proposed amendment would be futile.

If the Court grants the Federal Defendants' motion to dismiss, it should therefore decline to exercise supplemental jurisdiction over Plaintiffs' state-law claims.

C. Plaintiffs' Nuisance Claim Fails As A Matter Of Kansas Law.

Even if Plaintiffs' nuisance claim satisfied Article III (it does not), and even if the Court were to exercise supplemental jurisdiction of the claim (it should not), then Plaintiffs' nuisance claim would still fail as a matter of law. In fact, in its motion to dismiss, Soldier Creek Wind pointed out a host of defects with Plaintiffs' nuisance claim—many of which Plaintiffs simply ignore. This is not, as Plaintiffs glibly claim, simply a question of whether or not "notice pleading is still alive." Opp'n at 22. Rather, there are two insurmountable *legal* defects that Plaintiffs cannot overcome. *First*, Plaintiffs have not plausibly alleged that Soldier Creek Wind *intended a nuisance*, alleging only that it intended to build a renewable energy facility, consistent with the State of Kansas's energy policies, on private land a few miles from Plaintiffs' properties. *Second*, no matter how "visceral and effective" they believe their allegations to be, *id.* at 25, Plaintiffs have not plausibly alleged any unreasonable interference with the use and enjoyment of their land that has caused them substantial harm. Because Plaintiffs could not allege other facts that would be consistent with their Amended Complaint and would plausibly establish that Soldier Creek Wind intended a nuisance and substantially harmed them, the dismissal should be with prejudice. *See Rollins v. Wackenhut Servs., Inc.*, 703 F.3d 122, 131 (D.C. Cir. 2012) (quoting *Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996)).

First, Plaintiffs' allegations, even benefiting from all reasonable inferences, do not plausibly show that Soldier Creek Wind intended a private *nuisance*, as Kansas law requires. *See United Proteins, Inc. v. Farmland Indus., Inc.*, 915 P.2d 80, 85 (Kan. 1996). Intending to build a renewable-energy facility on private land is a far cry from a plausible allegation that Soldier Creek Wind intended to construct a *nuisance*. The best Plaintiffs can come up with is an argument that Soldier Creek Wind knew that a nuisance was "substantially certain" to result from the Project, supposedly because Soldier Creek Wind signed "leases" with landowners near the Project. *See*

Opp'n at 23. But Plaintiffs failed to include any specific allegations of intent in their Amended Complaint, and there is no plausible inference that can be drawn to conclude that Soldier Creek Wind intended a nuisance simply because it entered into leases with nearby landowners.

The bottom line is that it is not enough to allege that Soldier Creek Wind intentionally built wind turbines, or even that Soldier Creek Wind intentionally built wind turbines *near Plaintiffs' homes*; Kansas law requires plausible allegations of intentional harm, and Plaintiffs have not provided any. Plaintiffs simply cannot state a private-nuisance claim on the facts alleged, and could not amend their complaint—again—to add consistent allegations that would entitle them to relief. *See Firestone*, 76 F.3d at 1209. Plaintiffs' nuisance claim should therefore be dismissed with prejudice.

Second, Plaintiffs also have not pled sufficient facts to show either an unreasonable interference with their use and enjoyment of their land or substantial harm resulting from any unreasonable interference. This is a separate and independent basis for dismissing Plaintiffs' claim, as both are necessary elements of a Kansas private-nuisance claim, and Plaintiff does not argue otherwise. *See Williams v. Amoco Prod. Co.*, 734 P.2d 1113, 1124-25 (Kan. 1987). Plaintiffs were required to allege "enough facts to state a claim to relief that is plausible on its face," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007), and show "more than a sheer possibility that a defendant has acted unlawfully," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Here, Plaintiffs have not done so.

Plaintiffs' mere recitation of the allegations in their Amended Complaint about the "adverse consequences of wind towers," Am. Compl. ¶ 27, does not show that Plaintiffs have suffered any interference with their land, let alone an unreasonable interference, because *the Project is not operational*. The Project is still in the construction phase, and Plaintiffs do not

plausibly allege—or even argue in their opposition—that the construction itself has interfered with their use and enjoyment of their land. Even if Plaintiffs had alleged an interference, whether as a result of the Project's future operation or its current construction, Plaintiffs have not pleaded sufficient facts to show that the inference is *unreasonable*. *See Burdette v. Vigindustries, Inc.*, No. 10-1083-JAR, 2012 WL 405621, at *9 (D. Kan. Feb. 8, 2012) (quoting *St. David's Episcopal Church v. Westboro Baptist Church, Inc.*, 921 P.2d 821, 828 (Kan. Ct. App. 1996)).

Similarly, Plaintiffs have not pleaded sufficient facts to show that they have suffered any harm, let alone substantial harm, because of Soldier Creek Wind's conduct. Again, the Soldier Creek Wind Project is not currently operational, so the harms that Plaintiffs allege all wind turbines—"monstrosities," in Plaintiffs' parlance—cause *have not occurred*. Plaintiffs allege that the Soldier Creek Wind Project will cause "attention and mental fatigue and agitation" and "severe physical and mental effects," Am. Compl. ¶ 27, not that these harms have already occurred. Just as Plaintiffs have not plausibly alleged any interference that they have actually suffered, let alone any unreasonable interference, they have not plausibly alleged any harm resulting from any interference, let alone any substantial harm. Plaintiffs' nuisance claim should be dismissed with prejudice.

CONCLUSION

For the foregoing reasons, Plaintiffs' claims against Soldier Creek Wind should be dismissed with prejudice.

Dated: September 3, 2020

KIRKLAND & ELLIS LLP

By: */s/ Daniel T. Donovan, P.C.*
Daniel T. Donovan, P.C., #459680
Ragan Naresh, P.C., #984732
1301 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 389-5000
(202) 389-5200
daniel.donovan@kirkland.com
ragan.naresh@kirkland.com

Counsel for Soldier Creek Wind, LLC

CERTIFICATE OF SERVICE

I hereby certify that on September 3, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system that will send a notice of electronic filing to counsel of record in this case.

/s/ Daniel T. Donovan, P.C.
Daniel T. Donovan, P.C.