

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

FRESH AIR FOR THE EASTSIDE, INC., et al,

Plaintiffs,

vs

WASTE MANAGEMENT OF NEW YORK,L.L.C.,
and the CITY OF NEW YORK,

Defendants.

**ANSWER AND AFFIRMATIVE
DEFENSES AND CROSSCLAIM
OF DEFENDANT THE CITY OF
NEW YORK**

Civil Action No. 6:18-cv-06588

Defendant, the City of New York (“City” or “answering defendant”) by its attorneys Heisman Nunes & Hull LLP, for its response to the Amended Complaint (hereinafter the “Complaint”) of Plaintiff Fresh Air for the Eastside, Inc., including individual plaintiffs (together collectively referred to as “FAFE”), alleges as follows:

1. As to the allegations contained in paragraph 1 of the Complaint, the City admits, upon information and belief, that Waste Management of New York, LLC (“WMNY”) owns and operates the High Acres Landfill and Recycling Center (the “Landfill”) located at 425 Perinton Parkway in the Towns of Perinton and Macedon, New York, and denies knowledge or information sufficient to form a belief as to truth of the remainder of the allegations asserted therein.

2. Denies the allegations contained in paragraph 2 of the Complaint that the “NYC Garbage” or the City’s municipal solid waste (“MSW”) constitutes or contributes to a nuisance, rejects the characterization of MSW as “garbage” and incorporates by reference the definition of MSW set forth in the regulations of the New York State Department of Environmental Conservation (“NYSDEC”) at 6 N.Y.C.R.R 360.2(b)(176).

3. Denies the allegations contained in paragraph 3 of the Complaint, except to admit that the City is responsible for the collection of residential MSW generated in the City, and rejects

any characterization or description of the waste referenced in the Complaint as “NYC Garbage” as an alternative to the appropriate characterization of the material as MSW.

4. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 4, 5 and 6 of the Complaint.

5. Denies the allegations contained in paragraph 7 of the Complaint as to the City and denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations set forth therein.

6. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 8 of the Complaint.

7. Denies the allegations set forth in paragraph 9 of the Complaint as to the City and denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations set forth therein.

8. No response is required to the allegations in paragraphs 10 and 11, including their subparts, to the extent they assert legal argument or describe the nature of the relief requested by FAFE and to the extent any factual allegations regarding odors or other matters are alleged, upon information and belief the City denies same.

9. Admits, upon information and belief, the allegations set forth in paragraph 12 of the Complaint.

10. Admits, upon information and belief, the allegations in paragraph 13 of the Complaint and respectfully refers the Court to defendant WMNY’s answer regarding the allegations set forth therein.

11. Admits the allegations contained in paragraph 14 of the Complaint.

12. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33 and 34 of the Complaint.

13. No response is required to the allegations contained in paragraphs 35, 36, 37, 38, 39 and 40 of the Complaint because such allegations assert legal argument and are statements of law to which no response is necessary, and respectfully refers the Court to the regulations and statutes set forth in these paragraphs for their content and import, but denies any allegations impermissibly or inaccurately characterizing the provisions of the regulations and statutes referenced, and to the extent FAFE makes any factual allegations, denies knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

14. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 41, 42 and 43 of the Complaint.

15. Denies the allegations in paragraph 44 of the Complaint as they concern the City and denies knowledge or information sufficient to form a belief as to the truth of the allegations pertaining to WNYM, the United States Environmental Protection Agency (“EPA”) or the State of New York set forth therein.

16. No response is required to the allegations contained in paragraph 45 of the Complaint because such allegations assert legal argument and are statements of law to which no response is necessary, except that the City does not dispute that the facility is located within the Western District of New York.

17. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 46 of the Complaint and respectfully refers the Court to the NYSDEC Permit referenced in said paragraph and attached to the Complaint as Exhibit C for a complete statement of its text and import.

18. As to the allegations contained in paragraph 47 of the Complaint, the City respectfully refers to copies of the documents referenced and attached to the Complaint, including permits issued to the Landfill, which speak for themselves, and denies any allegations improperly or inaccurately characterizing any such terms and provisions.

19. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 48 and 49 of the Complaint.

20. Paragraph 50 of the Complaint sets forth a legal argument to which no response is required.

21. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 51 of the Complaint.

22. Paragraph 52 of the Complaint sets forth a legal argument to which no response is required, and which the City denies as argumentative.

23. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraphs 53 and 54 of the Complaint.

24. Paragraph 55 of the Complaint sets forth legal argument to which no response is required and, to the extent FAFE makes any factual allegations, denies knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

25. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 56, 57, 58, and 59 of the Complaint.

26. Paragraph 60 of the Complaint set forth legal arguments to which no response is required, and which the City denies as argumentative.

27. Denies the allegations in paragraph 61 of the Complaint, except to admit that the City has a PlanNYC.

28. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73 and 74 of the Complaint, and respectfully refers the Court to the actual documents described therein and attached to the Complaint as Exhibits C and D, and denies as to each of the foregoing paragraphs any allegations improperly or inaccurately characterizing such documents.

29. No response is required as to the allegations contained in paragraphs 75, 76, and 77 of the Complaint, which set forth legal argument to which no response is required and respectfully refers the Court to the regulations cited therein for a complete and accurate statement of their content.

30. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 78, 79, 80, 81, 82, 83 and 84 of the Complaint.

31. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 85, 86 and 87 of the Complaint and respectfully refers the Court to the Permit referenced in said paragraph and attached to the Complaint as Exhibit F for a complete statement of its text and import.

32. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99 and 100 of the Complaint.

33. Denies the allegations contained in paragraphs 101 and 102 of the Complaint.

34. Admits the allegations contained in paragraph 103 of the Complaint that certain MSW managed by the City is collected at transfer stations, but denies the characterization of MSW contained therein.

35. Admits, upon information and belief, the allegations contained in paragraph 104 of the Complaint.

36. Denies the allegations contained in paragraph 105 of the Complaint.

37. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 106 and 107 of the Complaint.

38. Denies, upon information and belief, the allegations contained in paragraph 108 of the Complaint.

39. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 109, 110, 111 and 112 of the Complaint.

40. No response is required as to the allegations contained in paragraphs 113, 114, 115, 116, 117, 118, and 119 of the Complaint, and respectfully refers the Court to the contract and the City's Charter for the actual terms and provisions of same, denies any allegations improperly characterizing the terms of same, and denies any factual allegations outside of the terms of the referenced contract contained in such paragraphs as relates to the City, and denies knowledge or information sufficient to form a belief as to any factual allegations regarding WMNY.

41. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182 and 183 of the Complaint.

42. Denies the allegations contained in paragraph 184 of the Complaint concerning the City's MSW and denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations therein.

43. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 185 and 186 of the Complaint.

44. Denies that any response is required as to the allegations contained in paragraphs 187, 188, 189 and 190 of the Complaint as argumentative and respectfully refers the Court to the referenced document attached to the Complaint as Exhibit J for the actual contents thereof and denies any allegations improperly or inaccurately characterizing same.

45. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 191 of the Complaint.

46. Denies that any response is required as to the allegations contained in paragraphs 192 and 193 of the Complaint and respectfully refers the Court to the referenced document attached to the Complaint as Exhibit G for the actual contents thereof and denies any allegations improperly or inaccurately characterizing same.

47. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 194 of the Complaint.

48. Denies that any response is required as to the allegations contained in paragraphs 195 and 196 of the Complaint and respectfully refers the Court to the referenced document attached to the Complaint as Exhibit G for the actual contents thereof and denies any allegations improperly or inaccurately characterizing same.

49. Denies, upon information and belief, the allegations contained in paragraph 197 of the Complaint.

50. Denies that any response is required as to the allegations contained in paragraphs 198, 199, 200 and 201 of the Complaint and respectfully refers the Court to the referenced document attached to the Complaint as Exhibit G for the actual contents thereof and denies any allegations improperly or inaccurately characterizing same.

51. Denies knowledge or information sufficient to form a belief as to truth of the allegations contained in paragraphs 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219 and 220 of the Complaint.

52. Denies the allegations contained in paragraphs 221 and 222 of the Complaint and respectfully refers the Court to the NYSDEC NOV annexed to the Complaint as Exhibit H for a full and accurate statement of its content.

53. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 223, 224, and 225 of the Complaint.

54. Denies the allegations contained in paragraphs 226, 227, 228 and 229 of the Complaint and respectfully refers the Court to the NYSDEC NOV annexed to the Complaint as Exhibit H for a full and accurate statement of its content.

55. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 230 and 231 of the Complaint.

56. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 232 and 233 of the Complaint and respectfully refers the Court to the Compliance Order annexed to the Complaint as Exhibit I for a full and accurate statement of its content.

57. Denies the allegations contained in paragraphs 234, 235, 236, 237, 238, 239 and 240 of the Complaint.

58. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278 and 279 of the Complaint.

59. Denies that any response is required as to the allegations contained in paragraph 280 of the Complaint and respectfully refers the Court to the document annexed to the Complaint as Exhibit K for the actual contents thereof.

60. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 281, 282, 283, 284 and 285 of the Complaint.

61. Denies that any response is required as to the allegations contained in paragraphs 286, 287, 288, 289, 290 and 291 of the Complaint and respectfully refers the Court to the documents annexed to the Complaint as Exhibits L and M for the actual contents thereof.

62. Denies the allegations contained in paragraph 292 of the Complaint as unfounded, based on speculation and as argumentative.

63. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304 and 305 of the Complaint.

64. No response is required as to the allegations contained in paragraphs 306, 307, 308, 309, 310, and 311 of the Complaint which refer to a permit or permits issued by NYSDEC or other agencies for Landfill operations and to regulations and respectfully refers the Court to such permits and the regulations at issue as to the actual terms, conditions, and provisions regarding same, and denies any allegations improperly or inaccurately characterizing the above referenced documents, permits, authorizations, statutes and/or regulations.

65. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 312, 313, 314, 315, 316, 317, 318, 319, 320 and 321 of the Complaint.

66. As to the allegations contained in paragraph 322 of the Complaint in which FAFE re-alleges previous allegations made in the Complaint, the City repeats and re-alleges as if fully

set forth herein each of its responses asserted to the allegations identified in the paragraphs referenced by FAFE.

67. No response is required as to the allegations contained in paragraph 323 of the Complaint, which set forth legal argument to which no response is required and the City respectfully refers the Court to the statute cited therein for a complete and accurate statement of its content.

68. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 324, 325, 326, 327, 328 and 329 of the Complaint.

69. No response is required as to the allegations contained in paragraph 330 of the Complaint which refer to a permit or permits issued by NYSDEC for Landfill operations and respectfully refers the Court to such permit as to the actual terms, conditions, and provisions regarding same, and denies any allegations improperly or inaccurately characterizing the above referenced documents, permits, authorizations, statutes and/or regulations.

70. Denies the allegations contained in paragraph 331 of the Complaint and respectfully refers the Court to the NYSDEC NOV annexed to the Complaint as Exhibit H for a full and accurate statement of its content.

71. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 332 and 333 of the Complaint.

72. No response is required as to the allegations contained in paragraph 334 of the Complaint which refer to a permit or permits issued by NYSDEC for Landfill operations and respectfully refers the Court to such permit as to the actual terms, conditions, and provisions regarding same, and denies any allegations improperly or inaccurately characterizing the above referenced documents, permits, authorizations, statutes and/or regulations.

73. Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 335 of the Complaint.

74. No response is required to the allegations contained in paragraphs 336, 337 and 338 of the Complaint because such allegations assert legal argument and are statements of law to which no response is necessary, except that the City denies that the FAFE is entitled to any relief under the Clean Air Act.

75. As to the allegations contained in paragraph 339 of the Complaint in which FAFE re-alleges previous allegations made in the Complaint, the City repeats and re-alleges as if fully set forth herein each of its responses asserted to the allegations identified in the paragraphs referenced by FAFE.

76. No response is required as to the allegations contained in paragraph 340 of the Complaint, which set forth legal argument to which no response is required and the City respectfully refers the Court to the statute cited therein for a complete and accurate statement of its content.

77. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 341, 342, 343 and 344 of the Complaint.

78. No response is required as to the allegations contained in paragraphs 345, 346 and 347 of the Complaint which reference permits and regulations and respectfully refers the Court to the permits and regulations cited therein for a full and accurate statement of their content and denies any allegations improperly or inaccurately characterizing such regulations.

79. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 348, 349, 350 and 351 of the Complaint.

80. No response is required to the allegations contained in paragraphs 352 and 353 of the Complaint because such allegations assert legal argument and are statements of law to which

no response is necessary, except that the City denies that the FAFE is entitled to any relief under the Resource Conservation and Recovery Act.

81. As to the allegations contained in paragraph 354 of the Complaint in which FAFE re-alleges previous allegations made in the Complaint, the City repeats and re-alleges as if fully set forth herein each of its responses asserted to the allegations identified in the paragraphs referenced by FAFE.

82. Denies the allegations contained in paragraph 355 of the Complaint.

83. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 356 and 357 of the Complaint.

84. No response is required as to the allegations contained in paragraphs 358, 359 and 360 of the Complaint, which set forth legal argument to which no response is required and the City respectfully refers the Court to the statute cited therein for a complete and accurate statement of its content.

85. Admits, upon information and belief, the allegations set forth in paragraph 361 of the Complaint.

86. Denies the allegations contained in paragraph 362 of the Complaint.

87. No response is required as to the allegations contained in paragraph 363 of the Complaint, which set forth legal argument to which no response is required and the City respectfully refers the Court to the statute cited therein for a complete and accurate statement of its content.

88. Admits the allegations contained in paragraph 364 of the Complaint that MSW is a solid waste and otherwise denies the remaining allegations.

89. Denies the allegations contained in paragraphs 365, 366 and 367 of the Complaint.

90. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 368 of the Complaint.

91. No response is required to the allegations contained in paragraphs 369 and 370 of the Complaint because such allegations assert legal argument and are statements of law to which no response is necessary, except that the City denies that the FAFE is entitled to any relief under the Resource Conservation and Recovery Act.

92. As to the allegations contained in paragraph 371 of the Complaint in which FAFE re-alleges previous allegations made in the Complaint, the City repeats and re-alleges as if fully set forth herein each of its responses asserted to the allegations identified in the paragraphs referenced by FAFE.

93. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 372, 373, 374 and 375 of the Complaint.

94. Denies the allegations contained in paragraphs 376 and 377 of the Complaint and respectfully refers the Court to the NYSDEC NOV and other documents annexed to the Complaint for a full and accurate statement of their content.

95. No response is required to the allegations contained in paragraph 378 of the Complaint because such allegations assert legal argument and are statements of law to which no response is necessary.

96. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 379, 380, 381, 382 and 383 of the Complaint.

97. As to the allegations contained in paragraph 384 of the Complaint in which FAFE re-alleges previous allegations made in the Complaint, the City repeats and re-alleges as if fully set forth herein each of its responses asserted to the allegations identified in the paragraphs referenced by FAFE.

98. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 385, 386, 387 and 388 of the Complaint.

99. As to the allegations contained in paragraph 389 of the Complaint in which FAFE re-alleges previous allegations made in the Complaint, the City repeats and re-alleges as if fully set forth herein each of its responses asserted to the allegations identified in the paragraphs referenced by FAFE.

100. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 390, 391, 392, 393, 394, 395, 396, 397, 398 and 399 of the Complaint.

101. As to the allegations contained in paragraph 400 of the Complaint in which FAFE re-alleges previous allegations made in the Complaint, the City repeats and re-alleges as if fully set forth herein each of its responses asserted to the allegations identified in the paragraphs referenced by FAFE.

102. No response is required to the allegations contained in paragraphs 401, 402, 403, 404, 405 and 406 of the Complaint as FAFE's Seventh Cause of action has been dismissed.

103. As to the allegations contained in paragraph 407 of the Complaint in which FAFE re-alleges previous allegations made in the Complaint, the City repeats and re-alleges as if fully set forth herein each of its responses asserted to the allegations identified in the paragraphs referenced by FAFE.

104. Denies the allegations contained in paragraphs 408, 409, 410, 411 and 412 of the Complaint.

105. As to the allegations and statements set out in the Wherefore clause, denies FAFE is entitled to any of the relief identified therein.

106. The City denies each of the other allegations made in the Complaint not heretofore specifically admitted, denied or otherwise controverted.

DEFENSES, INCLUDING AFFIRMATIVE DEFENSES

First Affirmative Defense

107. Upon information and belief, some or all of FAFE's claims are barred by the applicable statutes of limitations for the statutory and common law claims alleged and by the doctrines of laches, as well as unclean hands.

Second Affirmative Defense

108. FAFE is not entitled to a trial by jury on some or all of its causes of action under the circumstances.

Third Affirmative Defense

109. Upon information and belief, FAFE's claims for equitable relief are barred because there is an adequate remedy at law.

Fourth Affirmative Defense

110. Upon information and belief, costs incurred, or damages suffered by FAFE were caused by superseding and intervening acts, omissions and negligence of other parties over whom the City had no control and for whose acts, omissions and negligence the City is not liable. Any response costs incurred or damages resulting from the wrongful conduct of other persons or entities over which the City had no control, and for whose acts, omissions and negligence the City cannot be liable.

Fifth Affirmative Defense

111. Upon information and belief, FAFE is barred from any recovery against the City because of its failure to mitigate its own damages and/or costs incurred, if any.

Sixth Affirmative Defense

112. Upon information and belief, the relative culpability of each person who is or may be liable to contribute to any liability for the damages alleged by FAFE in this action should be determined in accordance with the decisional and statutory authority of the State of New York in such cases made and provided; and the equitable share of each person liable for such contribution should be determined and apportioned in accordance with the relative culpability of each such person, if any, pursuant to Article 14 of the New York Civil Practice Law and Rules except under no circumstances is the City responsible for any such liability.

Seventh Affirmative Defense

113. Upon information and belief, if the City should be found liable to FAFE, and if such liability is found to be equal to fifty percent (50%) or less of the total liability of all persons liable (whether or not clearly named in the complaint), then pursuant to Article 16 of the New York Civil Practice Law and Rules, the City's liability to FAFE should not exceed its equitable share determined in accordance with the relative culpability of each person causing or contributing to the total liability for such loss or damage.

Eighth Affirmative Defense

114. Upon information and belief, FAFE failed to provide proper notice required under 42 U.S.C. 7604(b).

Ninth Affirmative Defense

115. Upon information and belief, FAFE failed to provide proper notice required under 42 U.S.C. 6972(c).

Tenth Affirmative Defense

116. The City incorporates by reference each of the other affirmative defenses that has been or may be asserted in this matter except to the extent that any such affirmative defense attempts to impose any liability on the City.

CROSS CLAIM

As and for a First Cross Claim Against Defendant WNMV

117. Upon information and belief any endangerment, nuisance, injuries or damages sustained by FAFE herein as a result of the actions described in the Complaint were sustained, in whole or in part, by reason of the intentional or unintentional acts, omissions, negligence, wrongdoing, and/or culpable conduct on the part of co-defendant Waste Management of New York, LLC, or its agents, contractors or representatives, over whom the city had no control or responsibility.

118. Upon information and belief, any injuries or damages sustained by FAFE herein as a result of the allegations contained in the Complaint were not the result of any intentional acts, omissions, negligence, wrongdoing, and/or culpable conduct on the part of the City and the City bears no legal or equitable responsibility for FAFE's alleged injuries or damages.

119. If it is determined that the City is liable in any degree to FAFE, the City is entitled to judgment in contribution and/or indemnification pursuant to statute, including, but not limited to RCRA, or common law, over and against co-defendant Waste Management of New York, LLC, for any judgment in favor of FAFE against the City.

WHEREFORE, defendant the City of New York demands judgment dismissing the Complaint in its entirety as against the City of New York and further demands that judgment be granted in favor of the defendant City of New York on its cross claim against Waste Management

of New York, LLC, that costs and disbursements of this action be awarded to defendant the City of New York and that such other and further relief be granted as the Court deems just and proper.

Dated: October 28, 2019
Rochester, New York

HEISMAN NUNES & HULL LLP

s/Ronald G. Hull

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