UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

VOLUNTEERS OF AMERICA OF WESTERN NEW YORK, INC.,

Plaintiff,

-vs-

ROCHESTER GAS & ELECTRIC CORPORATION, and JOHN DOE INSURANCE COMPANIES,

Defendants.

DECISION AND ORDER
No. 06:99-CV-6238(MAT)(MWP)

I. Introduction

On January 28, 2014, Volunteers of America of Western New York, Inc. ("VOA" or "Plaintiff") filed its Third Amended Complaint [#184][1]. Rochester Gas & Electric Corporation ("RG&E" or "Defendant") filed a Motion to Dismiss [#188] Counts Five, Six, Seven, Eight, Nine, Ten, Eleven, Twelve, Thirteen, Fourteen, and Fifteen of the TAC pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure ("F.R.C.P."). VOA filed a memorandum of law in opposition [#191], and RG&E filed a reply [#193]. The matter is now fully submitted and ready for decision. For the reasons discussed below, RG&E's motion is granted in part and denied in part.

II. Factual Background and Procedural History

VOA's allegations concerning the use and contamination of the Site are summarized in the Court's January 12, 2000 decision [#17],

[1] Citations to [#] refer to document numbers on the CM/ECF docket sheet for this case.

Volunteers of America v. Heinrich, 90 F. Supp.2d 252 (W.D.N.Y. 2000). On January 12, 2000, the Court granted in part and denied in part the defendants-property owners' joint-motion to dismiss VOA's initial Complaint for failure to state a claim. In particular, the Court found that CERCLA did not preempt VOA's state law environmental claims because VOA's initial Complaint alleged that the Site was contaminated with petroleum, and VOA's claims based on petroleum contamination were not duplicative of VOA's claims brought under CERCLA. See Heinrich, 90 F. Supp. 2d at 258 ("Because plaintiff has alleged conduct which may fall under CERCLA's 'petroleum exclusion' (such as releases of unadulterated gasoline), . . . the plaintiff may have claims for damages which are not identical to the damages available under CERCLA. Therefore, to the extent that plaintiff's common law causes of action seek recovery for damages that are different than the damages available under CERCLA, the common law claims are not preempted."). Following Heinrich, VOA settled with all of the defendants except RG&E and its "John Doe" insurers.

On January 28, 2014, VOA filed its Third Amended Complaint ("TAC") [#184] asserting sixteen causes of action. Under the supervision of various state agencies, RG&E and VOA supported an extensive remedial investigation into the contamination at the Site. TAC, ¶ 29 (first of two paragraphs numbered "29"). This investigation was documented in the Remedial Investigation Report

("RIR") [#174-14], issued in December 2011 and revised in May 2012, which found that the investigation had adequately characterized the nature and extent of surface soil, subsurface soil, and groundwater conditions at the Site. The RIR concluded that "[p]etroleum contamination was not found." TAC, ¶ 30; see also id., ¶ 194 (alleging, under fifth claim based on the New York State Navigation Law, that "[u]pon information and belief, there is no petroleum contamination on the Site").

RG&E, on February 24, 2014, filed a Motion to Dismiss Certain Causes of Action in the Third Amended Complaint [#188]. The causes of action at issue in RG&E's motion to dismiss are as follows: liability under New York Navigation Law § 181(5) (Count Five), indemnification or contribution and a declaratory judgment under Article 12 of the New York Navigation Law, including § 176(8) (Count Six), breach of contract (Count Seven), promissory estoppel (Count Eight), negligence (Count Nine), negligence per se (Count Ten), strict liability for ultrahazardous activities (Count Eleven), public nuisance (Count Twelve), indemnification under Article 27, Title 13 of the New York State Superfund Law (Count Thirteen), equitable or implied indemnification (Count Fourteen), and restitution (Count Fifteen).

III. Preliminary Matters

Prior to filing its TAC, VOA had filed a Motion for a Declaratory Judgment in its favor as to its claims of breach of

contract and promissory estoppel. On July 14, 2014, the Court issued a Decision and Order denying VOA's request for a declaratory judgment, and granting RG&E's Cross-Motion for a Declaratory Judgment as to these counts. In light of the Court's July 14, 2014 Decision and Order, RG&E's request to dismiss these causes of action, denominated as Count Seven and Count Eight in the TAC, is moot. See Dujardin v. Liberty Media Corp., 359 F. Supp.2d 337, 357 (S.D.N.Y. 2005) ("[S]ubsequent to the conclusion of briefing on the instant motion to dismiss, the arbitration proceeding was resolved and Defendant Livewire has conceded liability with respect to Count V of the Complaint. Thus, Defendants' motion to dismiss is denied as moot as to Count V of the Complaint.").

With regard to Counts Eleven and Thirteen, VOA conceded in its opposition brief that they should be dismissed but has not voluntarily withdrawn them. See Plaintiff's Memorandum of Law ("Pl's Mem.") [#191] at 2. See Advanced Portfolio Technologies, Inc. v. Advanced Portfolio Technologies Ltd., No. 94 Civ. 5620(JFK), 1999 WL 64283, at *7 (S.D.N.Y. Feb. 8, 1999) ("APT/NY has voluntarily withdrawn [certain] [c]ounts, therefore, APT/UK's motion [to dismiss] is denied as moot as it pertains to these counts."). Therefore, RG&E's request to dismiss them is not mooted.

IV. Summary of the Parties' Arguments

RG&E, in its Memorandum of Law ("Def's Mem.") [#188-1], argues that the state law environmental claims (Counts Five, Six, Nine,

Ten, Twelve, Fourteen, and Fifteen) must be dismissed as preempted under CERCLA, based upon VOA's admission that there is no petroleum contamination on the Site. RG&E contends that Heinrich, supra, which found that VOA's state law environmental claims were not preempted by CERCLA solely to the extent they alleged petroleum contamination, compels a finding that the state law environmental claims are preempted by CERCLA now that VOA concedes that there is no petroleum contamination at the Site.

VOA asserts that RG&E has ignored relevant allegations in the TAC, and contends that it permissibly pleaded petroleum contamination in the alternative. See TAC, ¶¶ 195, 196 (alleging that "[i]n the unlikely event that petroleum contamination does exist", RG&E "is strictly liable for the investigation, remediation, cleanup, and removal of the Petroleum Contamination, and all of plaintiff's associated direct and indirect damages" pursuant to N.Y. Nav. Law §181(5)). VOA contends that this alternative pleading is prudent given the facts pleaded elsewhere in the TAC referring to RG&E's historic use of petroleum on the Site. Pl's Mem. at 23 (citing TAC, ¶ 18 (RG&E arranged for coal to be transported to and from the Site "by a diesel powered railroad")).

In its Reply Memorandum of Law ("Reply") [#193], RG&E asserts, for the first time, the issue of lack of standing. The Court notes that VOA did not seek permission to file a sur-reply, and did not

move to strike the portion of RG&E's reply brief regarding standing.

The Court looks with disfavor upon the practice of raising new arguments for the first time in reply briefs, and ordinarily declines to consider such arguments. See, e.g., Mitchell v. Fishbein, 377 F.3d 157, 164 (2d Cir. 2004); United States v. Yousef, 327 F.3d 56, 115 (2d Cir. 2003). Standing, however, is jurisdictional. See Central States SE and SW Areas Health and Welfare Fund v. Merck-Medco Managed Care, L.L.C., 433 F.3d 181, 198 (2d Cir. 2005) ("If plaintiffs lack Article III standing, a court has no subject matter jurisdiction to hear their claim."). Because the standing issue goes to a court's subject matter jurisdiction, it can be raised sua sponte. Id. (citations omitted). Indeed, this Court has an independent obligation to address it before considering the merits of RG&E's motion to dismiss. See Harty v. Simon Property Group, L.P., 428 F. App'x 69, 71 (2d Cir. 2011) ("Because the district court dismissed Harty's ADA claim for lack of standing, however, it lacked jurisdiction to adjudicate Simon's alternative motion to dismiss for failure to state a claim.") (citing Morrison v. National Australia Bank, Ltd., 547 F.3d 167, 170 (2d Cir. 2008) ("Determining the existence of subject matter jurisdiction is a threshold inquiry . . . .") (citation omitted)).

V. Overview of Heinrich and the Law of the Case

Before proceeding to the standing issue, the Court finds it helpful to revisit briefly the holding in Heinrich regarding CERCLA preemption and VOA's state law environmental claims. In Heinrich, the Court determined that while VOA "cannot recover indemnification or contribution for CERCLA damages by alleging alternative state law causes of action, CERCLA does not completely preempt [VOA]'s state law claims to the extent those claims seek damages which are not available under CERCLA." Heinrich, 90 F. Supp.2d at 257-58 (discussing Bedford Affiliates v. Sills, 156 F.3d 416, 426 (2d Cir. 1998)). The Court found that because VOA had alleged conduct, such as the release of unadulterated gasoline, which could fall under CERCLA's "petroleum exclusion", VOA might have claims for damages which were not identical to the damages available under CERCLA. Therefore, to the extent that VOA's common law causes of action sought recovery for damages that were different than the damages available under CERCLA, this Court held, these common law claims were not preempted. Heinrich, 90 F. Supp.2d at 258; see also id. at 260 ("[S]ince CERCLA specifically excludes from coverage certain damages, including petroleum contamination (which is alleged in this case), [VOA] ha[d] properly alleged state common law claims to recover damages which are not available under CERCLA."). In the years following Heinrich, the Second Circuit has reaffirmed that CERCLA preempts state law claims for contribution and

indemnification that do not arise "outside of CERCLA" and also has held that CERCLA preempts state law claims of "unjust enrichment for CERCLA expenses." Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc., 596 F.3d 112, 139 (2d Cir. 2010) (noting that "allowing unjust enrichment claims for CERCLA expenses would again circumvent the settlement scheme, as [potentially responsible parties] could seek recompense for a legally unjustifiable benefit outside the limitations and conditions of CERCLA") (citing Bedford Afilliates, 156 F.3d at 427).

"Under the law of the case doctrine, a decision on an issue made at one stage of a case becomes binding precedent to be followed in subsequent stages of the same litigation." In re PCH Assocs., 949 F.2d 585, 592 (2d Cir. 1991) (citation omitted). This doctrine "is admittedly discretionary and does not limit a court's power to reconsider its own decisions prior to final judgment." Virgin Atl. Airways, Ltd. v. National Mediation Bd., 956 F.2d 1245, 1255 (2d Cir. 1992) (citations omitted). However, the Second Circuit has "repeatedly stated [that it] will not depart from the law of the case absent cogent or compelling reasons[,]" Pescatore v. Pan Am. World Airways, Inc., 97 F.3d 1, 8 (2d Cir. 1996) (internal quotation marks and alteration omitted), such as an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." Virgin Atl. Airways, Ltd., 956 F.2d at 1255 (internal

quotation marks omitted). VOA has not come forward with any reasons to depart from the Court's prior holding on preemption. The Court agrees with RG&E that Heinrich binds VOA under the law of the case doctrine.

V. Motions to Dismiss Under F.R.C.P. 12(b)(1) vs. Motions to Dismiss Under F.R.C.P. 12(b)(6)

Under F.R.C.P. 12(b)(6), "[t]he facts alleged in the pleadings and documents either attached as exhibits or incorporated by reference are considered[.]" Rent Stabilization Ass'n of City of N.Y. v. Dinkins, 5 F.3d 591, 593-94 (2d Cir. 1993) (citing Samuels v. Air Transport Local 504, 992 F.2d 12, 15 (2d Cir. 1993)). In order to survive dismissal under F.R.C.P. 12(b)(6), "a complaint must allege a plausible set of facts sufficient 'to raise a right to relief above the speculative level.'" Operating Local 649 Annuity Trust Fund v. Smith Barney Fund Mgmt. LLC, 595 F.3d 86, 91 (2d Cir. 2010) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). Here, RG&E only references F.R.C.P. 12(b)(6) in support of its motion to dismiss. Although it seeks dismissal of certain claims based on lack of subject matter jurisdiction (as the result of VOA's lack of standing), it does not mention F.R.C.P. 12(b)(1), which is the subsection of F.R.C.P. 12 that deals with dismissals for subject matter jurisdiction.

Although, as the Second Circuit has observed, "dismissals for lack of standing may be made pursuant to [F.R.C.P.] 12(b)(6) rather than 12(b)(1)[,]" Rent Stabilization Ass'n of City of N.Y., 5 F.3d

at 594 & n.2, the Supreme Court instructs that the standing "'inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.'" Thompson v. County of Franklin, 15 F.3d 245, 247 (2d Cir. 1994) (quoting Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979) (quotation omitted)). Here, the Court need not resolve disputed factual issues (which it is permitted to do under F.R.C.P. 12(b)(1)). See Rent Stabilization Ass'n, 5 F.3d at 594 ("[L]ike many cases under 12(b)(1) (but not under 12(b)(6)), it may become necessary for the district court to make findings of fact to determine whether a party has standing to sue."). Accordingly, the Court will review RG&E's motion to dismiss for lack of standing under F.R.C.P. 12(b)(6).

VI. Standing

A. General Legal Principles

"In every federal case, the party bringing the suit must establish standing to prosecute the action[,]" Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11 (2004), that is, its entitlement to have the court decide the merits of the dispute, Warth v. Seldin, 422 U.S. 490, 498 (1975). The doctrine of standing "is an essential and unchanging part of the case-or-controversy requirement of Article III." Lujan v. Defenders of Wildlife, 504 U.S. at 560.

Standing comprises three elements: injury-in-fact, causation, and redressability. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992); Warth, 422 U.S. at 499. "Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." Defenders of Wildlife, 504 U.S. at 561 (citations omitted). The Supreme Court has explained that "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice," id., because on motion to dismiss, the court "presumes that general allegations embrace those specific facts that are necessary to support the claim." Lujan v. National Wildlife Federation, 497 U.S. 871, 889 (1990). Thus, the court must ask whether a plaintiff's factual allegations, taken as true, establish the three requisites of standing.

Nonetheless, a plaintiff "cannot rely solely on conclusory allegations of injury or ask the court to draw unwarranted inferences in order to find standing." Baur v. Veneman, 352 F.3d 625, 637 (2d Cir. 2003) (citation omitted). As is the case with other jurisdictional inquiries, standing "cannot be 'inferred argumentatively from averments in the pleadings,' . . . but rather 'must affirmatively appear in the record.'" Thompson, 15 F.3d at

247 (quoting FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990) (citations omitted in Thompson).

B. Analysis

RG&E's standing challenge centers on VOA's pleading of the first element–injury in fact. In particular, RG&E contends that VOA has admitted that petroleum contamination currently does not exist on the Site. RG&E notes that any possibility of future petroleum contamination is, in VOA's words, an "unlikely event[,]" TAC, ¶ 195. Therefore, RG&E argues, VOA has conceded the non-justiciability of its state law environmental claims. While VOA, in its initial Complaint, alleged that the Site was contaminated with petroleum, in the TAC, VOA now states that "upon information and Belief", there is "no petroleum contamination" at the site. TAC, ¶ 194. In addition, VOA has attached to the TAC a document from the New York State Department of Environmental Conservation ("NYSDEC") stating that

> it appears that petroleum contamination in the shallow groundwater and soil, in the vicinity of the operating VOA buildings, has been satisfactorily remediated to the appropriate levels for groundwater (exposure levels for adult and child resident receptor) and for soils (TAGM 4046). Based on the closure report, it also appears that the soil piles staged at the rear of the property appear to have been satisfactorily cleaned of petroleum contamination to TAGM 4046 levels. Based upon these submissions, no further action is required to treat the shallow groundwater and soils for petroleum contamination in the immediate vicinity of the operating VOA facility and this spill will be inactivated.

Letter from Peter Miller, NYSDEC to Linda Shaw, Esq., dated 04/23/02 [#184-3].

VOA argues that RG&E has selectively quoted the TAC, ignoring other allegations showing that VOA has not ruled out the potential for petroleum contamination caused by RG&E. First, VOA points out, it alleges that "[t]he coal at the Site "was transported to and from the Site by a diesel powered railroad." TAC, ¶ 18. VOA next notes that although "[t]he RIR concludes Petroleum contamination was not found as evidenced by the lack of detection of volatile organic chemical ("VOC") contamination in surface soils or subsurface soils and only in low levels in only two groundwater samples out of 103," TAC, ¶ 30, VOA alleges that the RIR found that "[d]iesel range organics . . . were also reported [at the Site near an area of black stained sandy soil], both of which [according to VOA] can be linked to RG&E's former operations at the Site." TAC, ¶ 31. It is not clear from the RIR the significance of the presence of diesel range organics ("DROs"), which are "commonly known as number 2 fuel, oil, or heating oil." 50 Day Street Assocs. v. Norwalk Housing Auth., No. X08CV020191396S, 2005 WL 1394772, at *4 n.5 (Conn. Super. May 17, 2005). As noted above, notwithstanding the presence of DROs, the RIR concluded that petroleum was not present. The RIR also distinguished between DROs and "gasoline range organics." See RIR [#174-14].

VOA appears to equate DROs with petroleum. It points out that, according to the RIR, a detectible concentration of DROs was found in the area of "black sandy soil". Thus, one would assume, VOA is arguing that the presence of DROs means that petroleum *is* present, However, VOA goes on to assert that

- "*[i]n the event that petroleum exists* on the Site, including but not limited to *diesel* and/or other forms of Petroleum, Defendant used, stored or disposed of such Petroleum, which flowed, drained, leached, or otherwise migrated into the soil and groundwater on the Site (the "Petroleum Discharges")." TAC, ¶ 33 (emphases supplied).

This allegation essentially negates VOA's attempt to equate the presence of DROs with the presence of petroleum.

Compounding the confusion, VOA's allegations following Paragraph 33 misleadingly suggest that the "Petroleum Discharges" actually have occurred:

- "As a direct and natural consequence of the Petroleum Discharges, Petroleum flowed, drained, leached, or otherwise migrated into the ground on the Site and either into, or in a position to threaten to contaminate the ground waters of the state on the Site and caused the Petroleum Contamination." TAC, ¶ 35.

- "Upon information and belief, some or all of the Toxic Releases and the Petroleum Discharges (collectively the "Releases") occurred in a sudden and accidental manner." TAC, ¶ 36.

- "Upon information and belief, the Releases and the Toxic Contamination have contaminated the Site and threaten to contaminate off-Site soil and groundwater." TAC, ¶ 37.

- "The Contamination occurred as a direct, proximate, and natural consequence of the Releases, and health

> and/or the environment are threatened on the Site." TAC, ¶ 40.

However, Paragraph 33 of the TAC, wherein VOA defined "Petroleum Discharges", makes clear that these discharges *have not yet occurred*. See TAC, ¶ 33 ("*In the event that petroleum exists* on the Site, . . . Defendant used, stored or disposed of such Petroleum, which flowed, drained, leached, or otherwise migrated into the soil and groundwater on the Site . . . ."") (emphasis supplied). Later in the TAC, under the fifth cause of action, VOA states that "[u]pon information and belief, there is *no* petroleum on the Site[,]" TAC, ¶ 194 (emphasis supplied), but "[i]n the *unlikely event* that petroleum contamination does exist," RG&E is strictly liable under Navigation Law § 181(5), id., ¶ 195 (emphasis supplied).

"An injury sufficient to satisfy Article III must be 'concrete and particularized' and 'actual or imminent, not "conjectural" or "hypothetical."'" Susan B. Anthony List v. Driehaus, ___ S. Ct. ____, 2014 WL 2675871, at *5 n.5 (June 6, 2014) (quoting Lujan, at 560 (some internal question marks omitted in original). An allegation of future injury may be sufficient, provided that the threatened injury is "certainly impending" or there is a "'substantial risk'" that the injury will occur. Clapper v. Amnesty Int'l USA, ___ U.S. ____, 133 S. Ct. 1138, 1146, 185 L. Ed.2d 264 (2013) (emphasis deleted and internal quotation marks omitted). The burden is on the party seeking to invoke jurisdiction to

"demonstrate a realistic danger of sustaining a direct injury." Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979). The Supreme Court has reiterated that while "'imminence' is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is 'certainly impending.'" Defenders of Wildlife, 504 U.S. 555, 564 n. 2 (quoting Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)). VOA's nebulous and internally inconsistent statements in the TAC, detailed at length above, defy a conclusion that VOA has sufficiently alleged an injury that is "concrete and particularized", "actual or imminent" or "certainly impending." See Genesis Brand Seed, Ltd. v. Limagrain Cereal Seeds, LLC, 944 F. Supp.2d 564, 569 (W.D. Mich. 2013) (horticulture businesses' claim for declaratory judgment was not ripe,[2] and thus district court lacked subject matter jurisdiction over claim, which sought judgment that settlement with competitor gave businesses full rights to all wheat seeds in their possession, regardless of whether seeds were contaminated with competitor's varieties; alleged harm that businesses would violate settlement by selling contaminated seeds involved contingent future events that might

[2] "Standing and ripeness are closely related doctrines that overlap 'most notably in the shared requirement that the [plaintiff's] injury be imminent rather than conjectural or hypothetical.'" New York Civil Liberties Union v. Grandeau, 528 F.3d 122, 130 n.8 (2d Cir. 2008) (quoting Brooklyn Legal Servs. Corp. v. Legal Servs. Corp., 462 F.3d 219, 225 (2d Cir. 2006); other citation omitted).

never occur, given small probability of contamination and remote possibility businesses would select contaminated variety for commercial development). Here, the only harm redressable in this action, at least with regard to the state law environmental claims, is petroleum contamination at the Site. VOA has conceded that petroleum contamination presently does not exist at the Site, and the discovery of petroleum contamination at the Site in the future is an "unlikely event". The alleged harm thus involves "contingent future events that may not occur as anticipated, or indeed may not occur at all." Thomas v. Union Carbide Agr. Products Co., 473 U.S. 568, 580-81 (1985) (quotation omitted).

The Court notes that VOA asserts in its memorandum of law that "[u]ntil excavation commences on a Site, the full nature and extent of contamination cannot be fully known." Pl's Mem. [#191] at 23. VOA did not make such a similar allegation in the TAC. Factual allegations made in legal briefs or memoranda generally are not considered for purposes of deciding a Rule 12(b)(6) motion because they are not part of the pleadings. See Fonte v. The Board of Mgrs. of Continental Towers Cond., 848 F.2d 24, 25 (2d Cir. 1988). The Court declines to consider this unsworn statement in support of RG&E's motion to dismiss.

When a court dismisses a cause of action based on the failure to adequately plead an injury for Article III purposes, the dismissal may be without prejudice to allow the plaintiff leave to

replead so as to remedy the defect. Here, however, the Court finds that the dismissal of VOA's state law environmental claims should be with prejudice, without leave to replead. Discovery in this litigation has spanned many years, giving VOA ample opportunity to gather the information needed to make a sufficient allegation of injury-in-fact. That VOA has not been able do so, after filing three complaints, leads the Court to conclude that filing of a fourth complaint would be futile.

V. Conclusion

For the reasons set forth above, RG&E's Motion to Dismiss Certain Causes of Action is denied in part and granted in part. The request to dismiss Counts Seven and Eight is denied as moot in light of this Court's issuance of a declaratory judgment in RG&E's favor as to these counts.

The request to dismiss Counts Eleven and Thirteen, which was not opposed by VOA, is granted. Counts Eleven and Thirteen are dismissed with prejudice.

RG&E's motion to dismiss Counts Five, Six, Nine, Ten, Twelve, Fourteen, and Fifteen on the basis that VOA has failed to sufficiently allege an injury-in-fact for standing purposes is granted. Counts Five, Six, Nine, Ten, Twelve, Fourteen, and Fifteen accordingly are dismissed with prejudice.

The Court does not reach the merits of that branch of RG&E's motion seeking to dismiss Counts Five, Six, Nine, Ten, Twelve,

Fourteen, and Fifteen for failure to state a claim under F.R.C.P. 12(b)(6).

SO ORDERED.

S/Michael A. Telesca

HONORABLE MICHAEL A. TELESCA
United States District Judge

DATED: July 21, 2014
Rochester, New York