

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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

Plaintiffs,

vs

ANSWER AND AFFIRMATIVE
DEFENSES OF DEFENDANT
WASTE MANAGEMENT OF
NEW YORK, LLC

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

Civil Action No. 6:18-cv-06588

Defendants.

Defendant, Waste Management of New York, LLC, incorrectly named as Waste Management of New York L.L.C. (“WMNY” or “answering defendant”) by its attorneys Harris Beach PLLC for its response to the Amended Complaint (hereinafter the “Complaint”) of Plaintiff Fresh Air for the Eastside, Inc.’s, including individual plaintiffs (together they may be collectively referred to as “FAFE”), alleges as follows:

1. As to the allegations contained in paragraph 1, WMNY admits that that it 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 the remainder of the allegations asserted therein.

2. Denies the allegations contained in paragraph 2.

3. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 3 except denies any characterization or description of the waste referenced as “NYC Garbage.”

4. As to the allegations contained in paragraph 4, the volume of municipal solid waste attributed to the City of New York (“NYC”) and to others disposed of at the Landfill is identified in documents filed by WMNY, including with the New York State Department of

Environmental Conservation (“DEC”), for the time period referenced, and refers to same as to the volume of waste disposed of at the Landfill in any event denies that municipal solid waste generated by NYC and deposited at the Landfill is “garbage,” and WMNY admits that it accepts MSW from among other sources in New York City, and states that between 2015 and 2018 as a percentage of High Acres permitted operating capacity for all waste streams, such MSW constituted no more than 52% of the Landfill’s capacity, and admits that in terms of the average amount of MSW received from NYC over that time period (among the several waste streams the Landfill is permitted to accept) over 500,000 tons per year was accepted, but denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegation that such amount constitutes ‘more than 70% of the MSW’ accepted by the Landfill, as it is not known how such percentage was calculated, including what is meant by ‘since mid-2015’ and states that the amounts accepted from different generators of waste in any given year or span of years often varies significantly based on market factors.

5. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraphs 5, 6, and 30 as to how Plaintiffs allegedly describe or described certain odors and deny the characterization that such odors have occurred in the manner described.

6. Denies the allegations contained in paragraphs 7, 8, and 9.

7. No response is required to the allegations in paragraph 10, including its subparts to the extent they concern legal argument or the nature of the relief requested by Plaintiffs and to the extent any factual allegations regarding odors or other matters are alleged, WMNY denies same.

8. No response is required to the allegations in paragraph 11 because same concern the relief requested and as such constitutes legal argument, and to the extent any factual allegations are made relating to odors or other matters, WMNY denies same.

9. Admits the allegations contained in paragraph 12, and as to the allegations in paragraph 13, admits that WMNY is identified as a permittee pursuant to a Part 360 Permit issued by DEC for the Landfill and refers to a true and correct copy of same for its terms and conditions which speak for themselves, and also admits that WMNY is the permittee for a Title V Permit issued in accordance with applicable law for the Landfill and refers to a true and correct copy of same for its terms and conditions which speak for themselves.

10. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations regarding the allegations contained in paragraphs 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, and 26.

11. Denies the allegations contained in paragraphs 24, 25, 27, 28, 29, 31, 32, 54, and 57.

12. As to the allegations contained in paragraphs 33 and 34, denies any implication or allegation that the persons referenced require property devaluation protection and refers to the true and accurate copy of the agreements at issue with the Towns of Perinton and Macedon for the actual terms and other contents of same denies any allegations that seek to impermissibly or inaccurately characterize the provisions of such documents

13. No response is required to the allegations contained in paragraphs 35, 36, 37, 39, 40, and 45 because such allegations constitute legal argument and also reference various statutes and regulations and refers to such statutes and regulations cited which speak for themselves and denies any allegations that seek to impermissibly or inaccurately characterize the provisions of

the regulations and statutes referenced, and to the extent Plaintiffs make any factual allegations, denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained therein.

14. As to the allegations contained in paragraphs 38 and 44, to the extent they reference statutes or regulations, denies any response is required to same because those matters speak for themselves, denies any violations are ongoing or likely to occur, and admits that no enforcement action has been filed as none is justified here, and denies knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations in those paragraphs.

15. As to the allegations contained in paragraphs 41, 42, and 43 refer to true and correct copies of the notices and documents as well as statutes and regulations referenced which speak for themselves and refers to true and accurate copies of such documents, statutes and regulations for their actual contents, and refers to the manner and method of transmission of the notices referenced which speaks for itself, and denies any allegations that seek to impermissibly or inaccurately characterize the notices, documents regulations and statutes referenced, as well as denying any substantive allegations contained in such notices.

16. As to the allegations contained in paragraphs 46 and 47 refers to true and correct copies of the documents referenced, including permits issued to the Landfill which speak for themselves, and deny any allegations that seek to improperly or inaccurately characterize any such terms and provisions.

17. As to the allegations contained in paragraph 48 and 49, admits that WMNY has operated the Landfill since 1972 and refers to true and correct copies of each and every permit in place regarding such operation which speak for themselves, and as to the closure of “the original

landfill,” refers to true and correct copies of applicable documents which speak for themselves as to Landfill operations, including any operational changes to same, and denies any such allegations that seek to improperly or inaccurately characterize any such terms and provisions of the permits and documents referenced or that seek to inaccurately characterize the operational history of the Landfill as set out in such documents.

18. No response is required as to the allegations contained in paragraphs 50 and 51 because such allegations refer to various regulations, permit documents including those issued concerning the Landfill and refer to true and accurate copies of same which speak for themselves, and deny any allegations attempting to improperly or inaccurately characterize same.

19. Denies knowledge and information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraphs 52 and 53.

20. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in paragraphs 55, 56, 58, 59, 60, and 61, and denies the allegations contained in paragraph 57.

21. No response is required as to the allegations contained in paragraphs 62, 63, 64, 65, 66, 67, and 68 which refer to various documents filed regarding the Landfill, including changes and/or modifications referenced therein and refers to true and correct copies of same, and as to the legal proceeding referenced, refers to the true and correct copies of the pleadings and proceedings therein, and denies each of the allegations made in the foregoing paragraphs any allegations attempting to improperly or inaccurately characterize such documents, pleadings and/or proceedings.

22. No response is required as to the allegations contained in paragraph 69, 70, 71, 72, 73, 74, 75, 76, and 77, to the extent same concern plans and proceedings before the DEC,

permits issued to the Landfill and/or authorizations received concerning same, as well as underlying regulations concerning same, refer to true and accurate copies of such permits, authorizations, documentation, and regulations for the actual contents of same all which speak for themselves, any deny any allegations attempting to improperly or inaccurately characterize same, and deny any implication or allegation that the Landfill is operating or has operated in violation of same.

23. As to the allegations contained in paragraphs 78 and 79, WMNY states that landfill gas is produced from the Landfill as is the case with most facilities which dispose of such waste, and as to the landfill gas which is produced which is controlled on site with, among others, vacuum sources that are connected to power plants and flares, refers to documentation filed with DEC regarding same for the facts regarding such control and collection, as well as referring to such documents regarding the nature of any gas which is produced, and denies the balance of the allegations, including any factual allegations as well as denying any allegations seeking to improperly or inaccurately characterize the nature of the gas at issue and the control and collection mechanisms employed and undertaken at the Landfill.

24. As to the allegations contained in paragraphs 80, 81, 82, and 83, to the extent same quote or claim to quote various statutes/regulations, data compilations and/or statements made by agencies, including the United States Environmental Protection Agency (“EPA”), refers to true and correct copies of the data compilations, statutes/regulations and statements at issue and refers to true and correct copies of the data compilations, statutes and regulations referenced for their actual contents and refers to the agency at issue for the text of such documents and the actual statement if any regarding the matters alleged in those paragraphs and denies any allegations seeking to impermissibly or inaccurately characterize same, and to the extent there

are factual allegations made that do not regard WMNY and the Landfill, denies knowledge or information sufficient to form a belief regarding such allegations.

25. As to the allegations contained in paragraph 84, refers to true and correct copies of the sampling referenced, including the composition of any compounds identified as such documents speak for themselves, and denies any allegations attempting to improperly or inaccurately characterize the results of any such sampling or analysis.

26. No response is required as to the allegations contained in paragraphs 85, 86, 87, and 88 which refer to a permit or permits issued by DEC or other agencies for Landfill operations, as well as referring to regulations and such permit(s) as well as the regulations at issue speak for themselves and refer to a true and correct copy of such permits and the regulations at issue as to the actual terms, conditions, and provisions regarding same, and deny any allegations seeking to improperly or inaccurately characterize the above referenced documents, permits, authorizations, statutes and/or regulations.

27. As to the allegations contained in paragraphs 89, 91, 93, and 94, to the extent same relate concern permits issued to the Landfill including the Title V Permit and the requirements of same, as well as the operations of the Landfill's gas collection system including submissions by WMNY concerning same, refers to the documents at issue including such submissions, permit(s) authorization and plans on file with DEC concerning such operations which such plans, permits and regulatory requirements speak for themselves, and refers to true and correct copies of same for their actual contents, terms and provisions, and denies any allegations seeking to improperly or inaccurately characterize such regulatory requirements or other documents including the submissions referenced, and admit that the Landfill operates a gas collection and control system and refers to the referenced documents, including the permit(s) at

issue as well as the plans on file with DEC regarding same, and denies the balance of the allegations in said paragraphs including any allegations that the system in place is “defective.”

28. Denies the allegations contained in paragraphs 90 and 92.

29. As to the allegations contained in paragraphs 95, 96, 97, 98, and 99 refer to the documents referenced therein, including application documents filed by WMNY, the record associated with any such application, including determinations made by the Town of Macedon under the New York State Environmental Quality Review Act (“SEQRA”) and other applicable law, as well as WMNY’s submissions to DEC regarding the facility at issue referenced in said paragraphs, and refers to true and correct copies of the documents submitted to the Town of Macedon and DEC and any findings and determinations made by the Town of Macedon and DEC which speak for themselves, and denies any allegations that attempt to improperly or inaccurately characterize any such application and associated documents and findings, and states that in 2013 application was made by WMNY to facilitate the construction of a rail spur to be constructed on WMNY’s property directly adjacent to and associated an existing railroad track to allow for the rail transport of municipal solid waste to be disposed of at the Landfill.

30. As to the allegations contained in paragraph 100, admit that following construction of the referenced rail spur on WMNY property, the Landfill began to accept certain municipal solid waste, but denies the characterizations of the waste received by rail.

31. Denies the allegations contained in paragraphs 101 and 102.

32. As to the allegations contained in paragraph 103, admits that certain municipal solid waste that is generated by NYC is located at some point at certain transfer stations, but denies knowledge or information sufficient to form a belief as to the truth or falsity of the

remaining allegations, except also denies the characterization of NYC municipal solid waste contained therein.

33. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraph 104, except to the extent a response to same is found in paragraph 32 above which is incorporated herein by reference.

34. Denies the allegations contained in paragraph 105.

35. As to the allegations contained in paragraphs 106, 107, 109, and 110, denies that any response to allegations referencing the documents referenced, including the Operations and Maintenance Manual and measures incorporated therein regarding odor control as well as references to the Rail Permit Modification Application associated with the rail spur constructed on WMNY's site and studies or documents associated with such application and any findings associated with same as all speak for themselves and refers to true and correct copies of same for their actual contents including as provisions and terms of same as applicable, denies any allegations seeking to improperly or inaccurately characterize same, and denies the factual allegations made in such paragraphs.

36. Denies the allegations contained in paragraphs 108 and 112.

37. No response is required as to the allegations contained in paragraph 111 which refer to WMNY's annual reports which speak for themselves and refers to true and correct copies of same for the actual provisions of such reports, denies any allegations seeking to improperly or inaccurately characterize same, and to the extent Plaintiffs make any factual allegations, denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained therein.

38. No response is required as to the allegations contained in paragraphs 113, 114, 115, 116, 117, 118, and 119 which refer to the NYC contract which speaks for itself and refers to a true and accurate copy of such contract for the actual terms and provisions of same, denies any allegations which improperly characterize the terms of same, and denies any factual allegations outside of the terms of the referenced contract contained in such paragraphs as relates to WMNY, and denies knowledge or information sufficient to form a belief as to and factual allegations regarding NYC.

39. As to the allegations contained in paragraphs 120, 121, and 122, no response is required to the extent same refer to requirements associated with permits issued to the Landfill and regulatory requirements as such permits and regulatory requirements speak for themselves and refer to a true and accurate copy of same for the actual provisions or requirements of same, deny any allegations seeking to improperly characterize same, and deny any factual allegations contained in said paragraphs, except WMNY states that where necessary to control gas generated from Landfill operations, horizontal collectors (as those terms are defined in the applicable regulations and as further identified in documents submitted by WMNY as part of its permit and pursuant to SEQRA review processes associated with the Landfill) have been installed in general conformity with requirements where necessary to control gas that is generated.

40. No response is required as to the allegations contained in paragraphs 123, 124, 125, 126, 127, 128, 129, 130, and 131, to the extent same refer to among other documents permits issued to the Landfill and regulatory requirements associated with same, communications concerning the Perinton Conservation Board, and applications and determinations associated with Landfill operations including under SEQRA, and refers to requirements under permits issued to the Landfill including those related to gas collection and

drawings submitted by WMNY regarding same, as well as referring to various SEQRA documents including the Final Supplemental Environmental Impact Statement for the Phase II and Phase III expansion as each of those communications, documents and requirements, submissions and plans speak for themselves and refers to true and accurate copies of same, and denies each of the allegations to the extent same improperly or inaccurately characterize those communications, requirements, plans and submissions, and denies the factual allegations made therein, except WMNY states that it has, as referenced in the previous paragraph, implemented among other things horizontal collectors in accordance with requirements and the applicable permit(s), and denies any factual allegations contained in such paragraphs.

41. Denies the allegations contained in paragraphs 132, 135, 141, 142, 143, 144, 145, 150, 151, and 152.

42. No response is required as to the allegations contained in paragraphs 133 and 134 to the extent that such allegations concern reports and/or plans filed by WMNY or requirements associated with construction of collection systems at the Landfill as those documents speak for themselves and refers to true and accurate copies of same for the contents of them, denies any allegations seeking to improperly or inaccurately characterize the provisions of said reports, documents and plans, and denies any of the factual allegations made therein including allegations that WMNY did not comply with applicable requirements.

43. As to the allegations contained in paragraphs 136, 137, 138, 139, and 140, denies that any response is required concerning reference to statements made by those persons quoted as their statements speak for themselves and refers to such statements for the true, accurate and full context of same, including referring to any accurate transcripts of same, as well as refers to the December 20, 2017 letter referenced which also speaks for itself, and denies any allegations

seeking to improperly or incorrectly characterize any part of any such statements and correspondence.

44. As to the allegations contained in paragraphs 146, 147, 148, and 149, denies that any response is required to the extent that such allegations relate to or concern verbal or written statements made which statements speak for themselves and refers to those statements for the accurate contents of same, including the context of any such statements, denies any allegations that WMNY admitted that it was not in compliance with applicable requirements, and denies that any statements made constitute admissions that any odors constitute a public or private nuisance as defined by applicable law.

45. Denies the allegations contained in paragraphs 153, 154, 156, 159, 160, 161, 168, 171, and 176.

46. Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 155, 158 (including as to which members of the community are being referenced), 162, 163, 164, 165, and 166.

47. As to the allegations contained in paragraphs 157, 167, 169, 170, 172, 173, 174, and 175, denies any response to the allegations is appropriate to the extent same concern references to correspondence, regulatory requirements including those set out in permits issued regarding Landfill operations, and other communications including written communications by DEC and WMNY and meetings of WMNY representatives, as all of those correspondences, regulatory requirements and communications speak for themselves and refers to true and correct copies of the documents and regulations for their actual provisions and requirements and refers to the communications referenced for their contents denies allegations seeking to improperly characterize any such requirements and provisions, and denies factual allegations contained

therein related to the alleged “severity” of odors and admits WMNY had communications with DEC including those which took place face to face with DEC representatives and refers to documentation and records of such meetings for the precise date(s) of same.

48. As to the allegations contained in paragraphs 177, 178, and 179, to the extent same concern correspondence and/or statements issued by WMNY or others, deny a response to such allegations is required or appropriate, and state that such documents and correspondence speak for themselves and refer to true and correct copies of same for the actual statements made in such documents, and denies any allegations seeking to improperly or inaccurately characterize same.

49. As to the allegations contained in paragraphs 180, 181, 185, and 186, denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained therein, and to the extent such allegations concern or relate to documents or other information available, refers to documentation and information identified in said paragraphs available regarding previous conditions, including weather conditions which speak for themselves, and states that the Town of Perinton Conservation Board is an advisory board which provides information and recommendations and/or comments to the Perinton Town Board regarding matters on which it is directly to review.

50. Denies the allegations contained in paragraphs 182, 183, and 184.

51. As to the allegations contained in paragraphs 187, 188, 189, and 190, denies that any response is required to the extent that the allegations contained therein refer to various correspondences, including those purported to be issued by the Town of Perinton Conversation Board, as such correspondence speaks for itself and refers to true and correct copies of same for

the full and correct content of such correspondence, and denies any allegations attempting to impermissibly or inaccurately characterize same.

52. Denies the allegations contained in paragraphs 191, 193, 194, 196, and 197.

53. As to the allegations contained in paragraphs 192, 195, 198, 199, 200, and 201, to the extent same relate to documents submitted by WMNY regarding measures implemented at the Landfill and or regulatory requirements regarding same, as such documents and requirements speak for themselves and refer to a true and accurate copy of same for their actual contents and provisions and for the full context of same, and denies allegations that seek to improperly or inaccurately characterize same.

54. Denies the allegations contained in paragraphs 202, 204, 205, 206, 207, 208, 209, 212, 213, 222, 227, 229, 231, 235, 238, and 244.

55. Denies knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in paragraphs 203, 210, 211, 215, 217, 218, 252, and 362.

56. As to the allegations contained in contained in paragraphs 214, 216, 219, 220, 221, 223, 226, 228, 230, 232, 233, 234, 236, 237, 241, 242, 243, 245, 246, 247, 248, 249, 250, and 251, denies any response to same is required under the circumstances to the extent the allegations made therein concern or relate to regulatory requirements or criteria, recommendations or communications from or to the Town of Perinton Conservation Board, and well as to a Notice of Violation (“NOV”) issued by DEC, to DEC’s incorporating certain measures into the Landfill permit and regulatory requirements as well as to DEC directions regarding certain Landfilling activities, as well as to requirements under the NOV and correspondence from WMNY in response to the NOV, as well as to a compliance order issued by the Town of Perinton and to the contract between WMNY and NYC, as well as to certain

sampling and surface screening undertaken by WMNY and to regulatory requirements for same and the results for certain sampling and surface screening undertaken by WMNY, as each of the referenced matters, documents, analyses, and communications, sampling results, regulatory and other requirements speak for themselves and refer to true and accurate copies of same for their actual contents and to the context of same, including as relates to permit and regulatory requirements for the conditions and provisions of same and denies any allegations seeking to improperly or inaccurately characterize such matters.

57. As to the allegations contained in paragraphs 224 and 225, admits that DEC has not issued an Administrative Consent Order but denies the balance of the allegations in paragraph 224 implying that DEC was required to do so, and admits regarding the allegations in paragraph 225 that neither DEC nor the EPA has commenced any action, and states that no such action would have been appropriate or required under the circumstances, and denies any implication that any such action should have been filed under the circumstances.

58. As to the allegations contained in paragraphs 239 and 240, admits that WMNY has not breached the contract at issue, and it has not put on notice any party of any breach, as WMNY contends no such breach has occurred, denies the allegations in paragraph 240 as they concern WMNY, and denies knowledge or information sufficient to form a belief as to the allegations as they relate to NYC.

59. Denies the allegations contained in paragraphs 253, 256, 257, 258, 259, 260, 261, 269, 271, 272, 274, 276, 278, 279, 281, 282, 283, 292, 294, 296, 298, 299, 300, 301, 304, 307, 308, 312, 316, 317, 321, 329, 332, 333, 335, 336, 337, 338, 349, 350, 351, 352, 353, 355, 365, 366, 367, 368, 369, 370, 372, 373, 374, 375, 376, 378, 379, 380, 381, 382, 383, 385, 386, 387,

388, 391, 392, 393, 394, 395, 396, 397, 398, 399, 401, 402, 403, 404, 405, 406, 408, 409, 410, 411, and 412.

60. No response is required as to the allegations contained in paragraphs 254, 255, 262, 263, 264, 265, 266, 267, 268, 273, 280, 284, 285, 286, 287, 288, 289, 290, 291, 306, 309, 310, 311, 318, and 319 which refer or relate to various documents including documents prepared by WMNY, as well as referring to various studies undertaken including observation by DEC representatives that were documented, DEC correspondence, additional WMNY correspondence, regulatory requirements, and permit conditions, and each of these documents including correspondence generated by WMNY and DEC, regulatory requirements, regulations, permit requirements, observations and data compiled by DEC representatives and other data and documentation as the above matters referred to in the referenced paragraphs speak for themselves and refers to true and accurate copies of such documentation, regulations, correspondences, and including same regarding DEC representatives' observations for their actual contents and for the context of same, and denies any allegations seeking to improperly or inaccurately characterize the contents of such documents, regulations, observations.

61. As to the allegations contained in paragraphs 270, 275, 293, 295, 302, 303, 305, 313, 314, 315, and 320, denies knowledge and information sufficient to form a belief as to the truth or falsity of such allegations and as to the allegations contained in paragraph 297 deny any allegation or implication that the permits at issue are not being properly followed or enforced.

62. As to the allegations contained in paragraphs 322, 339, 354, 371, 384, 389, 400, and 407 in which Plaintiffs re-allege previous allegations made in the Amended Complaint, WMNY repeats and re-alleges as if fully set forth herein each of WMNY's responses asserted to the allegations identified in the referenced paragraphs of the Amended Complaint.

63. As to the allegations contained in paragraphs 323, 324, 325, 326, 328, 330, 331, 334, 340, 341, 342, 344, 345, 346, 347, 348, 356, 357, 358, 359, 360, 363, 364, 377, and 390, no response is required to the extent the allegations contained therein concern or relate to provisions of statutes and regulations, including but not limited to the Clean Air Act, and other regulations and statutes including 42 USC 6901 et seq. and/or constitute legal argument concerning same, and/or refer to various permits issued for the Landfill including permit conditions, as well as referring to notices issued on behalf of the Plaintiffs in this matter, as well as referring to the statutes and regulations cited therein, as each of those matters including regulations, notices, correspondences, and statutes that speak for themselves and refer to true and correct copies of same for their actual provisions and requirements and the context of same, and denies any allegations seeking to improperly or inaccurately characterize same, and denies the factual allegations beyond the legal arguments made in same.

64. As to the allegations contained in paragraphs 327, 343, and 361, admits that WMNY owns and operates the Landfill and has done so since 1972, and states that it holds certain permits and authorizations relating to the Landfill and complies with same, and states that to the extent such paragraphs make allegations regarding any permit requirements or regulations, that such requirements and regulations speak for themselves, and deny any allegations seeking to mischaracterize or inaccurately characterize same.

65. As to the allegations and statements set out in the Wherefore clause, deny plaintiffs are entitled to any of the relief identified therein.

66. WMNY denies each and every allegation made in the Amended Complaint not heretofore specifically admitted, denied or otherwise controverted.

DEFENSES, INCLUDING AFFIRMATIVE DEFENSES¹

First Affirmative Defense

67. Upon information and belief, some or all of Plaintiffs' 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 and because, upon information and belief, Plaintiffs failed to mitigate some or all of their damages.

Second Affirmative Defense

68. Plaintiffs are not entitled to a trial by jury on some or all of its causes of action under the circumstances.

Third Affirmative Defense

69. Upon information and belief, some or all of Plaintiffs' claims are barred because they have failed to state a claim upon which relief can be granted.

Fourth Affirmative Defense

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

Fifth Affirmative Defense

71. Upon information and belief, costs incurred, or damages suffered by Plaintiffs were caused by superseding and intervening acts, omissions and negligence of other parties over whom WMNY had no control and for whose acts, omissions and negligence WMNY is not liable and because at all times relevant, WMNY complied with applicable requirements and exercised due care regarding the matters which Plaintiffs' allege were caused by or the responsibility of WMNY including any alleged acts or omissions. Any response costs incurred or damages

¹ Please note that identification of a defense herein as an affirmative defense shall not change the burden under applicable law as to the nature of proof required to prove any such defense, nor does it change the party on whom the burden to prove any such defense lies.

resulting from the wrongful conduct of other persons or entities over which WMNY had no control, and for whose acts, omissions and negligence WMNY cannot be liable.

Sixth Affirmative Defense

72. Upon information and belief, Plaintiffs are barred from any recovery against WMNY because of its failure to mitigate its own damages and/or costs incurred, if any.

Seventh Affirmative Defense

73. 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 Plaintiffs 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 of New York responsible for in any fashion any such liability.

Eighth Affirmative Defense

74. Upon information and belief, if WMNY should be found liable to Plaintiffs, 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, WMNY's liability to Plaintiffs 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.

Ninth Affirmative Defense

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

Tenth Affirmative Defense

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

Eleventh Affirmative Defense

77. WMNY 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 WMNY.

Twelfth Affirmative Defense

78. WMNY reserves its right to assert additional defenses upon the completion of discovery.

Dated: October 28, 2019
Pittsford, New York

HARRIS BEACH PLLC

By: _____

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