SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

SENECA LAKE GUARDIAN, INC., SENECA FALLS ENVIRONMENTAL ACTION COMMITTEE, WATERLOO CONTRACTORS, INC., d/b/a WATERLOO CONTAINER COMPANY, ABSOLUTE AUTO REPAIR, INC., VALERIE SANDLAS, and HEATHER BONETTI,

Plaintiffs,

-against-

SENECA MEADOWS, INC. and THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTALCONSERVATION,

Defendants.

Index No. 902866-24

MEMORANDUM OF LAW IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS

WHITEMAN OSTERMAN & HANNA LLP
One Commerce Plaza
Albany, New York 12260
(518) 487-7600
Of Counsel:
Philip H. Gitlen, Esq.
Molly D. Parlin, Esq.
Arthur A. Nix, Esq.

THE LAW OFFICE OF DOUGLAS H. ZAMELIS
7629A State Highway 80
Cooperstown, New York 13326
(315) 858-6002
Of Counsel:
Douglas H. Zamelis, Esq.

Attorneys for Plaintiffs

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Regulations

Constitutional Provisions

Other Authorities

PRELIMINARY STATEMENT

In this action, Plaintiffs seek to enjoin and abate the noxious and foul odors and gull infestation created by the continued operation of the Seneca Meadows Landfill (the "Landfill") owned and operated by Seneca Meadows, Inc. ("SMI") and the proposed expansion of the Landfill that would allow it to continue to operate for fifteen more years after its current permit expires on December 31, 2025. Plaintiffs further seek a declaratory judgment that SMI's operation of the Landfill, with the New York State Department of Environmental Conservation's ("DEC") day-to-day participation, along with DEC's failure to remedy the harm caused by the Landfill and its facilitation of the Landfill's continued operations, is depriving Plaintiffs of their constitutionally protected right to clean air and a healthful environment.

In lieu of answering the Complaint, Defendants moved to dismiss Plaintiffs' claims pursuant to CPLR Rule 3211(a) for a defense founded upon documentary evidence, lack of subject matter jurisdiction, and failure to state a cause of action.[1] Plaintiffs respectfully submit this memorandum of law in opposition to Defendants' motions to dismiss.

Article 1 Section 19 of the New York State Constitution, the Environmental Rights Amendment or Green Amendment, enshrines within the Bill of Rights the basic right of all New Yorkers to "clean water, clean air and a healthful environment." It is a self-executing, fundamental right, just like religious liberty and freedom of speech, which belongs to all people. "Clean air" plainly refers to air free of pollution, including noxious odors. But the nauseating air surrounding the Landfill, which the individual Plaintiffs and the customers and employees of the business Plaintiffs are exposed to on a daily basis, is neither free of pollution nor "clean" by any measure. The persistent and noxious odors migrating from the Landfill are also of such quantity,

[1] While Defendant SMI moved this Court to dismiss pursuant to CPLR Rules 3211(a)(1), (2), and (7), Defendant DEC did not specify the grounds upon which its motion to dismiss is based.

characteristic, and duration that they have and continue to interfere with the comfortable enjoyment by Plaintiffs of life or property in clear violation of 6 NYCRR § 211.1 and Condition 28 of SMI's Title V Permit and constitute a "nuisance" under well-settled New York law.

Defendants' motions are almost exclusively focused on the contention that the Green Amendment cannot "displace" or "abrogate" agency enforcement discretion. Setting aside the fact that State agencies have no discretion whatsoever when it comes to complying with the Constitution, Defendants simply miss the point. Whatever DEC has (or has not) done to effectively regulate the Landfill and prevent the harm experienced by the Plaintiffs is irrelevant because, at the end of the day, the odors remain, the air is not "clean" and the gull infestation and the droppings they leave behind are disgusting. The issue is not enforcement, it is that Plaintiffs' constitutionally protected right to clean air and a healthful environment has been violated and the odors and gull infestation are interfering with Plaintiffs' reasonable use and enjoyment of their property.

Furthermore, Plaintiffs are not required to exhaust administrative remedies before bringing their claims; the harms alleged in the Complaint are occurring now and constitute a current violation of their constitutionally protected rights and a nuisance. The relief Plaintiffs seek (judgment that their constitutional rights are being violated, that the Landfill's odors and gull infestation are causing a nuisance, and an injunction to prevent further Landfill expansion) is properly resolved via a declaratory judgment action, not a CPLR Article 78 proceeding challenging agency action.

Defendants' attempts to obfuscate the issues here and prevent Plaintiffs from having their claims heard on the merits are unavailing. As set forth herein, Plaintiffs have sufficiently pled causes of action for declaratory relief, and Defendants have failed to demonstrate any reason why they are entitled to dismissal of those causes of action under CPLR 3211.

STATEMENT OF FACTS

Plaintiffs respectfully refer this Court to the statement of facts set forth in its Complaint for a full recitation of the facts material to Plaintiffs' opposition to Defendants' motions to dismiss. It is sufficient to note here the Complaint alleges that, for many years, the Landfill has been the source of noxious, nauseating odors and disgusting remnants of gull infestation that have caused actual economic damages to the Plaintiff businesses and have interfered with the reasonable use and enjoyment of the individual Plaintiffs' property. The odors themselves are indicators of potential hazardous and other air pollutants which are constituents of the emissions from the Landfill. The census tract within which the Landfill is located has been identified as a "disadvantaged community" and has some of the worst health outcomes in New York State. The New York State Health Department has identified a "cancer cluster" in the surrounding community that cannot be explained by typical causes, e.g., smoking or radon. The Director of the Seneca County Health Department has formally requested that DEC identify and measure the specific contaminants being emitted from the Landfill, but, upon information and belief, there has been no response. All of the tourism-related jobs within two kilometers of the Landfill have been lost. Both of the Plaintiff businesses allege specific economic damages related to the loss of business, lost work time, and inability to attract employees and expand.

SMI and DEC have acknowledged the Landfill is a source of noxious odors and DEC added special conditions to the Landfill operating permit in an attempt to address the odor problems—but these efforts have been entirely unsuccessful in preventing the harms alleged in the Complaint.

ARGUMENT

"[W]ith regard to a pre-answer motion to dismiss a declaratory judgment action, the only issue presented for consideration is whether a cause of action for declaratory relief is set forth, not

whether the plaintiff is entitled to a favorable declaration" (*Matter of Dashnaw v Town of Peru*, 111 AD3d 1222, 1225 [3d Dept 2013] [internal quotation marks, ellipses and citations omitted] *citing North Shore Towers Apartments Inc. v Three Towers Assocs.*, 104 AD3d 825, 827 [2d Dept 2013]; *see also Dodson v Town Bd. of Town of Rotterdam*, 182 AD3d 109 [3d Dept 2020]; *Hirsch v Lindor Realty Corp,* 63 NY2d 878, 881 [1984]; *Staver Co. Inc. v Skrobisch*, 144 AD2d 449 [2d Dept 1988]). "Where issues of fact are presented, the court should deny a motion to dismiss if the complaint 'is sufficient to invoke the court's power to render a declaratory judgment . . . as to the rights and other legal relations of the parties in a justiciable controversy'" (*Dodson v Town Bd. of Town of Rotterdam*, 182 AD3d 109 [3d Dept 2020], quoting *N. Oyster Bay Baymen's Ass'n v Town of Oyster Bay*, 130 AD3d 885, 890 [2d Dept 2015]).

This Court, in fact, recently rejected similar motions to dismiss an Intervenor Complaint that alleged dust emissions from a DEC-regulated facility violated the Green Amendment (*State of New York, et al. v Norlite, LLC* [Sup Ct, Albany County] [Index No. 907689-22, NYSCEF Doc. No. 156]). In that case, this Court held that "allegation of a violation of the Green Amendment involves a 'real dispute between adverse parties regarding substantial legal interests' establishing the Court's jurisdiction over the matter" (citations omitted) and that "Supreme Court may consider a claim for injunctive relief against the State or a State agency" (citations omitted) (*id*. at 4-5). This Court also rejected the CPLR 3211(a)(7) motion to dismiss for failure to state a claim, holding that in considering such a pre-answer motion the Court must "liberally construe" the allegations in the Complaint and accept the factual allegations as true, and concluded that an allegation that DEC violated the Green Amendment by permitting and allowing the regulated facility to operate and cause the harms alleged states a valid cause of action at the pre-answer stage of the proceedings (*id*. at 6-7).

SMI's motion to dismiss based on "documentary evidence" (CPLR 3211 (a) (1)) also fails. Although SMI uses the term "documentary evidence" once in support of its motion, it fails to otherwise address that prong of its motion in its Memorandum of Law. To the extent SMI would contend the DEC administrative process constitutes such documentary evidence, that contention should be rejected. There is no dispute that the DEC administrative process is arduous and time-consuming—but here, the allegations in the Complaint are that these processes have failed over many years to prevent the serious harms alleged in the Complaint.

In sum, Plaintiffs have sufficiently set forth causes of action for declaratory relief, and Defendants have failed to demonstrate any reason why they should succeed on a motion to dismiss pursuant to CPLR 3211.

POINT I
DEFENDANTS FAIL TO ALLEGE ANY DEFENSES FULLY FOUNDED UPON DOCUMENTARY EVIDENCE

On a motion to dismiss pursuant to CPLR 3211(a)(1) on the ground that the action is barred by documentary evidence "such motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]). "[T]he defendant has the burden of showing that the relied-upon documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" *Fortis Fin. Servs., LLC v. Fimat Futures USA, Inc.,* 290 A.D.2d 383, 383 (N.Y. App. Div. 1st Dep't 2002) (internal quotation marks and citation omitted); *see also Leon v. Martinez,* 84 N.Y.2d 83, 88 (N.Y. 1994). If documentary evidence leaves open any material factual issue, then the motion must be denied (*Fortis Fin. Servs.*, 290 A.D.2d at 384-85).

In addition to being unsupported by caselaw, Defendants' claims that the Green Amendment is not self-executing simply do not constitute a defense to Plaintiffs' causes of action as a matter of law (*see People v. Carroll*, 3 N.Y.2d 686 (1958) (finding that "[t]he general rule is that constitutional provisions are presumptively self-executing.") Indeed, while both Defendants acknowledge that no appellate court has yet interpreted the Green Amendment, neither acknowledge that none of the trial courts addressing Green Amendment claims have held that it is not self-executing (*see, e.g., Marte v. City of NY*, 2023 N.Y. Slip Op. 31198[U], 2023 WL 2971394 [Sup. Ct., NY County 2023]; *Fresh Air for the Eastside, Inc. v. State*, 2022 N.Y. Slip Op. 34429[U], 2022 WL 18141022 [Sup. Ct., Monroe County 2022]; *State v. Norlite* [Index No. 907689-22, NYSCEF Doc. No. 156]).

Defendant SMI's argument that Plaintiffs' claims are not yet ripe because DEC's SEQRA review of SMI's proposed permit modification has not concluded similarly falls short. Defendants suggest Plaintiffs' claims are premature because that administrative process is not yet complete; but Plaintiffs are not challenging DEC's permitting decision in a CPLR Article 78 proceeding. Instead, they are alleging their constitutional rights are currently being violated and the Landfill's odors and the gull infestation from the Landfill are currently causing a nuisance. Plaintiffs need not wait until a permitting decision on the proposed Landfill expansion has been reached to raise these types of claims. Indeed, constitutional rights are appropriately resolved in a declaratory judgment, 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'"]). Nor would any such permitting decision "prevent" or "significantly ameliorate" the claimed harm, as the decision before DEC is whether to permit expansion, not whether to revoke the permit entirely.

For these reasons, the documents submitted by Defendants (e.g., DEC's SEQRA review and the transcripts of Green Amendment proceedings of the New York State Assembly) do not even come close to conclusively establishing a defense to the claims asserted. Accordingly, Defendant SMI's motion to dismiss pursuant to CPLR 3211(a)(1) should be denied.

POINT II
THIS COURT HAS SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' CLAIMS

Pursuant to CPLR 3001, "[S]upreme [C]ourt may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." A "justiciable controversy" means "a real dispute between adverse parties, involving substantial legal interests for which a declaration of rights will have some practical effect" (*Hernandez v. State*, 173 AD3d 105, 109-110 [3d Dept 2019]). Further, such controversy "must involve a present, rather than hypothetical, contingent, or remote prejudice to the plaintiff" and "the dispute must be real, definite, substantial, and sufficiently matured so as to be ripe for judicial determination" (*Zwarycz v Marnia Const., Inc*., 102 AD3d 774, 776 [2d Dept 2013]).

The Green Amendment, which provides "[e]ach person shall have a right to clean air and water, and a healthful environment," was enshrined within the Bill of Rights to "ensure that clean air and water are treated as fundamental rights for New Yorkers." (Sponsor's Mem., Senate Bill S528 [2021]). "The Bill of Rights embodied in the Constitution[] of the State…is not an arbitrary restriction upon the powers of government. It is a guarantee of those rights which are essential to the preservation of the freedom of the individual—rights which are part of our democratic traditions and which no government may invade" (*People v. Barber*, 289 N.Y. 378, 385 [1943]). Accordingly, Plaintiffs' allegations that Defendants have violated the Green Amendment implicate

a fundamental constitutional right, thereby "establish[ing] the existence of a real dispute between adverse parties regarding substantial legal interests" (*Hernadez*, 173 AD3d at 110). Furthermore, Plaintiffs claim Defendants are *currently* causing noxious, offensive odors to emanate to their property, creating a nuisance and substantially interfering with their rights. Therefore, Plaintiffs' tort claims are neither hypothetical, nor remote, and are ripe for judicial review.

Finally, if the court determines that a constitutional violation exists, it has authority to issue an injunction to remedy that violation (*see Matter of New York Charter Schools Ass'n, Inc. v DiNapoli*, 13 N.Y.3d 120 [2009]). Therefore, Plaintiffs' request for declaratory judgment with respect to its Green Amendment and nuisance claims, and their request for injunctive relief to remedy a violation of the New York Constitution are properly before this Court and Defendant SMI's motion to dismiss for lack of subject matter jurisdiction must be denied.

POINT III
PLAINTIFFS HAVE SUFFICIENTLY SET FORTH CAUSES OF ACTION FOR DECLARATORY JUDGMENT

"When assessing the adequacy of a complaint in light of a CPLR 3211(a)(7) motion to dismiss, the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide the plaintiff the benefit of every possible favorable inference" (*Shephard v Friedlander*, 195 AD3d 1191, 1192 [3d Dept 2021] [internal quotation marks, brackets and citations omitted]; *see also 511 W. 232nd Owners Corp. v Jennifer Realty Co*., 98 NY2d 144, 152 [2002]; *Leon v Martinez,* 84 NY2d at 87). The motion should be denied if from the pleadings' four corners "factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Polonetsky v Better Homes Depot*, 97 NY2d 46, 54 [2001], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). "[A] court resolving a motion to dismiss for failure to state a claim cannot base the determination upon submissions by the defendant –

without regard to how compelling claims made in such submissions may appear" (*Carr v Wegmans Food Markets, Inc*., 182 AD3d 667 [3d Dept 2020] [citations omitted]; *see Miglino v Bally Total Fitness of Greater New York, Inc*., 20 NY3d 342, 351 [2013]). Accordingly, the relevant inquiry is merely, "whether the complaint adequately alleged facts giving rise to a cause of action, not whether [it] properly labeled or artfully stated one" (*Sassi v Mobile Life Support Services, Inc.*, 37 NY3d 236, 239 [2021]).

Defendants allege, incorrectly, that Plaintiffs have no viable claims under the New York State Constitution or New York tort law. As demonstrated herein, Plaintiffs have more than satisfied the pleading standard with respect to their Green Amendment and nuisance claims.

A. Plaintiffs have Adequately Pled a Green Amendment Claim

The Green Amendment guarantees "[e]ach person shall have the right to clean air and water and a healthful environment" (NY Const. Art. I, § 19). Plaintiffs have alleged numerous facts supporting their claims that odors emanating from the Landfill to their property are violating their constitutional right to clean air. Plaintiffs allege, and Defendants do not dispute, that the air emanating from the Landfill is noxious and objectionable. Nevertheless, in what appears to be an attempt to distract from the core issue that the air surrounding the Landfill is not clean, Defendants try to shift the focus to whether the Green Amendment abrogates DEC's enforcement authority. But Defendants simply miss the point. The Complaint does not seek DEC enforcement—DEC has had more than enough time to prevent the harms suffered by Plaintiffs and the time for "business as usual" has come to an end. Instead, the Complaint alleges that by its permitting and allowing the Landfill to operate, DEC is violating Plaintiffs' constitutionally protected rights to "clean air" and a "healthful environment" (*State v. Norlite* [Index No. 907689-22, NYSCEF Doc. No. 156]). DEC's regulatory and enforcement authority over the Landfill is irrelevant when Plaintiffs'

constitutional rights are being violated. In fact, Defendants' myriad examples of how DEC already exercises such authority over the Landfill merely highlight the ineffectiveness of the State's regulatory process and support Plaintiffs' assertion that, absent a declaratory judgment, Plaintiffs will continue to breath air that isn't "clean," in violation of the Constitution.

Defendants' argument that Plaintiffs cannot compel DEC enforcement against the Landfill has already been found to be irrelevant to the issue of Green Amendment violations as alleged in the Complaint. As one court recently found, "[u]tilizing its enforcement authority is just one of the ways the State could respond to the constitutional violation, but is not the sole option it has" (*Fresh Air for the Eastside,* 2022 WL 18141022 at 16). "Complying with the Constitution is not optional for a state agency and is thus nondiscretionary and ministerial" (*see D.J.C.V., v. USA*, 2022 WL 1912254, at *16 [S.D.N.Y. June 3, 2022] [the government "lack[s] discretion to violate the Constitution"]) [citations omitted]; *Finn's Liquor Shop, Inc. v. State Liquor Auth*., 24 N.Y.2d 647, 655 (1969) [State agencies are required to conduct their activities in conformity with the Constitution]). Furthermore, if a Constitutional violation is established, this Court has the authority to restrict any action that would result in the continuation of such violation (*see New York Charter Schools*, 13 N.Y.3d at 133).

For all of these reasons, Defendants' motions to dismiss Plaintiffs' Green Amendment claims on the basis that they fail to state a cause of action should be rejected.

B. Plaintiffs have Adequately Pled a Private Nuisance Claim

"A private nuisance claim may be established by proof of intentional action or inaction that substantially and unreasonably interferes with other people's use and enjoyment of their property" (*DelVecchio v. Collins,* 178 A.D.3d 1336, 1336 [3d Dept 2019] [internal quotation marks, brackets and citations omitted]). "A private nuisance threatens one person or a relatively few, an essential

feature being an interference with the use or enjoyment of land. It is actionable by the individual person or persons whose rights have been disturbed" (*Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 N.Y.2d 564, 568 [1977] [citations omitted]).

SMI quotes *Copart* and argues that, because SMI's activities have interfered with so many property owners' private rights, a cause of action for private nuisance cannot be maintained. This position reflects a fundamental misunderstanding of both private nuisance in general and SMI's cited precedent in particular. It is no excuse to say that, where a defendant injures the private rights of more than one or two landowners, none of them can recover for their injuries—the prolificacy of SMI's misconduct by no means shields it from liability. Rather, *Copart* states that private nuisance affects "one person or relatively few" in drawing a contrast to public nuisance (*id.* at 568). Whereas a public nuisance "interfere[s] with or cause[s] damage to the public in the exercise of rights common to all," a private nuisance "is actionable by the individual person or persons whose rights have been disturbed" (*id.*). SMI's selective omission of *Copart*'s context does not change these meanings; nor does the brief repetition of that quote in *Davies v S.A. Dunn & Co., LLC* (200 A.D.3d 8 [3d Dept 2021], *lv denied* 38 N.Y.3d 902 [2022]). *Davies* likewise quotes *Copart* in describing the distinction to public nuisance, and it resolved an action for public nuisance, not private, making it inapposite to this claim. By quoting this small excerpt from *Copart*, SMI gives the impression that affecting "one person or relatively few" is an element of the private nuisance claim, rather than a distinction fundamental to the type of right violated.

This error can be found in *William Metrose Ltd. Bldr./Dev. v Waste Mgt. of N.Y., LLC* (225 A.D.3d 1223 [4th Dept 2024]), a decision SMI cites, but one that notably does not bind this Court. *William Metrose* concludes, in a two-sentence analysis, that because a large number of community residents were affected, the private nuisance claim must be dismissed (*see id.* at 1224). It cites to

Copart and *Davies* for this proposition, as well as the unreported *D'Amico v. Waste Management of New York, LLC* (No. 6:18-CV-06080 EAW, 2019 WL 1332575 [W.D.N.Y. March 25, 2019]). *D'Amico*, in turn, cites to *Copart* and another case citing to *Copart*. Thus, *William Metrose* cites to *Davies, Copart,* and *D'Amico*, *D'Amico* cites to *Copart, Davies* cites to *Copart*, and *Copart* itself does not stand for the proposition asserted. What began as an apt description of the distinction between public and private nuisance, and the varying types of violations pertinent thereto, has begun transforming through a precedential game of "telephone" into a degradation of the law and denial of judicial redress.

Nor is there any discernable justification for why a nuisance that invades the rights of multiple private landowners should go unabated. Rather, the intended meaning of *Copart* is clear: where a defendant's activities violate publicly held rights, a public nuisance claim exists, and where they violate the private rights of individual landowners, the claim is one of private nuisance. This conclusion is further reflected in the case to which *Copart* cites as support for the language at issue, *McFarlane v City of Niagara Falls* (247 N.Y. 340 [1928]). There, the Court explained that, "[i]f the danger threatens the public, the nuisance is classified as common; private, if it threatens one person or a few," again using this phrase to distinguish between public and private nuisance (*id.* at 344). Earlier in the same paragraph, the Court stated that "[o]ne who emits noxious fumes or gases day by day in the running of his factory may be liable to his neighbor though he has taken all available precautions," an example especially pertinent to this litigation, and incompatible with the notion that liability can be escaped where a defendant poisons the air of *more than one* neighbor (*id.* at 343). Clearly, the meaning is that in a private nuisance action, a defendant must invade a privately held right, such as a property right, as opposed to a public right

held by the community. By no means did it add an element to private nuisance claims, nor create a "prolific tortfeasor" defense. [2]

The seminal *Boomer v Atlantic Cement Co.* (26 N.Y.2d 219 [1970]) addressed the remedy for a private nuisance action, where the defendant cement manufacturer was "found . . . to have damaged the nearby properties of plaintiffs," just as the present Plaintiffs have been damaged by SMI's Landfill operation (*id.* at 223). If private nuisance actions were truly preempted where many neighbors suffer the same damages, the *Boomer* case would never have proceeded to trial. Similarly and more recently, the Third Department upheld the landowner plaintiffs' right to press private nuisance claims in *Ivory v International Bus. Machines Corp.* (116 A.D.3d 121 [3d Dept 2014]), where the defendant's facility emitted air and groundwater contaminants within the Village of Endicott; and in *Burdick v Tonoga, Inc.* (191 A.D.3d 1220 [3d Dept 2021]), the Court allowed private nuisance claims against a defendant who contaminated the private wells of its neighbors. By SMI's logic, all of the above claims should have been dismissed because the harms affected more than one plaintiff. Instead, an extensive body of precedent exists demonstrating that SMI's position is fundamentally incorrect. As such, SMI's motion to dismiss the private nuisance cause of action should be denied.

C. Plaintiffs have Adequately Pled a Public Nuisance Claim

An action for public nuisance must allege harm "of a different kind from that suffered by other persons exercising the same public right" (*Burns Jackson Miller Summit & Spitzer v Lindner*,

[2] Any further examination of this theory demonstrates that it is not viable. If private nuisance claims should be dismissed because they affect more than "one or relatively few" potential plaintiffs, where is the line drawn? Should they be dismissed where two landowners are aggrieved, or three, or ten? If all Plaintiffs here had previously agreed to combine their parcels and abide as tenants in common, would a claim lie? If they each sold their interest to a single, ultimate owner, such that only one plaintiff existed with respect to the private nuisance claim, would that transform the claim into an actionable one? These questions are unanswerable because the proposition of law is unworkable. Landowners' rights, deserving of vindication and enforcement, do not change simply because other landowners are similarly situated; their right to judicial redress should likewise remain, rather than being subject to dismissal on the bases of inscrutable logic and misread precedent.

59 N.Y.2d 314, 334 [1983] [quotation marks and citations omitted]). "Allegations of pecuniary injury may be sufficient to satisfy the peculiar injury test so long as the injuries involved are not common to the entire community exercising the same public right" (*Leo v General Elec. Co.*, 145 A.D.2d 291, 294 [2d Dept 1989] [citations omitted]).

In arguing for dismissal of Plaintiffs' public nuisance claim, SMI relies extensively on *Davies*. Rather than foreclosing this claim, though, the analysis in *Davies* supports it. There, the Court focused its inquiry on "whether plaintiffs have sufficiently alleged a special injury different from the community at large" and held that they had not done so (*Davies*, 200 A.D.3d at 12). The Court contrasted that case with the plaintiffs in *Leo* (145 A.D.2d 291 [2d Dept 1989]), who were commercial fishermen, and who had alleged that pollution of the Hudson River caused them special injury by damaging their commercial fishing operations. This injury was different in kind to that suffered by the community at large exercising the same right to use of public waters, which included recreational fishers (*see id.* at 294). The fact that commercial and recreational fishers were both injured by contamination of striped bass did not prevent assertion of the public nuisance claim, since the damage to the commercial fishers' business enterprise differed in kind to the recreational fishers' injuries. Here, the community at large includes both commercial and residential landowners in proximity to the Landfill. Just like the commercial fishermen in *Leo*, commercial Plaintiffs WCI and Absolute have alleged pecuniary damages and unreasonable interference with the conduct of business – claims not shared by the community at large. Many members of the public in proximity to the Landfill suffer various injuries from the noxious fumes it emits. Not all of them suffer damage to their ability to earn a living. Many similarly suffer gulls' roosting and defecation, but not all lose customers, potential employees, and expansion opportunities as a result. As stated in *Leo*, "[a]llegations of pecuniary injury may be sufficient to

satisfy the peculiar injury test so long as the injuries involved are not common to the entire community exercising the same public right" (*id.* at 294 [citations omitted]). The public right exercised, and impaired, is the right to clean air and a healthful environment under the Green Amendment, and Plaintiffs have alleged impairment of that right unique to themselves as businesses. Plaintiffs should therefore be permitted to pursue claims for harm to their businesses, which is not common to all or most of the community at large affected by the Landfill.

SMI's argument here assumes the scope of the "community at large" is limited to the *businesses* surrounding the Landfill. This position does not find support in their proffered precedent. The Court in *Davies* relied upon *532 Madison Ave. Gourmet Foods v Finlandia Ctr.* (96 N.Y.2d 280 [2001]), where the scope of the relevant community included "every person who maintained a **business, profession or residence**" in an area affected by building collapses and ensuing road closures (*id.* at 294 [emphasis supplied]). *Davies* itself recognizes that the proper inquiry was "a comparison of the economic injuries allegedly incurred by the plaintiffs with other nearby business owners, merchants and neighborhood residents" (*Davies*, 200 A.D.3d at 14). Likewise, the community in *Leo* included "every person who fishes in the Hudson River or the waters of Long Island" (*Leo*, 145 A.D.2d at 294). Further, *Davies* finds its support in *Burns Jackson* (59 N.Y.2d 314 [1983]). There, the scope of the community included "**all members of the public affected** by [a transit] strike," not just the businesses affected (*id.* at 335 [emphasis supplied]).

Contrasting with this precedent, SMI contends that "the community is defined by the type of injury alleged in the complaint" (NYSCEF Docket No. 27, at p. 21). That definition, which does not appear in the cases cited, would foreclose the possibility of any public nuisance claim, as a plaintiff must allege an injury "'different in kind, not merely in degree'" from that community

(*Davies*, 200 A.D.3d at 12, *quoting 532 Madison*, 96 N.Y.2d at 294). Clearly, defining the scope of the community by the kind of injury alleged by the plaintiffs would mean that the community's injury and the plaintiff's injury are necessarily identical in kind, in all cases. Rather, the cited precedent reveals the scope of the community is defined by those exercising the same public right, *i.e.*, the members of the public who suffer harm to their right to clean air and a healthful environment due to SMI's activities—not just the businesses (*see 532 Madison*, 96 N.Y.2d at 294; *Burns Jackson*, 59 N.Y.2d at 334; *Leo*, 145 A.D.2d at 294). Here, the community is suffering harm to the public right to a clean environment due to noxious odors and gulls, but the harm done to Plaintiffs' businesses is not common to the entire community. Therefore, SMI's motion to dismiss the public nuisance cause of action should be denied.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendants' motions to dismiss in their entirety, and grant such other and further relief as this Court shall deem just and proper.

Dated: July 12, 2024

WHITEMAN OSTERMAN & HANNA LLP

By: /s/ *Philip H. Gitlen*

Philip H. Gitlen, Esq.
Molly D. Parlin, Esq.
Arthur A. Nix, Esq.
One Commerce Plaza
Albany, New York 12260
Telephone: (518) 487-7600
pgitlen@woh.com
mparlin@woh.com
anix@woh.com

THE LAW OFFICE OF DOUGLAS H. ZAMELIS

By: /s/ *Douglas H. Zamelis*
Douglas H. Zamelis, Esq.
7629A State Highway 80
Cooperstown, New York 13326
Telephone: (315) 858-6002
dzamelis@windstream.net

Attorneys for Plaintiffs

CERTIFICATION OF COMPLIANCE WITH UNIFORM CIVIL RULE 202.8-b

I hereby certify the foregoing Memorandum of Law, exclusive of caption and signature block, comprises 5,143 words, which is in compliance with the limitation provided under Uniform Civil Rule 202.8-b.

Dated: July 12, 2024

/s/ *Philip H. Gitlen*
PHILIP H. GITLEN

4885-0594-7600