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**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 9**

IN THE MATTER OF)	
)	
)	DOCKET NO. UIC-09-2022-0058
)	
NSHE HI Narcissus, LLC)	COMPLAINANT’S REPLY IN SUPPORT
)	OF MOTION TO WITHDRAW
Respondent.)	COMPLAINT WITHOUT PREJUDICE
_____)	

I. INTRODUCTION

On September 3, 2024, Respondent NSHE HI Narcissus, LLC filed a Motion to Dismiss, arguing that this action for penalties under the Safe Drinking Water Act (SDWA) may be invalid under the Supreme Court’s recent decision in *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024), and that instead this penalty action should proceed “in a court of law.” On September 17, 2024, Complainant filed a Motion to Withdraw the Complaint Without Prejudice and a Response to Respondent’s Motion to Dismiss. Complainant’s Motion to Withdraw stated that while

Complainant disagrees that *Jarkesy* precludes an action for penalties under the SDWA in the administrative forum, Complainant is nevertheless willing to withdraw the Complaint and refer the case to the U.S. Department of Justice consistent with the desire Respondent expressed in its Motion to Dismiss that this action proceed “in a court of law.” In its Response to the Motion to Dismiss, Complainant explained that if the Motion to Withdraw the Complaint Without Prejudice is granted then the Presiding Officer should find that Respondent’s Motion to Dismiss is moot. Complainant also requested additional briefing on the Motion to Dismiss if the Motion to Withdraw the Complaint Without Prejudice is denied.

On September 25, 2024, Respondent filed an “Answer”¹ to Complainant’s Motion to Withdraw the Complaint Without Prejudice and Response to the Motion to Dismiss. In that pleading, Respondent asserts that: (1) it would be unfair to allow Complainant to withdraw the Complaint to refer the case to the U.S. Department of Justice due to the time and resources already spent on this litigation, and (2) that Complainant did not respond to the Motion to Dismiss, and therefore Respondent’s motion should be granted.

However, as explained further below, it would not be unfair to Respondent to allow Complainant to withdraw the case because it was *Respondent* who requested that this action proceed in a “court of law” in the first place. Further, Complainant did file a Response to the Motion to Dismiss at the same time it filed its Motion to Withdraw, and so dismissal on the grounds that Complainant did not oppose the motion is not warranted. Complainant

¹ Respondent filed a document on September 25, 2024, titled “My answer because EPA had no opposition but instead filed a Motion to Withdraw.” 40 C.F.R. § 22.16(b) contemplates that for any motion, the party opposing the motion will have an opportunity to file a written response, and that the moving party will then have opportunity to file a written reply. Complainant is therefore treating Respondent’s “Answer” as both a Response to Complainant’s Motion to Withdraw the Complaint Without Prejudice, and a Reply to Complainant’s Response to the Motion to Dismiss.

respectfully requests that the Presiding Officer grant Complainant's Motion to Withdraw the Complaint Without Prejudice and deny Respondent's Motion to Dismiss as moot.

II. REPLY IN SUPPORT OF THE MOTION TO WITHDRAW THE COMPLAINT WITHOUT PREJUDICE

Respondent argues in its "Answer" that Complainant should be precluded from withdrawing the Complaint to refer the matter to the U.S. Department of Justice because it has already spent "three years" and "tens of thousands of dollars" litigating this matter in the administrative forum. This argument ignores the fact that (1) it was *Respondent* who requested that this action proceed "in a court of law," and (2) the Complainant has obtained a favorable ruling establishing the Respondent's liability, which it would be forgoing by withdrawing the Complaint. Respondent's efforts to prolong litigation and avoid paying a penalty for established violations of the SDWA provide no basis for denying Complainant's Motion to Withdraw the Complaint Without Prejudice.

In its Motion to Dismiss, Respondent expressed its desire that this action proceed in a "court of law." As noted previously in the Motion to Withdraw the Complaint Without Prejudice, Complainant has the discretion to bring an action for penalties under the SDWA in an administrative forum or in federal court. 42 U.S.C. § 300h-2 (a)(2); 40 C.F.R. § 300h-2 (a)(2). Although Complainant does not agree with Respondent's legal arguments, Complainant is exercising its discretion in response to Respondent's request to proceed in "a court of law," by seeking to withdraw the Complaint and refer the matter to the U.S. Department of Justice.

Moreover, Complainant is willing to exercise this discretion despite having already obtained a favorable ruling on the issue of Respondent's liability. Complainant has also spent three years and considerable resources litigating this matter in the administrative forum and

has proven by a preponderance of evidence that Respondent violated the SDWA by owning or operating a large capacity cesspool. See Order Granting Motion for Partial Accelerated Decision on Liability (August 28, 2023). The complaint in this matter was filed August 2, 2022.

Complainant moved for Partial Accelerated Decision on Liability on January 13, 2023. The Motion for Partial Accelerated Decision on Liability was granted on August 28, 2023, when the Presiding Officer concluded that there is no genuine issue of material fact and that Respondent violated the SDWA by owning or operating one large capacity cesspool after April 5, 2005.

Order Granting Motion for Partial Accelerated Decision on Liability (August 28, 2023). By arguing first that this action belongs in a “court of law” and then that it would be unfair to allow Complainant to withdraw the Complaint to refer this matter to the U.S. Department of Justice, Complainant is simply trying to avoid paying a penalty for the violations of the SDWA that have already been established.²

The Consolidated Rules of Practice at 40 C.F.R. § 22.14(d) allow a complainant to withdraw a complaint *without prejudice* “upon motion granted by the Presiding Officer.” Complainant’s Motion to Withdraw the Complaint Without Prejudice should be granted so that Complainant may refer this case to the U.S. Department of Justice, consistent with the desire Respondent expressed in its Motion to Dismiss that this action proceed “in a court of law.”

² To the extent Respondent argues that Complainant should be precluded from pursuing this action in federal district court, the Presiding Officer need not reach that question in order to rule on Complainant’s Motion to Withdraw Without Prejudice. The Consolidated Rules of Practice at 40 C.F.R. § 22.14(d) allow a complainant to withdraw a complaint without prejudice “upon motion granted by the Presiding Officer.” The Consolidated Rules of Practice do not require the Presiding Officer to determine whether an action may be heard in another forum in order to grant a motion to withdraw a complaint without prejudice. 40 C.F.R. § 22.14(d). Furthermore, if the U.S. Department of Justice were to file a complaint in federal district court, that court may determine whether the action could proceed in that forum. The Presiding Officer need not reach that question to decide the motions currently before him.

III. RESPONDENT'S MOTION TO DISMISS

Respondent incorrectly claims that EPA did not meet the September 18, 2024 deadline to file a response to Respondent's Motion to Dismiss. Complainant filed a pleading on September 17, 2024 titled "Motion to Withdraw Complaint Without Prejudice *and Response to Motion to Dismiss.*" (emphasis added). In Complainant's Response to the Motion to Dismiss, Complainant explained that if the Motion to Withdraw the Complaint Without Prejudice is granted, then Respondent's Motion to Dismiss should be denied as moot, and requested additional briefing on the Motion to Dismiss if the Motion to Withdraw the Complaint Without Prejudice is denied. But even if Complainant had failed to respond—which is not the case—the Presiding Officer need not reach the merits of Respondent's Motion to Dismiss at this time, because the Motion to Dismiss will be moot if Complainant's Motion to Withdraw the Complaint Without Prejudice is granted. Accordingly, Respondent's Motion to Dismiss should not be granted at this juncture.

IV. CONCLUSION

Complainant respectfully moves the Presiding Officer to GRANT its Motion to Withdraw the Complaint Without Prejudice, and DENY Respondent's Motion to Dismiss as moot.

Respectfully submitted,

Erin Brewer
Assistant Regional Counsel
Office of Regional Counsel, EPA Region 9

Certificate of Service

The undersigned certifies that on the date indicated below this Reply in Support of Complainant's Motion to Withdraw Complaint Without Prejudice was served upon Respondent's representative and managing member, who has consented in writing to electronic service pursuant to 40 C.F.R. § 22.5(b)(2).

One copy via electronic mail to:

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Dated: October 4, 2024

Erin Brewer
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