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The City of New York
Waste Management of New York, L.L.C.

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SUPREME COURT
STATE OF NEW YORK COUNTY OF MONROE

FRESH AIR FOR THE EASTSIDE, INC.,

Plaintiff,

vs.

Index No.: E2022000699

THE STATE OF NEW YORK,
NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, THE CITY OF NEW YORK,
WASTE MANAGEMENT OF NEW YORK, L.L.C.

Defendants.

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO THE MOTION TO DISMISS BY THE CITY OF NEW YORK

KNAUF SHAW LLP
Attorneys for Plaintiff
Linda R. Shaw, Esq.,
Alan J. Knauf, Esq.,
Dwight E. Kanyuck, Esq.,
Melissa M. Valle, Esq., and
William F. Kellermeyer, Esq.,
of Counsel
1400 Crossroads Building
2 State Street
Rochester, New York 14614
Tel: (585) 546-8430

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PRELIMINARY STATEMENT

Plaintiff Fresh Air for the Eastside, Inc. ("FAFE" or "Plaintiff") submits this Memorandum of Law in opposition to the Motion to Dismiss filed by the City of New York ("NYC"). In this action, FAFE complains, *inter alia*, the constitutional rights of its members (the "Members") to clean air and a healthy environment, guaranteed by Section 19 of Article I of the New York Constitution (the "Green Amendment"), are being violated as a result of the actions or inactions on the part of the Defendants regarding the High Acres Landfill ("the Landfill"). Complaint, Docket No. 2 ("Compl.") ¶ 1. Defendant Waste Management of New York, L.L.C. ("WMNY") owns and operates the Landfill, which accepts and disposes of mostly garbage generated by the NYC ("NYC Garbage") and transported to the Landfill via rail. Compl. ¶¶ 1, 4.

A full Preliminary Statement and recitation of relevant Facts can be found in FAFE's response to the Motion to Dismiss of Defendants State of New York and the New York State Department of Environmental Conservation (together "the State"), and is incorporated herein by reference. *See* Docket No. 65.

As detailed below, NYC's Motion should be denied in its entirety because NYC has violated FAFE's Green Amendment rights, both by failing in its non-discretionary duty embodied in its Charter, and its deliberate disposal of solid waste at the polluting High Acres Landfill ("Landfill"); this suit is procedurally proper and should not be dismissed; FAFE has standing; and FAFE has a private right of action to enforce the Green Amendment.

LEGAL ARGUMENT

LEGAL STANDARD

NYC seeks to dismiss FAFE's Complaint in its entirety pursuant to CPLR § 3211 for failure to state a claim. *See* Docket No. 20. On a CPLR § 3211 motion to dismiss, "[a]ny facts in the complaint and submissions in opposition to the motion to dismiss are accepted as true, and the benefit of every possible favorable inference is afforded to the plaintiff." *Gibraltar Steel v. Gibraltar Metal Proc.*, 19 A.D.3d 1141, 1142 (4th Dep't 2005). On such a motion, the court's inquiry is '"whether the proponent of the pleading has a cause of action, not whether he has stated one."' *See Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994) [citations omitted].

POINT ONE

FAFE STATES A VALID CLAIM AGAINST NYC

NYC's Point I, II, and III[1] rest on a complete misreading of FAFE's Complaint, and can be summarily addressed by the points below.

A. FAFE's Allegations Rest on the Duties Embodied in the NYC Charter and Not NYC's Contracts with WMNY.

NYC attempts to confuse this Court by arguing that NYC's duty to act arises solely from the contracts ("Contracts") NYC has with WMNY. It is not surprising that NYC attempts to distract this Court with arguments premised on the Contracts, rather than its Charter, since the Charter clearly sets forth NYC's responsibility for the proper management of its solid waste, but alas this is a misreading of FAFE's Complaint.

[1] Point I: FAFE did not allege a cognizable claim because it has no legal rights regarding NYC's contracts with WMNY. NYC MOL at 5.
Point II: NYC has no ministerial duty to abate the Constitutional Violation and FAFE alleges a duty arising solely from the NYC Contracts. NYC MOL at 10.
Point III: Declaratory judgment is not the proper vehicle to enforce the NYC contracts with WMNY. NYC MOL at 11.

As stated in its Charter, NYC has a nondiscretionary duty, the "power and dut[y]… and shall have charge and control of and be responsible for … all those functions and operations of the city relating to … the disposal of waste, the regulation of the use of … landfills … necessary for or useful for performing the functions and exercising the powers and duties enumerated in this section … [and responsibility for how NYC Garbage] will be collected by the city, from whom it will be taken, the manner in which it shall be arranged or sorted, the time when it will be collected and the place at which it shall be deposited for collection." *See* Compl. ¶ 159; NYC Charter Chapter 31[2]. A municipality's charter confers upon it a duty to act. *See People v. Corp. of Albany*, 11 Wend. 539, 542 (Sup. Ct. of Judicature of New York 1834). Charters contain nondiscretionary duties when they contain language like "shall" and otherwise "unequivocal[y] and [] clearly directs the" municipality to take some action. *See Marone v. Nassau County*, 39 Misc. 3d 1034, 1045 (Sup. Ct. Nassau Co. 2013); *Korn v. Gulotta*, 72 N.Y.2d 363, 373 (1988) (charter that contains the word "shall" provided a "mandatory" duty on the government). "Mandamus will lie to compel acts that public officials are duty bound to perform regardless of how they may exercise their discretion in doing so." *Korn*, 72 N.Y.2d at 370.

FAFE does not allege that NYC's duty arises from the Contracts, but rather from the nondiscretionary duties to proper manage its solid waste, as stated in its Charter. Compl. ¶ 159. Thus, if this Court finds that FAFE seeks mandamus to compel an action by NYC, FAFE has properly established a ministerial duty. *Id.*

Nevertheless, the allegations regarding the Contracts do illustrate that NYC is completely capable of abating the constitutional violation. NYC is the majority generator of municipal solid waste ("MSW") disposed at the Landfill. NYC Garbage currently represents about 90% of all

[2] https://nyccharter.readthedocs.io/c31/

MSW disposed at the Landfill. Compl. ¶ 33. Since 2015, NYC Garbage has represented an increasing majority of the total MSW the Landfill accepts. Compl. ¶ 32. The Contracts demonstrate that NYC is not powerless and is capable of abating the Odors and Fugitive Emissions, by, for example, changing any one of the conditions FAFE alleged in Complaint ¶¶ 32 or 33.

Thus, clearly FAFE is not seeking redress through the Contracts and is not asking this Court to find it is entitled to third-party beneficiary status. This is a red herring. Rather, FAFE alleges details about the Contracts to show that FAFE's claims are not without redress, and NYC is fully capable of taking actions to remedy the constitutional violation, and must do so pursuant to its Charter. Compl. ¶ 159.

B. FAFE's Allegations Also Rest on Conduct by NYC.

Even in the absence of a duty under its Charter, or rights under its Contract, NYC is still violating the Green Amendment by arranging for disposal of its solid waste in the Landfill. It cannot escape responsibility by loading its waste on a train and forgetting about it. Liability attaches to waste generators. *See e.g., Andres v. Town of Wheatfield*, 2020 WL 7764833, at *9 (W.D.N.Y. Dec. 30, 2020) (at pleading stage, court did not dismiss case alleging strict liability of generator of waste when waste was deposited on another's property); *City of New York v. Exxon Corp.*, 766 F. Supp. 177 (S.D.N.Y. 1991) (generator liability attaches pursuant to CERCLA).

Rather, NYC is well aware of the Odors and Fugitive Emissions, but it continues to deliberately send 90% of the waste that is causing those offensive conditions. And it is no answer that the policy is allegedly discretionary, since this is not a tort action, and the City does not have the discretion to abridge constitutional rights. *See* Plaintiff's Memorandum of Law in Response to WMNY Motion to Dismiss, Point One (C). One who contributes to a constitutional violation is still liable for the violation, even if they were not the direct cause. *See Monell v. Dept. of Soc.*

Services of City of New York, 436 U.S. 658, 694 (1978) ("when execution of a government's policy or custom … inflicts the injury that the government as an entity is responsible" for, a constitutional violation can arise); *Hussain v. City of New York*, 146 A.D.3d 430, 430 (1st Dep't 2017). If a governmental body's policy is causing a constitutional violation, liability attaches. *Id.*

C. FAFE's Declaratory Judgment Action Is Procedurally Proper, But Even if Converted, This Court May Compel Mandamus on NYC's Nondiscretionary Duties Embodied in its Charter.

NYC argues the action must be dismissed rather than converted, yet cites no authority. *See* Docket No. 23 ("NYC MOL") at 9. Alternatively, NYC argues that even if FAFE's claim is converted to an Article 78 proceeding, it still must be dismissed.

First, NYC woefully ignores the declaratory relief clearly sought by FAFE in "WHEREFORE" paragraph of its Complaint, which provides as follows, and only focuses on the relief stated in clause (2):

> 1) declare the Defendants are violating Plaintiff's constitutional rights under the Green Amendment in Article I §19 of the New York State Constitution to clean air and a healthful environment by causing the Odors and Fugitive Emissions and the emissions of GHGs into the atmosphere, furthering the cumulative impact of climate change; and (2) ordering the immediate proper closure of the Landfill, or alternatively directing Defendants to immediately abate the Odors and Fugitive Emissions in the Community.

Compl. at 29. A declaration of constitutional rights is most appropriate in a declaratory judgement action, not a CPLR Article 78 proceeding. *See Bunis v. Conway*, 17 A.D.2d 207, 208 (4th Dep't 1962) ("It is the settled law that an action for a declaratory judgment will lie 'where a constitutional question is involved.'"); *Parry v. County of Onondaga*, 51 A.D.3d 1385, 1387 (4th Dep't 2008); *Levenson v. Lippman*, 4 N.Y.3d 280, 287 (2005); *Murphy v. Diamond*, 78 Misc. 2d 309, 311 (Sup. Ct. Albany Co. 1973). "While an Article 78 proceeding is 'as plenary as an action,' it is 'brought on with the ease, speed, and economy of a mere motion' … 'By contrast, a declaratory judgment

action brings with it all the apparatus of an action, proceeding to trial unless the court dismisses the case or grants a motion for summary judgment. ' Because of the summary nature of an Article 78 proceeding, 'It is ill fit as a vehicle for constitutional analysis.'" *See Skelos v. Paterson*, 25 Misc. 3d 347, 354 (Sup. Ct. Nassau Co. 2009), *aff'd*, 65 A.D.3d 339 (2d Dep't 2009), *rev'd on other grounds*, 13 N.Y.3d 141 (2009).

Likewise, FAFE's relief for the Landfill to close or the Odors/Fugitive gases to be abated is proper in a declaratory judgment action. "The use of a declaratory judgment, while discretionary with the court, is nevertheless dependent upon facts and circumstances rendering it useful and necessary. The discretion must be exercised judicially and with care." *James v. Alderton Dock Yards*, 256 N.Y. 298, 305 (1931). "The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations … No limitation has been placed, or attempted to be placed, upon its use…" *Id.* [citations omitted]. Here, the method to "quie[t]" FAFE's dispute is to close the Landfill or abate the Odors/Fugitive Emissions.

At the heart of FAFE's Complaint is a constitutional rights question, in need of a declaration of rights. NYC's attempts to manipulate the Complaint are without merit. However, even if this action is more appropriate in the form of a special proceeding, it should be converted and not dismissed. *See* CPLR § 103(c); *City of New York v. State Bd. of Equalization and Assessment*, 60 A.D.2d 932, 933 (3d Dep't 1978) (court converted a declaratory judgment action to an Article 78 proceeding).

POINT TWO

FAFE HAS STANDING

NYC did not bring its Motion to Dismiss based on lack of standing, *see* Docket No. 20, yet it asserted arguments on that point.[3] NYC is the only Defendant to allege that FAFE lacks standing. FAFE of course has standing to pursue its constitutional claim against NYC, since NYC generates the waste that is causing the unclean air and unhealthful environment. *See New York Ass'n of Convenience Stores v. Urbach*, 169 Misc. 2d 906, 916 (Sup. Ct. Albany Co. 1996) (the court held that petitioner had standing to bring an action in the nature of mandamus to compel the government to "fulfill their statutory and regulatory duties" in the "interest of the furtherance of petitioners' constitutional rights").

FAFE has alleged direct harm and injury caused by NYC's actions, which the City lacks discretion to take. Compl. ¶¶ 152, 153, 154, 159. Thus, FAFE has standing to pursue its claims, especially because its Complaint asserts "a violation of plaintiffs' own constitutional rights." *See Pirro v. Bd. of Trustees of Village of Groton*, 203 A.D.3d 1263, 1266 (3d Dep't 2022) (plaintiff "clearly had standing to litigate" when its complaint "explicitly stated that "[t]he actions of defendants violated the rights of ...plaintiffs secured by the Constitution of the United States, including their rights of petition or association under the First Amendment.'"). Furthermore, it is well-settled that persons impacted by pollution can sue to address the cause. *Scribner v. Summers*, 84 F.3d 554 (2d Cir. 1996).

NYC seeks to dismiss FAFE's Complaint based on pure speculation that "Changes in the City's waste management programs might, or might not, actually affect the volume of MSW disposed at High Acres Landfill. Thus, there is no certainty whatsoever that any of plaintiffs

[3] 22 NYCRR § 202.8-a requires the notice of motion to state "the exact relief sought."

members have been injured." NYC MOL 8. However, raising such conjectural claims on a Motion to Dismiss does not satisfy NYC's burden because this Court is required to accept FAFE's allegations as true, and give FAFE "every possible favorable inference." *See Gibraltar,* 19 A.D.3d at 1142. The issue is whether FAFE "has a cause of action, not whether [it] has stated one."' *See Leon,* 84 N.Y.2d at 87-88. And even if this speculative argument made sense (in light of the excess disposal capacity at the Landfill that is not currently being utilized), and NYC could find an expert to reach the dubious opinion that sources from other cities would replace NYC Garbage even though they are not sending large quantities there now, that would, at most, be an issue of fact for trial.

Likewise, NYC's argument that FAFE and its Members do not fall within the zone of interest of the Green Amendment must fail. The Green Amendment was enacted for exact situations like the instant case. FAFE has alleged the NYC's disposal practices are causing a violation of its constitutional right to clean air and a healthful environment, falling squarely within the zone of interest to be protected by the Green Amendment. *Saratoga County Chamber of Com. Inc. v. Pataki*, 275 A.D.2d 145, 154 (3d Dep't 2000) ("A plaintiff has standing to maintain an action when that plaintiff has suffered an injury in fact and such injury falls within the zone of interests to be protected by the statute or constitutional provision involved").

Thus, NYC failed its burden to show that FAFE lacks standing as a matter of law. *U.S. Bank Nat. Ass'n v. Guy*, 125 A.D.3d 845, 847 (2d Dep't 2015) ("the burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing as a matter of law).

POINT THREE

THE GREEN AMENDMENT CAN BE ENFORCED BY AN INDEPENDENT CAUSE OF ACTION

NYC essentially is asking this Court to find that the Green Amendment, when adopted, meant nothing to impacted New Yorkers being forced to breathe unhealthy air. "[P]laintiff implicitly assumes that the amendment provides a cause of action independent of the considerable body of law and regulation which has been developed over the course of decades in this State regarding solid waste and air quality." NYC MOL at 13. As more fully stated in FAFE's Memorandum of Law in Response to WMNY's Motion to Dismiss, Point One[4], the Green Amendment is self-executing and provides a right of action to impacted New Yorkers.

The Green Amendment does not "obliterate the statutory authority of the New York State Environmental Conservation Law (ECL) or the standards promulgated under the ECL's related State regulations." NYC MOL at 14. But, the Green Amendment was voted into the Bill of Rights in New York's Constitution by the People and enacted into law, despite the fact that New York has numerous laws, regulations, and policies to regulate air and the environment, so it certainly added rights for citizens of New York. As more fully stated in FAFE's response to WMNY's MOL, this Court should not look past the language of the Green Amendment itself since it is unambiguous, and should ignore the legislative history cited by NYC. *See Makinen v. City of New York*, 30 N.Y.3d 81, 85 (2017). However, if this Court finds the Green Amendment is ambiguous, it should rely on the legislative history cited in Point One of FAFE's MOL in Response to WMNY's Motion to find that the Green Amendment is self-executing and can be enforced by a private right of action.

[4] FAFE incorporates by references its arguments which will not be repeated here.

CONCLUSION

For the reasons stated above, NYC has failed to carry its burden on its Motion to Dismiss FAFE's Complaint, and thus its Motion should be denied.

Dated: June 17, 2022
Rochester, New York

/s/ Linda R. Shaw
KNAUF SHAW LLP
Attorneys for Plaintiff
Linda R. Shaw, Esq.,
Alan J. Knauf, Esq.,
Dwight E. Kanyuck, Esq.,
Melissa M. Valle, Esq., and
William F. Kellermeyer, Esq.,
of Counsel
1400 Crossroads Building
2 State Street
Rochester, New York 14614
Tel: (585) 546-8430
Lshaw@nyenvlaw.com
Aknauf@nyenvlaw.com
Dkanyuck@nyenvlaw.com
Mvalle@nyenvlaw.com
Wkellermeyer@nyenvlaw.com

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Dated: June 17, 2022
Rochester, New York

/s/ Linda R. Shaw
KNAUF SHAW LLP
Attorneys for Plaintiff
Linda R. Shaw, Esq.,
Alan J. Knauf, Esq.,
Dwight E. Kanyuck, Esq.,
Melissa M. Valle, Esq., and
William F. Kellermeyer, Esq.,
of Counsel
1400 Crossroads Building
2 State Street
Rochester, New York 14614
Tel: (585) 546-8430
Lshaw@nyenvlaw.com
Aknauf@nyenvlaw.com
Dkanyuck@nyenvlaw.com
Mvalle@nyenvlaw.com
Wkellermeyer@nyenvlaw.com