317 Or.App. 207
Court of Appeals of Oregon.

PNW METAL RECYCLING, INC., dba Rivergate Scrap Metals, dba RS Davis Recycling, dba PNW Auto Parts, dba Orient Auto Parts and Recycling, an Oregon corporation; Schnitzer Steel Industries, Inc., an Oregon corporation; and Pacific Recycling, Inc., an Oregon corporation, Petitioners,
v.
OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY, an agency of the State of Oregon, Respondent.

A171317
|
Argued and submitted May 20, 2021.
|
January 26, 2022

Department of Environmental Quality

DEQ's challenged rule held invalid.

Attorneys and Law Firms

Jon W. Monson argued the cause for petitioners. Also on the joint opening brief were Nicole M. Swift and Cable Huston LLP; and Crystal S. Chase, Kirk B. Maag, and Stoel Rives LLP. Also on the joint reply brief was Nicole A.W. Abercrombie.

Carson L. Whitehead, Assistant Attorney General, argued the cause for respondent. Also on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Danielle F. Waterfield; and Jennifer Gates and Pearl Legal Group, PC, filed the brief amicus curiae for Institute of Scrap Recycling Industries, Inc.

Before James, Presiding Judge, and Lagesen, Chief Judge, and Kamins, Judge.

Opinion

KAMINS, J.

***1 KAMINS, J.**

In this rule challenge under ORS 183.400(1), petitioners contend that a decision by the Oregon Department of Environmental Quality (DEQ) to reinterpret one of its governing statutes regarding solid waste permitting constitutes a "rule" within the meaning of the Oregon Administrative Procedures Act (APA), ORS 183.310 to 183.690, and is invalid because DEQ does not have rulemaking authority on that subject and the agency did not conduct formal rulemaking procedures. We agree with petitioners and conclude that the new interpretation is a rule under the APA and therefore invalid.

The "rule" at issue relates to DEQ's interpretation of the so called "auto dismantler exemption" to the solid waste permitting requirement. Oregon's solid waste management statutes require that "disposal site[s]" obtain a solid waste disposal permit from DEQ. ORS 459.205(1). The definition of "disposal site," however, "does not include: * * * [a] site operated by a dismantler issued a certificate under ORS 822.110." ORS 459.005(8)(b)(D). That is the "auto dismantler exemption." The certificate referred to in the exemption is an automobile dismantler certificate issued by the Oregon Department of Transportation (ODOT).

Petitioners are scrap metal recyclers, whose business it is to purchase unwanted automobiles as well as other metal items, process them into scrap metal, then resell the resulting materials. Until 2018, DEQ allowed them to operate without a solid waste disposal permit, pursuant to the auto dismantler exemption, even though they also processed non-vehicular items such as household appliances. However, in late 2018, DEQ notified two of the petitioners that they did not qualify for the exemption because they accepted non-vehicular materials in addition to cars and asked them to apply for solid waste disposal permits. In other words, DEQ previously interpreted the exemption to apply to an entire facility if it had a dismantler certificate, but the agency has now concluded that the exemption only applies to the dismantling operations within each facility.

DEQ's decision is evidenced by two principle sources. The first is an internal memorandum prepared by senior DEQ staff in August 2018. That memorandum discussed a large fire that occurred at an automobile dismantling facility (unrelated to petitioners) in Northeast Portland in March 2018. It

also analyzed "potential gaps in environmental regulation of automobile dismantlers," and proposed "potential actions to fill those gaps." One option it suggested:

> "DEQ historically has applied the statutory exemption from solid waste management regulation as applying to an entire operation, even if that operation includes solid waste other than automobiles. Nevertheless, the statutory exemption could be applied narrowly to only cover auto dismantling operations—leaving other solid waste activities subject to regulation."

The memorandum thus acknowledged that established DEQ practice was to interpret the auto dismantler exemption to apply to an entire facility, not just the auto dismantling activities within that facility, and proposed changing that practice.

***2** Petitioners also cite statements made by DEQ staff at a December 2018 meeting between agency representatives and petitioner PNW Metal Recycling, Inc. During that meeting, Program Manager Audrey O'Brien acknowledged that, "historically, we've said, if you had the DMV certificate, then you're not defined as a disposal site by law," but explained that, "[w]hat we have clarified is that, for those facilities that accept other types of waste materials in addition to vehicles, they are a disposal site, and they should be regulated under a DEQ permit." DEQ representatives also indicated that the new interpretation would be applied to all other similar businesses. Specifically, a Senior Environmental Engineer stated, "we haven't gotten to those yet, but they—we will." Petitioners contend that the memorandum combined with those statements demonstrate that DEQ adopted a new, generally applicable policy that contradicted its prior practices.

Under ORS 183.400, our review to determine the validity of a rule is limited to "the face of the rule and the law pertinent to it." *Smith v. TRCI*, 259 Or App 11, 13, 312 P3d 568 (2013) (*Smith 2013*) (internal quotation marks omitted). We may declare a rule invalid only if it violates the state or federal constitutions, exceeds the agency's statutory authority, or was adopted in violation of applicable rulemaking procedures. *Id.* The parties agree that if DEQ's decision constitutes a rule, it is invalid because DEQ does not have authority to promulgate rules regarding solid waste permitting,[1] and the agency did not conduct formal rulemaking procedures. The issue on appeal is thus limited to whether the new interpretation constitutes a "rule" as defined by the APA.

ORS 183.310(9) broadly defines a "rule" as "any agency directive, standard, regulation or statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of any agency." However, an agency elaboration that "merely explains what is necessarily required" by a validly promulgated rule is not itself a rule. *Smith 2013*, 259 Or App at 25 (citation omitted). Conversely, an "interpretive amplification or refinement of an existing rule," does constitute a rule. *Id.*; *see also Smith v. Dept. of Corrections*, 276 Or App 862, 871, 369 P3d 1213 (2016) (explaining that rules include "policy-based" interpretations of "an existing rule which could have been otherwise construed"). To determine whether a given interpretation is "necessarily required" as opposed to an "amplification or refinement," we consider whether "the existing rule is susceptible to a reasonable interpretation other than that given by the agency." *Smith 2013,* 259 Or App at 25. In sum, to be a "rule," the challenged agency directive must be (1) of "general applicability," and (2) not "necessarily required" by a statute or validly promulgated rule.

ORS 459.005(8) defines "disposal site" as follows:

> "(a) 'Disposal site' means land and facilities used for the disposal, handling or transfer of, or energy recovery, material recovery and recycling from solid wastes, including but not limited to dumps, **landfills**, sludge lagoons, sludge treatment facilities, disposal sites for septic tank pumping or cesspool cleaning service, transfer stations, energy recovery facilities, incinerators for solid waste delivered by the public or by a collection service, composting plants and land and facilities previously used for solid waste disposal at a land disposal site.
>
> "(b) 'Disposal site' does not include:
>
> "* * * * *
>
> "(D) A site operated by a dismantler issued a certificate under ORS 822.110."

Petitioners contend that the ordinary meaning of "site" indicates that the legislature intended for the exemption to apply to an entire facility if that facility has a dismantler

certificate. DEQ, on the other hand, argues that because subsection (a) defines "disposal site" as "land and facilities used for" disposal activities, the legislature intended to limit the permit exemption to only those "land and facilities used for" automobile dismantling, requiring a permit for any other solid waste disposal even if it occurs at a facility that also dismantles automobiles. Both interpretations are reasonable, as demonstrated by DEQ's longstanding adherence to the interpretation it now rejects. Because more than one interpretation is plausible, the most recent interpretation is not "necessarily required" by the statute. DEQ's decision to change its interpretation is a "new exercise of agency discretion" which must be promulgated as a rule to be valid. *Smith 2013*, 259 Or App at 25; *see also Fulgham v. SAIF*, 63 Or App 731, 735-36, 666 P2d 850 (1983) (concluding that the Workers' Compensation Board's attempt to reverse its "long-standing procedures" of treating a request for a hearing date as an adequate response to an order to show case was a rule).

***3** DEQ also argues that the new interpretation is not "generally applicable" because it only applies to petitioners PNW Metal Recycling, Inc., and Schnitzer Steel Industries, Inc. However, the August 2018 memorandum, which did not specifically discuss petitioners' facilities, demonstrates that the reason DEQ reconsidered its interpretation was to increase oversight of the entire industry, and then the agency decided to enforce it against petitioners first. As its representatives acknowledged, DEQ intends to eventually apply the new interpretation to and require solid waste permits for all scrap metal recyclers in Oregon that accept vehicles and non-vehicles. Petitioners have demonstrated that the new interpretation is "generally applicable." *See Smith v. Board of Parole*, 250 Or App 345, 349, 284 P3d 1150 (2012) (concluding that a notice-of-rights form was of general applicability because it applied identically to "all inmates in a particular category or class of hearings.").

DEQ finally contends that petitioners have failed to identify a "directive, standard, regulation, or statement," because the purported rule is not embodied in any official document. Typically, our review of "the face of the rule and the law pertinent to it" contemplates situations where the agency announced its policy in written form. *Smith 2013*, 259 Or App at 13. The burden is on petitioners to identify the purported rule and prove that it qualifies as such under the APA. *Smith v. Dept. of Corrections*, 300 Or App 309, 311-12, 454 P3d 12 (2019) (*Smith 2019*). Here, despite the lack of a single document embodying the rule, petitioners point to several "statements," including a memorandum and oral statements to verify its existence. The August 2018 memorandum,[2] together with DEQ officials' unequivocal statements, demonstrate that DEQ substantially reinterpreted the automobile exemption across the board. Indeed, the fact of this policy shift is not disputed by DEQ in this proceeding. We are thus able to clearly identify the rule without sifting through extensive policies or transcripts. *Smith 2019*, 300 Or App at 311. Where, as here, an agency makes a generally applicable, policy-based decision, it cannot evade formal rulemaking requirements merely by failing to memorialize it in writing.

DEQ's new interpretation of the "auto dismantler exemption" reverses its long-standing practice without complying with the APA's rulemaking procedures. Because that action is "generally applicable" and not "necessarily required" by the statute, it constitutes a "rule" as defined by ORS 183.310(9) and is thus invalid.

DEQ's challenged rule held invalid.

All Citations

--- P.3d ----, 317 Or.App. 207, 2022 WL 220969

Footnotes

1 That rulemaking authority rests with the Environmental Quality Commission. ORS 459.045.

2 Although the inter-agency memorandum is not itself a rule, *see* ORS 183.310(9)(d), it evinces the existence of the DEQ policy.

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2022 WL 218896
Only the Westlaw citation is currently available.
United States District Court, S.D. Florida.

SUNSHINE CHILDREN'S LEARNING CENTER, LLC, on behalf of itself and all others similarly situated Plaintiff,
v.
WASTE CONNECTIONS OF FLORIDA, INC., Defendant.

Case No. 21-cv-62123-BLOOM/Valle
|
01/25/2022

BETH BLOOM, UNITED STATES DISTRICT JUDGE

ORDER ON MOTION TO DISMISS

***1 THIS CAUSE** is before the Court upon Defendant Waste Connections of Florida, Inc.'s ("Defendant") Motion to Dismiss Amended Complaint and to Strike Class Allegations, ECF No. [40] ("Motion"). Plaintiff Sunshine Children's Learning Center, LLC ("Plaintiff") filed a Response in Opposition, ECF No. [48] ("Response"), to which Defendant replied, ECF No. [52] ("Reply"). The Court has carefully reviewed the Motion, the record in this case, the applicable law, and is otherwise fully advised. For the reasons set forth below, the Motion is denied.

I. BACKGROUND

Plaintiff filed its First Amended Complaint ("Complaint") on November 17, 2021, asserting two counts against Defendant: breach of contract ("Count I"); and breach of the covenant of good faith and fair dealing ("Count II"). *See generally* ECF No. [35]. The basis for Plaintiff's claims against Defendant is that Defendant increased its rates in breach of the Parties' contract ("Contract") and in breach of the covenant of good faith and fair dealing. *See id.* The Contract enumerates two categories of rate increases:

5) Rate Adjustments.

(a) Contractor may increase the rates and/or charges set out on the front of this Agreement and Customer agrees to pay the increased charges and/or rates provided that such increased charges and/or rates are base [*sic*] upon increased costs to Contractor including as a result of increases in any one or more of the following: disposal facility costs, **landfill** costs (including due to recycling costs or otherwise), fuel costs or surcharges, transportation costs, increases in fees or taxes imposed by local, state or federal governments and costs of regulatory compliance. "**Landfill** costs" means and includes all costs of disposal, however and whenever incurred by Contractor in respect of [*sic*] the disposal of Waste Materials collected from Customer. Without limiting the generality of the foregoing, disposal costs shall include the costs of disposal incurred by Contractor may [*sic*] also increase the rates and/or charges annually to reflect increases in the Consumer Price Index.

(b) Adjustments to the rates and/or charges set out on the front of this Agreement other than as provided in Section 5 (a) hereof may be made by the Contractor by giving the Customer thirty (30) days prior written notice. Such rate adjustment will be effective on the date specified in the Contractors' notice unless the Customer gives written notice that it objects to the proposed adjustment within 15 days of receipt of the Contractor's notice. If the Customer gives written notice of objection pursuant to this subsection (b), this Agreement shall continue at the previous rate, but the Contractor may, at any time thereafter, terminate this Agreement by giving the Customer thirty (30) days prior written notice.

ECF No. [35] ¶ 26; *see also* ECF No. [35-1] at 3. Plaintiff also asserts class representation allegations. *See* ECF No. [35] ¶¶ 44-53.

Defendant now moves to dismiss each Count in the Complaint. Defendant contends that the Contract permits rate increases, Defendant provided adequate notice of rate increases through invoices, the voluntary payment doctrine applies, and Plaintiff fails to allege any damages. Defendant also argues that the Court should dismiss class representation allegations. Plaintiff responds that the rate increases required a corresponding increase in costs or prior notice, neither of which occurred, that issues regarding materiality, adequacy of notice, and the voluntary payment doctrine cannot be addressed in a motion to dismiss, and that the Complaint does allege damages. Plaintiff also argues that the Court should

reject challenges to class certification at this stage of the proceedings.

I. LEGAL STANDARD

A. Failure to State a Claim

***2** A pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although a complaint "does not need detailed factual allegations," it must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L.Ed.2d 929, (2007); *see Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L.Ed.2d 868 (2009) (explaining that Rule 8(a)(2)'s pleading standard "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation"). Additionally, a complaint may not rest on " 'naked assertion[s]' devoid of 'further factual enhancement.' " *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937 (quoting *Twombly*, 550 U.S. at 557, 127 S. Ct. 1955). "Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555, 127 S. Ct. 1955. If the allegations satisfy the elements of the claims asserted, a defendant's motion to dismiss must be denied. *Id.* at 556.

When reviewing a motion to dismiss, a court, as a general rule, must accept the plaintiff's allegations as true and evaluate all plausible inferences derived from those facts in favor of the plaintiff. *See Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1337 (11th Cir. 2012); *Miccosukee Tribe of Indians of Fla. v. S. Everglades Restoration Alliance*, 304 F.3d 1076, 1084 (11th Cir. 2002); *AXA Equitable Life Ins. Co. v. Infinity Fin. Grp., LLC*, 608 F. Supp. 2d 1349, 1353 (S.D. Fla. 2009) ("On a motion to dismiss, the complaint is construed in the light most favorable to the non-moving party, and all facts alleged by the non-moving party are accepted as true."); *Iqbal*, 556 U.S. at 678. A court considering a Rule 12(b) motion is generally limited to the facts contained in the complaint and attached exhibits, including documents referred to in the complaint that are central to the claim. *See Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 959 (11th Cir. 2009); *Maxcess, Inc. v. Lucent Technologies, Inc.*, 433 F.3d 1337, 1340 (11th Cir. 2005) ("[A] document outside the four corners of the complaint may still be considered if it is central to the plaintiff's claims and is undisputed in terms of authenticity.") (citing *Horsley v. Feldt*, 304 F.3d 1125, 1135 (11th Cir. 2002)). While the court is required to accept as true all allegations contained in the complaint, courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *Twombly*, 550 U.S. at 555; *Iqbal*, 556 U.S. at 678. "Dismissal pursuant to Rule 12(b)(6) is not appropriate 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Magluta v. Samples*, 375 F.3d 1269, 1273 (11th Cir. 2004) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

B. Class Certification

District courts have broad discretion in deciding whether to certify a class. *Washington v. Brown & Williamson Tobacco Corp.*, 959 F.2d 1566, 1569 (11th Cir. 1992). To certify a class action, the putative class must satisfy "the four requirements listed in Rule 23(a), and the requirements listed in any of Rule 23(b)(1), (2), or (3)." *Karhu v. Vital Pharm., Inc.*, 621 F. App'x 945, 946 (11th Cir. 2015) (citing *Little v. T–Mobile USA, Inc.*, 691 F.3d 1302, 1304 (11th Cir. 2012)); *see also Fitzpatrick v. General Mills, Inc.*, 635 F.3d 1279, 1282 (11th Cir. 2011) ("[T]he putative class must meet each of the four requirements specified in [Rule] 23(a), as well as at least one of the three requirements set forth in [Rule] 23(b)."); *Rutstein v. Avis Rent–A–Car Sys., Inc.*, 211 F.3d 1228, 1233 (11th Cir. 2000) ("A class action may be maintained only when it satisfies all of the requirements of Fed. R. Civ. P. 23(a) and at least one of the alternative requirements of Rule 23(b)." (quoting *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1005 (11th Cir. 1997)). "A district court must conduct a rigorous analysis of the Rule 23 prerequisites before certifying a class." *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1266 (11th Cir. 2009) (quoting *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 740 (5th Cir. 1996)).

II. DISCUSSION

A. Failure to State a Claim

i. Count I

***3** In Count I, Plaintiff asserts a breach of contract claim against Defendant. *See* ECF No. [35] ¶¶ 54-59. Defendant argues that Plaintiff fails to state a breach of contract claim because: (1) the Contract allows Defendant to raise rates in the absence of an objection; (2) delayed notice of rate increases is not a material breach; (3) the voluntary payment doctrine bars

the claim; and (4) Plaintiff fails to allege that it was damaged by the alleged breach. *See* ECF No. [40] at 13-23. Plaintiff argues that: (1) the Complaint states a breach of contract claim by alleging that Defendant breached Section 5(a) of the Contract; (2) materiality and adequacy of notice cannot be decided in a motion to dismiss; (3) the plain language of the Contract refutes Defendant's argument regarding materiality, contractual conditions, and damages; and (4) the voluntary payment doctrine cannot be considered at this stage of the proceedings. *See* ECF No. [48] at 7-16. The Court addresses Defendant's arguments in turn.

a. Allegations of a Breach

As a preliminary matter, the Court notes that, under Florida law, "an adequately pled breach of contract action requires three elements: (1) a valid contract; (2) a material breach; and (3) damages." *1100 Millecento Residences Condo. Ass'n, Inc. v. Empire Indem. Ins. Co.*, No. 21-CV-23424, 2021 WL 5205956, at *2 (S.D. Fla. Nov. 9, 2021) (Bloom, J.) (quoting *Friedman v. New York Life Ins. Co.*, 985 So. 2d 56, 58 (Fla. 4th DCA 2008); *Grove Isle Ass'n, Inc. v. Grove Isle Assocs., LLLP*, 137 So. 3d 1081, 1094-95 (Fla. 3d DCA 2014)). Neither Party contests the existence of a valid contract.

Instead, Defendant first argues that Plaintiff fails to allege a breach because the Contract allows Defendant to raise rates. *See* ECF No. [40] at 14-15. According to Defendant, the Complaint alleges that the rate increases were not Section 5(a) rate increases, and any alleged breach must have been a breach of Section 5(b). *See id.* Section 5(b) allows Defendant to raise rates unless Plaintiff objects, and Plaintiff never alleges that Plaintiff objected to the rate increases. *See id.* As such, Defendant argues that Plaintiff fails to allege that Defendant breached Section 5(b). *See id.* ("Waste Connections acted as envisioned under Section 5(b)."). Further, Defendant argues that the Complaint alleges that Plaintiff received monthly invoices with increased rates, which constitute compliance with the notice requirement of Section 5(b). *See id.* at 15 ("Sunshine's pleading concedes that it received actual notice of service rate increases, via monthly invoicing.").

Plaintiff responds that the Complaint does not allege that the rate increases were not Section 5(a) rate increases. *See* ECF No. [48] at 8. Rather, Plaintiff argues that if the rate increases were Section 5(a) rate increases, then Defendant breached the Contract because there were no corresponding cost increases to pass through to Plaintiff. *See id*. Plaintiff also argues that to the extent that the rate increases were Section 5(b) rate increases, the invoices did not provide sufficient notice as envisioned in the Contract, and Defendant therefore violated the notice requirement for Section 5(b) irrespective of the invoices. *See id.* at 13. [1]

The Court agrees with Plaintiff. The Complaint alleges that Defendant's rate increases were a breach of Section 5(a) or Section 5(b). *See* ECF No. [35] ¶ 4 (alleging that the rate increases did not meet the requirements of Section 5(a) "and/or" Section 5(b)). Defendant misconstrues paragraph 34 of the Complaint to argue that Plaintiff alleges that Section 5(a) was not breached. *See* ECF No. [40] at 14. In paragraph 34, Plaintiff alleges that because there was no advance notice of rate increases as required by Section 5(b), Defendant's rate increases "must have thus complied with [Section] 5(a) to comply with Plaintiff's contract." *See* ECF No. [35] ¶ 34. Section 5(a) rate increases, in turn, require corresponding cost increases to pass through to Plaintiff, and because there were no cost increases, Plaintiff alleges that Defendant breached Section 5(a). *See id.* ("[B]ecause the increase was not preceded by prior written Notice, it did not satisfy [Section] 5(b) and could only have possibly been a [Section] 5(a) increase. But this increase did not satisfy the conditions stated in [Section] 5(a) either....Hence, the increase breached the contract."). In other words, Plaintiff alleges that Defendant breached either Section 5(a) or Section 5(b). Furthermore, it is apparent that Plaintiff alleges its claims in such a manner because Defendant never informed Plaintiff of the reason for the rate increases. *See id.* ("Defendant's general policy and practice during all relevant times has in fact been ***not*** to provide prior written Notice of its increases." (emphasis in original)); *see also id.* ¶¶ 38-40. By alleging either a breach of Section 5(a) or Section 5(b), Plaintiff adequately alleges a breach of the Contract. [2] , [3]

b. Allegations of Materiality

***4** Defendant next argues Plaintiff fails to plead that any alleged breach was material. Defendant contends that the delayed timing of the notice of rate increases, through its monthly invoices reflecting increased rates, was not a material breach. *See* ECF No. [40] at 15-19. Defendant argues that the invoices provided adequate notice of the rate increases and

that the delayed timing of the rate increases is not a material breach because Plaintiff could still exercise its right to object to the rate increases. *See id.* Plaintiff disputes Defendant's interpretation of the Contract and argues that materiality and adequacy of notice cannot be determined at this stage of the proceedings. *See* ECF No. [48] at 9-14.

The Court agrees with Plaintiff. The disputed materiality of the alleged breach and the adequacy of notice are factual issues, which cannot be determined when addressing a motion to dismiss. *See Salem Homes of Fla., Inc. v. Res-Care, Inc*., 3:19-CV-333-J-39MCR, 2020 WL 11362262, at *10 (M.D. Fla. Mar. 30, 2020) (holding that the adequacy of notice is an issue of fact that cannot be determined on a motion to dismiss). Further, to the extent that the Parties have differing interpretation of the Contract, the Court cannot address such issues at this stage of the proceedings. *See Managed Care Solutions, Inc. v. Cmty. Health Sys., Inc.,* No. 10–60170–CIV, 2011 WL 6024572, at *8 (S.D. Fla. Dec. 2, 2011) ("A determination of the proper interpretation of the contract should be decided at the summary judgment stage, not in a ruling on a[ ] motion to dismiss." (alteration added)); *Geter v. Galardi S. Enters., Inc*., 43 F. Supp. 3d 1322, 1328 (S.D. Fla. 2014).

To survive a motion to dismiss, Plaintiff only needs to allege the elements of a breach of contract claim. Plaintiff's allegation that Defendant did not send advance notice of rate increases – other than through monthly invoices, which allegedly did not constitute proper notice as contemplated by the Contract – and that Defendant consequently foreclosed Plaintiff's right to object to overcharges is sufficient to allege a material breach for the purposes of surviving a motion to dismiss. [4]

c. Voluntary Payment Doctrine

Defendant argues that the voluntary payment doctrine bars Plaintiff's claims because Plaintiff voluntarily paid the increased rates. *See* ECF No. [40] at 19-21. Plaintiff relies on *Deere Constr., LLC v. Cemex Constr. Materials Fla., LLC*, 198 F. Supp. 3d 1332, 1342 (S.D. Fla. 2016), to argue that "the voluntary payment doctrine is an affirmative defense that may not be raised on a motion to dismiss, as it entails a fact-based inquiry not suited for resolution on a Rule 12(b)(6) motion." ECF No. [48] at 14; *see also United States v. Cayman Vill. Condo. Ass'n, Inc*., 12-61797-CIV, 2013 WL 1665846, at *1 (S.D. Fla. Apr. 17, 2013) ("[T]he relevant case authorities make plain, the issue of voluntary payment often entails a fact-based inquiry and is not suited for resolution at the dismissal stage."). Defendant argues that the voluntary payment doctrine can be considered at this stage of the proceedings because all of the relevant facts are apparent from the face of the Complaint. *See* ECF No. [40] at 19-20, n.8; *see also* ECF No. [52] at 10.

***5** The Court agrees with Defendant to the extent that the Court can consider the voluntary payment doctrine in the context of a motion to dismiss if all the relevant facts are evident from the Complaint. However, in this case, all the relevant facts are not evident from the Complaint. As Plaintiff correctly notes, "[t]he voluntary payment doctrine requires the party asserting it to show that the person who made the payment had full knowledge of the relevant facts, including allegedly wrongful conduct." ECF No. [48] at 14 (quoting *Carrero v. LVNV Funding, LLC*, No. 11-62439-CIV, 2014 WL 6433214, at *6 (S.D. Fla. Oct. 27, 2014)). The Complaint alleges that Plaintiff did not have "full knowledge of the facts." ECF No. [35] ¶ 40. As discussed above, Plaintiff includes specific allegations that Plaintiff was unaware of the reason for the rate increases. *See id.* Because Plaintiff alleges not to have had full knowledge of the relevant facts, all of the necessary facts for the voluntary payment doctrine are not evident from the Complaint. Therefore, the Court cannot consider the voluntary payment doctrine in addressing the Motion to Dismiss. [5] Defendant may, of course, raise the issue again at summary judgment. [6]

d. Allegations of Damages

Defendant contends that Plaintiff fails to allege that it suffered damages due to the alleged breach. *See* ECF No. [40] at 21. Defendant's argument is premised on the contention that the notice provision does not provide that "time is of the essence," and that the delayed notice did not discharge Plaintiff's reciprocal performance obligation. *See id.* at 21-22. [7] According to Defendant, Plaintiff could have also simply objected to all rate increases upon receiving delayed notice, and therefore Plaintiff did not lose its right to object to Section 5(b) rate increases. *See id*. Defendant lastly argues that the Complaint only alleges damages for "customers," rather than Plaintiff specifically. *See id.* at 10 (citing ECF No. [35] ¶ 30). Plaintiff argues that the Court cannot determine

the adequacy of the delayed notice in addressing a motion to dismiss. *See* ECF No. [48] at 9. Plaintiff also argues that without being informed of whether the rate increases were due to Section 5(a), for which Plaintiff could not object, or due to Section 5(b), for which Plaintiff could object, Plaintiff could not exercise its right to object. *See id.* at 12. Plaintiff also notes that the Complaint alleges that Plaintiff suffered damages in the form of massive overcharges. *See id.* at 6.

The Court agrees with Plaintiff. First, as noted above, in addressing a motion to dismiss, the Court cannot engage in contract interpretation to determine whether the notice provision implicitely provides that "time is of the essence." *See Managed Care Solutions, Inc.*, 2011 WL 6024572, at *8. As such, Defendant's argument that the notice provision does not provide that "time is of the essence" is unavailing at this stage of the proceedings. Next, the Complaint alleges that "Plaintiff and Class Members" paid massive overcharges, and that as a result, "Plaintiff seeks damages." *Id.* ¶¶ 4, 6, 7. As such, Plaintiff alleges its own damages for the breach of contract claim. [8]

***6** The Complaint also alleges that Plaintiff was not informed of whether the rate increases were pursuant to Section 5(a) or Section 5(b), and as a result, Plaintiff could not exercise its right to object to Section 5(b) rate increases. *See* ECF No. [35] ¶ 29. The Court is not persuaded by Defendant's argument that Plaintiff could have simply objected to all rate increases, even if Plaintiff was not aware of the reason for the rate increase, and that Plaintiff, therefore, did not lose its right to object. The Contract only sets forth the right to object for Section 5(b) rate increases, not for Section 5(a) rate increases. ECF No. [35] ¶ 26; *see also* [35-1] at 3. Therefore, blindly objecting to all rate increases, without being aware of the reason for the rate increases, would require Plaintiff to risk attempting to exercise a nonexistent right. Plaintiff was not obligated to do so. Plaintiff sufficiently alleges that Defendant's failure to give notice of the reason for the rate increases resulted in Plaintiff's inability to exercise its right to object. The Complaint alleges that Plaintiff suffered damages as a result of not being properly notified of the reason for the rate increases. As such, Count I should not be dismissed.

ii. Count II

In Count II, Plaintiff asserts a breach of the duty of good faith and fair dealing against Defendant. *See* ECF No. [35] ¶¶ 60-67. In the Motion, Defendant argues that Plaintiff fails to state a breach of the duty of good faith and fair dealing because Plaintiff fails to allege that Defendant breached the Contract. *See* ECF No. [40] at 23-24. Defendant further argues that Count II should be dismissed because it seeks to vary the express rights and obligations of the Contract. *See id.* at 24. Plaintiff responds that Defendant's first argument is unavailing because the Complaint alleges that Defendant breached the Contract. *See* ECF No. [48] at 18. Plaintiff contends that Defendant's second argument is unpersuasive because the Contract requires notice of Section 5(b) rate increases, Count II is based on Defendant's failure to provide adequate notice as required by the Contract, and Count II, therefore, does not attempt to vary the express rights and obligations of the Contract. *See id.* at 18-19.

The Court agrees with Defendant to the extent that a claim for a breach of the duty of good faith and fair dealing requires the breach of an express term of a contract. *See Centurion Air Cargo, Inc. v. United Parcel Serv. Co.*, 420 F.3d 1146, 1152 (11th Cir. 2005) ("[A] claim for a breach of the implied covenant of good faith and fair dealing cannot be maintained under Florida law in the absence of a breach of an express term of a contract."). However, as noted above, the Complaint alleges a a breach of an express term of the Contract. The Complaint alleges that Defendant breached Section 5(a) or Section 5(b) of the Contract by raising rates despite the lack of cost increases or by failing to provide adequate notice. *See* ECF No. [35] ¶ 34. Further, because Count II is based on the alleged failure to provide adequate notice and the contention that Plaintiff could not exercise its right to object, Plaintiff does not attempt to vary the express terms of the Contract through Count II. As such, Count II should not be dismissed.

B. Class Certification

The Court now turns to Defendant's request to strike Plaintiff's class allegations. Defendant argues that the Court should strike Plaintiff's class allegations because they do not satisfy Rule 23. *See* ECF No. [40] at 24-28. Defendant contends that the proposed class definition is overbroad because it includes class members who may not have signed a similar contract with Defendant and have no possible relation to Plaintiff's breach of contract allegations. *See id.* at 26. Defendant also argues that the issue of notice is a purely individual issue. *See id.* at 28. Plaintiff argues that the dismissal of class allegations at the pleading stage is an "extreme remedy" that is

appropriate only where Defendant can demonstrate from the face of the Complaint that it will be impossible to certify the class. ECF No. [48] at 19 (quoting *Randy Rosenberg, D.C., P.A. v. GEICO Gen. Ins. Co.*, No. 19-CV-61422, 2019 WL 6828150, at *6 (S.D. Fla. Dec. 13, 2019) (Bloom, J.)).

***7** The Court agrees with Plaintiff. The Eleventh Circuit requires a "rigorous analysis" when addressing class certification, *see Vega,* 564 F.3d at 1266, and courts generally cannot perform such an analysis until discovery has taken place, *see MSPA Claims I, LLC v. Century Sur. Co.*, No. 16-20752-CIV, 2017 WL 998282, at *5 (S.D. Fla. Mar. 15, 2017) ("Because the evidentiary record has not yet been developed, the Court cannot yet make a rigorous analysis."); *see also Mills v. Foremost Ins. Co.*, 511 F.3d 1300, 1309 (11th Cir. 2008) ("[P]recedent...counsels that...the district court will need to go beyond the pleadings and permit some discovery and/or an evidentiary hearing to determine whether a class may be certified.").

While Defendant raises a legitimate concern that the contract Defendant signed with other class members may not be similar to the Contract Defendant signed with Plaintiff, *see* ECF No. [40] at 26, Plaintiff alleges that the proposed class had identical or substantially similar contracts. *See* ECF No. [35] ¶¶ 42-43. Even if discovery revealed that such allegations were not true, the Court can address the issue of similar or dissimilar contracts at the class certification stage of the proceedings and certify subclasses if necessary. *See* Fed. R. Civ. P. 23(c)(5). Based on Plaintiff's allegations, it is not evident it would be "impossible" to certify the proposed class or cure overbroad class definitions after discovery.

Defendant relies on *In re Atlas Roofing Corp. Chalet Shingle Prods. Liab. Litig.*, 321 F.R.D. 430, 444 (N.D. Ga. 2017), and *Cohen, D.M.D., M.S. v. Implant Innovations, Inc.*, 259 F.R.D. 617, 642 (S.D. Fla. 2008), to argue that notice is an individual issue that cannot be addressed on a class-wide basis, *see* ECF No. [40] at 28, but the cases are inapposite. As Plaintiff correctly points out, the two cases involved notice from each of the customers to the defendant, which is an individual issue. *See* ECF No. [48] at 21. In contrast, the disputed notice here was from Defendant to the customers, and the Complaint alleges that Defendant engaged in a generalized practice regarding notice to all similarly situated customers. *See* ECF No. [35] ¶¶ 34, 42. Therefore, the issue of notice does not create individual issues in this case, and Defendant's request to strike class allegations is denied.

III. CONCLUSION

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. Defendant's Motion to Dismiss Amended Complaint and to Strike Class Allegations, **ECF No. [40]**, is **DENIED**.

2. Defendant shall file its Answer to Plaintiff's Complaint by no later than **February 8, 2022**.

DONE AND ORDERED in Chambers at Miami, Florida, on January 25, 2022.

BETH BLOOM

UNITED STATES DISTRICT JUDGE

Copies to:

Counsel of Record

All Citations

Slip Copy, 2022 WL 218896

Footnotes

1 As noted below, Plaintiff contends that the Court cannot address the adequacy of notice at this stage of the proceedings and argues that the invoices are not sufficient notice only in the alternative. *See* ECF No. [48] at 9-10, 13.

2 To the extent that Defendant argues that Defendant can never breach Section 5(a) because it "contains no promise or obligation that [Defendant] is bound to perform," ECF No. [52] at 4, the Court is not persuaded.

If Defendant designated a rate increase as a Section 5(a) rate increase, when there was no corresponding increase in costs to pass through, then Defendant would have breached Section 5(a).

3 Lastly, the Court is not persuaded by Defendant's argument that the plain language of the Contract does not require Defendant to explain its service rate increases. *See* ECF No. [40] at 15. The Contract requires Defendant to provide advance notice of rate increases for Section 5(b) increases but not Section 5(a) increases. ECF No. [35] ¶ 26; *see also* [35-1] at 3. Therefore, any advance notice of a rate increase would have effectively been an explanation that the rate increase was a Section 5(b) rate increase. Because the plain language of the Contract requires advance notice of only Section 5(b) rate increases, Defendant was required to at least provide an explanation of whether the rate increase was a Section 5(b) rate increase by providing advance notice of Section 5(b) rate increases.

4 Defendant appears to cite *Vorst v. TBC Retail Grp., Inc*., 2012 WL 13026643, at *3 (S.D. Fla. Apr. 12, 2012), for the proposition that Plaintiff must allege the materiality of a breach. *See* ECF No. [40] at 18. However, the Court notes that *Vorst* did not impose such a requirement on the plaintiff. The court in *Vorst* did not analyze the materiality of any breach. *See* 2012 WL 13026643. Instead, after a relatively brief discussion of the breach of contract claim, the court granted the motion to dismiss because the plaintiff failed to identify any provision of the contract that was breached, not because the plaintiff failed to allege the materiality of any alleged breach. *See id.* In this case, Plaintiff identified specific provisions of the Contract that were allegedly breached. *See* ECF No. [35] ¶ 34. Therefore, *Vorst* is inapposite.

5 To the extent that Defendant relies on *Sanchez v. Time Warner, Inc*., 1998 WL 834345, at *2 (M.D. Fla. Nov. 4, 1998), to argue that the Court can consider the voluntary payment doctrine on a motion to dismiss, *see* ECF No. [40] at 19, n.8, the Court is not persuaded. In *Sanchez*, all of the necessary facts were apparent from the face of the complaint. *See* 1998 WL 834345, at *2 (“It is apparent from Plaintiff's Amended Complaint that she entered into a contract with Defendant. Additionally, it is clear from her Amended Complaint that Plaintiff knew failure to pay her bill within the time frame specified in Defendant's ‘Payment Policy’ would trigger the assessment of a $6.00 late charge. Further, Plaintiff admits Defendant assessed her with at least one late charge, which she paid. These facts implicate the voluntary payment rule and act to bar the claims alleged.”). Therefore, the plaintiff had full knowledge of the relevant facts in *Sanchez*. As discussed above, the same cannot be said in this case.

6 The Court need not address Plaintiff's arguments in the alternative for why the voluntary payment doctrine is not applicable in this case.

7 Following Defendant's logic, Plaintiff was obligated to pay the increased rates and suffered no damages when it chose to satisfy its contractual obligations.

8 Defendant cites a paragraph in the Complaint in which Plaintiff alleges damages suffered by “customers” rather than Plaintiff specifically, *see* ECF No. [40] at 10, but the argument is unpersuasive. By entering into the Contract, Plaintiff became one of Defendant's customers. *See* ECF No. [35] ¶ 18.

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Only the Westlaw citation is currently available.
United States District Court, E.D. New York.

BASIL SEGGOS, as Commissioner of the New York State Department of Environmental Conservation and Trustee of New York State's Natural Resources, and the STATE OF NEW YORK, Plaintiffs,
v.
THOMAS DATRE, JR., et al., Defendants.

17-CV-2684 (MKB)
|
Filed 01/25/2022

MEMORANDUM & ORDER

MARGO K. BRODIE United States District Judge

***1** Plaintiffs Basil Seggos, as Commissioner of the New York State Department of Environmental Conservation (the "DEC"), and the State of New York commenced this action on May 4, 2017, against two categories of Defendants — "Operator/Transporter Defendants," who allegedly transported construction waste containing hazardous substances from construction sites to Roberto Clemente Park in Brentwood, New York (the "Park"), and "Arranger Defendants," who either (1) allegedly acted as brokers between the construction site operators and Operator/Transporter Defendants for the removal and disposal of waste or (2) were allegedly contractors or subcontractors at the construction sites where the waste was generated — asserting claims pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, New York Real Property Actions and Proceedings Law § 841, and New York common law. (Compl. ¶¶ 5–43, Docket Entry No. 1.) Plaintiffs contend that Defendants transported and then dumped "tens of thousands of tons" of construction and demolition debris containing hazardous materials at the Park. (*Id.* ¶ 1.) Following a lengthy procedural history discussed further below, which includes Judge Sandra J. Feuerstein's August 5, 2019 Order directing that all other issues in this case be stayed until the Court decided the timeliness of Plaintiffs' CERCLA claim, (Order dated Aug. 4, 2019 (the "August 2019 Order"), [1] Docket Entry No. 386), twelve Defendants move for partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on the grounds that Plaintiffs' CERCLA claim for natural resource damages is time-barred as a matter of law. [2] (Defs.' Mem. in Supp. of Defs.' Mot. ("Defs.' Mem."), Docket Entry No. 415-42; Defs.' Reply in Supp. of Defs.' Mot. ("Defs.' Reply"), Docket Entry No. 415-93.) Plaintiffs oppose the motion. (Pls.' Mem. in Opp'n to Defs.' Mot. ("Pls.' Opp'n"), Docket Entry No. 415-44.)

***2** For the reasons set forth below, the Court denies Defendants' motion.

I. Background

The following facts are undisputed unless otherwise noted. [3]

a. Factual background

i. DEC structure and protocol

The DEC consists of several branches. The Division of Law Enforcement (the "DLE") is the law enforcement branch and consists of a force of New York State police officers made up of investigators and Environmental Conservation Officers ("ECOs"). (Defs.' 56.1 ¶ 8.) DLE officers are trained to identify potential solid waste and solid waste violations. (*Id.* ¶ 9.) Investigation of a potential solid waste violation, including illegal dumping of solid waste, typically begins with a DLE officer or personnel from the DEC's Division of Material Management ("DMM") visiting the site. (*Id.* ¶ 17; Pls.' 56.1 ¶ 17.) Officers typically photograph the site to document violations and make an initial assessment of whether there is a potential solid waste violation. (Defs.' 56.1 ¶ 17.) DLE officers then consult with DMM's environmental engineers, who characterize the nature of the material. (Pls.' 56.1 ¶ 9; Defs.' 56.1 ¶ 18.) DMM engineers are aware of visual indicators of hazardous substances in solid waste. (Defs.' 56.1 ¶ 22.) The material then undergoes chemical analysis. (*Id.* ¶ 18.) To perform chemical analysis, the solid waste must be sampled. [4] (*Id.* ¶ 32.)

The timing for scheduling the chemical sampling varies, but this is typically done in the range of one to three weeks "at the latest." (Defs.' 56.1 ¶ 19 (quoting Dep. of Lt. Frank Lapinski, former Investigative Lieutenant with the Bureau of Environmental Crime Investigations ("BECI") division of the DLE ("Lapinski Dep.") 34:16–23, 105:14–24, annexed to Pls.' Opp'n as Ex. 4, Docket Entry No. 415-49).) Chemical testing results can be obtained within seven days of submission to the lab. (*Id.* ¶ 34.) In 2013 and 2014, the DEC had the ability to sample soil for hazardous substances. (*Id.* ¶ 33.) Items can be tested for asbestos by putting those items underneath a microscope. (*Id.* ¶ 35.) Whether those items contain asbestos can be determined in a single day. (*Id.*)

***3** For higher-level crimes, it is standard for ECOs to cede control of investigations to BECI officers. (Pls.' Counter-Stmt. ¶ 13.)

ii. Contents of waste and debris

Construction waste from New York City typically contains hazardous substances. (Defs.' 56.1 ¶ 1.) Indeed, the majority of the soil in New York City contains hazardous substances, including semi-volatile organic compounds ("SVOCs"), metals, and pesticides. (*Id.* ¶ 2.) Metals that are commonly found in soil in New York City include lead, chromium, nickel, copper, zinc, and cadmium. (*Id.* ¶ 3.) Construction and demolition ("C&D") debris from construction waste in New York City typically contains hazardous substances unless they have been removed. (*Id.* ¶ 7.) Dumping C&D debris in a public park constitutes a solid waste violation. (*Id.* ¶ 10.) Dumping solid waste can be a crime even if the material does not contain hazardous substances. (Pls.' Counter-Stmt. ¶ 5.) Hazardous substances are distinct from hazardous waste. (*Id.* ¶ 6.)

The presence of C&D debris in solid waste, when comingled with other materials, could be an indicator that the waste contains hazardous substances. (Defs.' 56.1 ¶ 23.) Abnormal coloration or odor is an indication that the material could potentially be contaminated. (*Id.* ¶ 24.) Coloration in soil that is not typical is another indicator of the presence of hazardous substances in C&D debris. (*Id.* ¶ 25.) Chemical odors, such as the smell of petroleum or a musky smell, can also indicate the presence of hazardous substances in C&D debris. (*Id.* ¶ 26.) Observation of asbestos-containing material or suspected asbestos-containing material in solid waste indicates that the waste may contain hazardous substances. (*Id.* ¶ 27.) Asbestos is listed as a hazardous substance in CERCLA regulations (40 C.F.R. § 302.4) and the DEC's list of hazardous substances (6 NYCRR § 597.3). [5] (*Id.*) The presence of unrecognizable debris — pulverized, crushed material — also indicates that the waste is potentially chemically contaminated. (*Id.* ¶ 28.) If solid waste is unrecognizable, the waste has to be tested for the presence of any chemical contamination through chemical analysis. (*Id.* ¶ 31.)

Defendants contend that DLE officers are aware of visual indicators of C&D debris, such as the presence of multi-colored fines or slag. [6] (*Id.* ¶ 20.) Plaintiffs contend that fines and slag are potential indicators of chemical contamination, not C&D. (Pls.' 56.1 ¶ 20.)

iii. July 2013 Sage Street Site investigation

***4** On July 26, 2013, in response to an anonymous complaint, Pappachan Daniel, an environmental engineer with the DMM, visited a site at 1625 Islip Avenue in Central Islip, located at Islip Avenue and Sage Street (the "Sage Street Site"). (Defs.' 56.1 ¶ 36.) The Sage Street Site is about 1.5 miles from the Park. (*Id.*) At the Sage Street Site, Daniel found waste consisting of C&D debris, including concrete, asphalt, and bricks mixed with soil. (*Id.* ¶ 38.) These materials had been illegally disposed of without a permit or authorization. (*Id.*) Daniel could not access the site directly but took pictures of the waste materials he observed and of a license plate of a truck parked at the Sage Street Site. (*Id.* ¶ 37.) The C&D debris from the Sage Street Site was "overflowing onto the sidewalks and into the neighboring areas." (*Id.* ¶ 39 (quoting Dep. of ECO Jeffrey Hull, who at the relevant times was a DEC ECO of New York Region 1, which encompasses the relevant area in this action ("Hull Dep.") 61:9–16, annexed to Pls.' Opp'n as Ex. 3, Docket Entry No. 415-48).) By this time, the DEC was familiar with non-moving Defendant Thomas Datre, Jr., who had committed prior environmental violations and who was then the subject of a criminal investigation undertaken by the Suffolk County District Attorney (the "SCDA"). (*Id.* ¶ 40.)

On July 29, 2013, Peter Scully, Regional Director of DEC Region 1, recognized a truck in one of Daniel's photographs of the Sage Street Site as a truck that belonged to a company owned by Datre. (*Id.* ¶ 41.) On September 5, 2013, Daniel returned to Sage Street and observed a truck unloading materials. (*Id.* ¶ 42.) During the visit, Daniel met with Christopher Grabe, who introduced himself as being hired by the property manager to clean the site. (*Id.*) By September 10, 2013, the DEC was aware of a connection between Grabe and Datre involving the Sage Street Site. (*Id.* ¶ 43.) That same day, Scully suggested that the DLE interview Grabe, Datre, and the property owner. (*Id.*)

Multiple pictures of the Sage Street Site from 2013 show an open gate to the fence surrounding it. (*Id.* ¶ 49.) In the fall of 2013, the DLE attempted to gain access to the Sage Street Site by the owner's consent by planning to serve a Notice of Violation. (*Id.* ¶ 44.) The DLE was unable to serve the property owner with the Notice. (*Id.*) The DEC asked the SCDA to issue a search warrant for the Sage Street Site, but its request was denied. (*Id.* ¶ 45.) Because the DEC did not have access to the site, (*id.* ¶ 48), the DEC did not sample or test the waste of the Sage Street Site until in or after May of 2014, (*id.* ¶ 47).

On May 1, 2014, Detective Ted Severino, who was assigned to the SCDA's Environmental Crimes Unit, found two pieces of "transite shingle" that spilled out onto Sage Street from the Sage Street Site. (*Id.* ¶¶ 50, 121.) Within one day, tests showed that one sample contained 16% asbestos. (Defs.' 56.1 ¶¶ 51, 122; Pls.' 56.1 ¶ 51.) In subsequent testing on samples from the soil, several hazardous substances were identified, including SVOCs, pesticides, metals, and asbestos-containing building materials. (Defs.' 56.1 ¶ 52.)

iv. January 2014 Park investigation

In January of 2014, the DEC received a complaint that a truck belonging to a company affiliated with Datre had been dropping off potentially illegal solid waste at the Park. (*Id.* ¶ 53.) On January 24, 2014, ECO Ron Gross visited the Park but could not gain access because of a closed and locked gate. (*Id.* ¶ 55; Pls.' 56.1 ¶ 55.) He could not confirm that there was C&D debris at the Park because there was snow on the ground at the time. (Defs.' 56.1 ¶ 55.) ECO Gross subsequently made an inquiry to the Town of Islip (the "Town"). (*Id.*) Joseph Montuori, who was at that time the Commissioner of the Town's Department of Parks, Recreation, and Cultural Affairs, represented to the DEC that the placement of C&D debris had been an error and that the material would be removed. (*Id.*) Montuori wrote that the Town was "aware of the C&D dumping and that it was a misunderstanding" related to a reconstruction project and that "all of the debris had been cleaned up." (Pls.' 56.1 ¶ 55 (quoting DEC Compl. Form, Received Jan. 24, 2014 at 4, annexed to Defs.' Mot. as Ex. 19, Docket Entry No. 415-20).) Montuori also represented that a Datre company had done work for the Town, but he would neither confirm nor deny that any Datre affiliate had been responsible for the C&D debris. (DEC Compl. Form.) The DEC closed the case on or about February 7, 2014. (Defs.' 56.1 ¶ 55.)

v. April 2014 Park investigation

***5** On March 31, 2014, the DEC received another complaint of illegal dumping at the Park. (*Id.* ¶ 57.) The caller asserted that the dumping was from a grading project using C&D materials. (*Id.*) Lt. Matthew Blaising, a patrol supervisor at the DLE, directed ECO Hull to investigate the complaint. (*Id.* ¶ 58.) By April of 2014, the DEC had received 4,095 complaints for dumping in the Park. (Pls.' Counter-Stmt. ¶ 15.)

1. April 2, 2014 visit by ECO Hull

ECO Hull first visited the Park on April 2, 2014. (Defs.' 56.1 ¶ 59.) During this initial visit, ECO Hull observed multiple piles of fill material on the soccer field at the Park. (*Id.* ¶ 60.) These contained some larger rocks and bricks, small pieces of poly sheeting and wire coating, rusted steel, glass, and other materials that he considered indicative of C&D debris. (*Id.*) ECO Hull memorialized his observations in written reports and took photographs. (*Id.* ¶ 61.) The photographs showed solid waste, including processed concrete, fines, a pile of dark brown material, and bricks. (*Id.* ¶ 62.) That same day, ECO Hull shared his findings by email with his DEC colleagues and superiors. (*Id.* ¶ 63.) ECO Hull recommended that a "solid waste engineer ... observe the site to make a proper conclusion on whether the fill [was] in violation of their permits." (Email

dated April 2, 2014, annexed to Defs.' Mot. as Ex. 22, Docket Entry No. 415-23.) Within a few hours, Lt. Blaising directed DMM staff to inspect the Park. (*Id.*; Defs.' 56.1 ¶ 65.) DMM arranged for engineering staff to visit the Park the following day. (Defs.' 56.1 ¶ 65.)

2. April 3 visit and first interaction with the SCDA

Daniel, ECO Hull, and ECO Gross visited the Park on April 3, 2014, to determine whether there was a solid waste violation. (*Id.* ¶ 66; Pls.' 56.1 ¶ 66.) Daniel observed broken glass, wood, plastic, asphalt, and bricks in the Park and determined that the fill material was solid waste mixed with C&D materials and that its placement constituted a solid waste violation. (Defs.' 56.1 ¶ 67.) The C&D debris had been dumped at the Park's soccer field and recharge basin, a low-lying area of the Park where water collected and drained and which was normally not used for recreation. (Defs.' 56.1 ¶ 72; Pls.' 56.1 ¶ 72.) Daniel took a "grab sample" of the fill from the soccer field. (Defs.' 56.1 ¶¶ 66, 78.) The DEC never conducted chemical analysis of this sample. [7] (*Id.* ¶ 80.)

By April 3, DMM staff had "inspected the site and determined that the fill material [was] solid waste and that its placement constitute[d] a solid waste violation." (Email dated Apr. 3, 2014, annexed to Defs.' Mot. as Ex. 28, Docket Entry No. 415-29.) In an April 3, 2014 email, Scully wrote that the material was covered with materials that might have been brought to the Park from the Sage Street Site. (Defs.' 56.1 ¶ 69.) In that same email, Scully suspected that Datre was involved in illegal dumping at both the Park and Sage Street Site. (Email dated Apr. 3, 2014, annexed to Defs.' Mot. as Ex. 31, Docket Entry No. 415-32.) The DEC notified the SCDA about the dumping in the Park on April 4. (Pls.' 56.1 ¶ 73.) Scully noted that he called the SCDA because of Datre's involvement in the Sage Street Site and the Park. (Defs.' 56.1 ¶ 74.)

3. April 9 and April 10 visits and follow-up with the SCDA

***6** On or around April 8, 2014, the DEC informed the Town that the material being spread at the site to renovate the soccer field was questionable in its makeup and asked the town to cease all activity until the material could be examined or analyzed. (Defs.' 56.1 ¶ 75.) On April 9, 2014, Lt. Lapinski took the lead in investigating illegal dumping at the Park. (*Id.* ¶ 81.) That day, the DEC received a complaint about ongoing activity at the Park's soccer field, and Lt. Lapinski and other officers responded to the Park and saw that piles of C&D had been spread out contrary to the instruction to not disturb the material. (Pls.' Counter-Stmt. ¶ 55.) Lt. Lapinski later testified to the large size of the illegal dumping spot during his deposition. (Defs.' 56.1 ¶ 82 (quoting Lapinski Dep. 187:6–189:9, 61:21–62:6).) He saw slag, broken bottles, chunks of wood, pieces of glass, rock, broken ceramic tile, and other materials in the Park. (*Id.* ¶ 87.) Lt. Lapinski explained that the slag was identifiable as looking like volcanic rock and further explained that the material he observed was C&D debris that did not belong in a park. (*Id.* ¶ 88.) He saw that the sand and fines were different colors ranging from burgundy to gray, black, and brown. (*Id.* ¶ 87.) He was concerned that "anything" could be in the material, which is why he wanted it sampled. (*Id.* ¶ 90 (quoting Lapinski Dep. 123:9–124:4).) On or about April 9, Lt. Lapinski recognized that there was a "good possibility" that hazardous substances could be in the materials dumped at the Park. (*Id.* ¶ 91.)

At this time, Lt. Lapinski was aware that Datre "ran a business," and he had heard Datre's name several years earlier. (Pls.' 56.1 ¶ 85 (quoting Lapinski Dep. 55:20–57:3).) During Lt. Lapinski's visit to the Park on April 9, he spoke with Grabe, who had been involved in Datre operations, and whom Lt. Lapinski had previously interviewed. (Defs.' 56.1 ¶ 87.) Grabe told Lt. Lapinski that the material at the Park was topsoil from a particular site in Long Island, New York. (*Id.* ¶ 92.) Lt. Lapinski knew that the site was the illegal sand mining site affiliated with Datre and that there was no topsoil there. (*Id.*) He believed Grabe's narrative was false. (*Id.*) The next day, on April 10, Lt. Lapinski again met Grabe at the Park. (*Id.* ¶ 93.) Grabe provided him with a copy of the supposed grading plan for the Park and a seven-page sample report of chemical analysis of material from a site at 96 Wythe Avenue in Brooklyn, which Grabe claimed was the source of the material at the Park. (*Id.* ¶ 93.) The report indicated detections of several hazardous materials, including lead and chromium. (*Id.*) Lt. Lapinski explained to Grabe that the material had the characteristics of fill from some other sites in New York City, and that most of the solid waste out of the city was contaminated with lead and metals, and occasionally arsenic and asbestos, "and the only means [he] had to find that out

was to sample it." (*Id.* ¶ 94.) Based on public information about Wythe Avenue generally, (Pls.' 56.1 ¶ 95), Lt. Lapinski determined that the area had been populated by factories, and that because the area had been an industrial area, the material could contain contaminants, (Defs.' 56.1 ¶ 95.) During his April 10 visit, Lt. Lapinski discovered a second **landfill** operation at the second portion of the Park with a road that had been constructed with solid waste, deposited in a hole, and covered with recycled concrete aggregate. (*Id.* ¶ 97.) The DEC attempted to obtain security camera footage of the Park from the Town, but the Town refused. (*Id.* ¶ 98.)

While DMM had initially planned to take samples from the Park for chemical analysis on April 9, Lt. Lapinski decided that the DEC's forensic sampling team would lead the sampling effort. (Defs.' 56.1 ¶ 83; Pls.' 56.1 ¶ 83.) Within the first half of April of 2014, the DEC had determined that the waste was solid waste and attempted to arrange for further laboratory analysis. (Defs.' 56.1 ¶ 107.) By April 10 or 11, the DEC had come to the opinion that the material dumped at the Park originated from New York City. [8] (*Id.* ¶ 106.) On April 11, sampling was postponed due to weather and the assembly of the DEC's forensic sampling team. (Pls.' Counter-Stmt. ¶ 65.)

On April 11, 2014, Lt. Lapinski met with Assistant District Attorney ("ADA") Maureen McCormack of the SCDA Environmental Crimes Bureau and Detective Severino. (Defs.' 56.1 ¶ 100.) Lt. Lapinski routinely notified and worked with the SCDA's office when environmental crimes arose. (*Id.* ¶ 101.) He conveyed his observations and concerns to the SCDA's office and suggested that they should take interest, as a criminal case for an environmental violation can be brought by a district attorney's office or by the state attorney general. (*Id.* ¶ 102.) The DEC worked together with the SCDA with regard to the investigation into dumping in the Park. (Pls.' 56.1 ¶ 104.) By April 15, Lt. Lapinski was trying to coordinate a concerted sampling effort with the SCDA, which has its own sampling team and laboratory. (Pls.' 56.1 ¶ 107; Pls.' Counter-Stmt. ¶ 66.) After several attempts to schedule sampling, the SCDA informed the DEC that it would be hiring an outside contractor for further testing. (Defs.' 56.1 ¶ 107.) The SCDA hired a contractor, Enviroscience, to complete the sampling and conduct testing. (*Id.* ¶ 84; Pls.' 56.1 ¶ 84.) Lt. Lapinski spoke to Detective Severino "fairly regularly" between mid-April and at least May 6, 2014. (Lapinski Dep. 269:11–21.) On April 21, 2014, Lt. Lapinski assisted the SCDA and served a subpoena on the Town that was issued by the SCDA. (Defs.' 56.1 ¶ 108; Pls.' 56.1 ¶ 108.)

4. Sampling in late April of 2014

***7** The parties disagree substantively as to the sequence of events in late April of 2014 that led to the eventual chemical sampling of materials from the Park.

A. Defendants' allegations about sampling in April of 2014

Defendants contend that the DEC was aware on April 22, 2014 that the SCDA was going to conduct sampling at the Park, approximately one week before that sampling was scheduled to be done on April 28. (Defs.' 56.1 ¶ 110.) On April 22, Lt. Lapinski reported to Captain Timothy Huss, the captain for Region 1 — the region encapsulating the Park — and Scott Florence, the DEC's state-wide major in charge of the BECI, that he had discussed with Detective Severino the SCDA's plan to conduct sampling at the Park in the following week and that he had committed to providing at least one team from the DEC to assist with the sampling. (Defs.' 56.1 Reply ¶ 113.) In an email that same day to Captain Huss, Florence said that the following week's sampling would "draw some attention." (*Id.* (quoting Email dated April 22, 2014, annexed to Defs.' Mot. as Ex. 37, Docket Entry No. 415-38).)

Engineers from Enviroscience, hired by the SCDA to conduct the sampling, visited the Park on April 28 and collected transite shingle and other friable debris. (*Id.* ¶ 111.) Defendants allege that Lt. Lapinski testified that he was aware on or around April 28 that someone had found asbestos at the Park. (*Id.* ¶ 112 (citing Lapinski Dep. 98:11–100:5).) Lt. Lapinski met with the SCDA on April 29, 2014, for a meeting he recorded as a "Meeting re Sampling," and when presented with his notes during his deposition, he testified that it could be reasonably concluded that he learned of the asbestos sampling results verbally by Detective Severino. (Defs.' 56.1 Reply ¶¶ 112 (quoting Compilation of Investigation Report and Narratives, annexed to Defs.' Mot. as Ex. 27, Docket Entry No. 415-28), 116.)

B. Plaintiffs' allegations about sampling in April of 2014

Plaintiffs contend that on April 22, 2014, the DEC believed comprehensive sampling was going to occur on April 30 and May 1. (Pls.' 56.1 ¶ 110.) On May 2, comprehensive sampling was postponed until May 8 and May 9. (*Id.*) Captain Huss did not think that the sampling had occurred on May 5, 2014. According to Plaintiffs, the SCDA conducted very limited sampling on April 28, and this differed from the sampling originally discussed by Lt. Lapinski and Captain Huss on April 22. (*Id.*) During this sampling, Enviroscience reportedly found one transite shingle containing non-friable asbestos and a single piece of "Friable debris/cloth." (*Id.* ¶ 111 (first citing Enviroscience Asbestos Bulk Sample Results dated April 28, 2014, annexed to Defs.' Mot. as Ex. 7, Docket Entry No. 415-8; and then citing Search Warrant dated May 5, 2014 at 10, annexed to Defs.' Mot. as Ex. 16, Docket Entry No. 415-17).)

Plaintiffs dispute that Lt. Lapinski was aware on or around April 28 that someone had found asbestos at the Park. Lapinski initially testified that he learned the results of the initial asbestos testing around April 28 and it could be reasonably concluded that the District Attorney ("DA") provided him the results at an April 29 meeting, but he later corrected his testimony to state that he could not recall the DA doing that prior to the execution of the search warrant at Datre Construction's headquarters on or about May 6, 2014. (*Id.* ¶ 112.) Lt. Lapinski was "not privy to" the sampling reportedly conducted by the SCDA and Enviroscience. (*Id.* (quoting Lapinski Dep. 265:8–10).)

5. The search warrant

***8** Defendants contend that the DEC and the SCDA jointly served a search warrant on Datre Construction's headquarters on or about May 6, 2014. (Defs.' 56.1 ¶ 124.) Plaintiffs dispute that they jointly served the search warrant, stating that the SCDA executed the search warrant with Lt. Lapinski's assistance. (Pls.' 56.1 ¶ 124.) The search warrant was executed on behalf of the People of the State of New York. (Defs.' 56.1 ¶ 125.) The search warrant alleged that Datre's affiliates were thought to have engaged in activities constituting a violation of "ECL § 71- 2713(3) ('Endangering Public Health, Safety or the Environment in the Third Degree') which prohibits a person from knowingly engaging in conduct which causes the release of more than one thousand five hundred gallons or fifteen thousand pounds, whichever is less, of an aggregate weight or volume of a substance hazardous to public health, safety or the environment." (*Id.* ¶ 126 (citing Search Warrant dated May 5, 2014).)

Plaintiffs contend that the search warrant was based on Detective Severino's affidavit and thus "reflected the views of [the] SCDA, not [the] DEC or other New York State personnel." (Pls.' 56.1 ¶ 126.) Plaintiffs also contend that the DEC would have completed its pre-search warrant execution surveillance of the Datre property at the latest on May 2, 2014. (Defs.' 56.1 ¶ 130.)

In his sworn affidavit, Detective Severino states that: on March 24, 2014, a Town park ranger observed five Datre trucks entering the Park to dump materials on the soccer fields; on April 4, 2014, the DEC informed the SCDA of the illegal disposal of solid waste, and the DEC ordered the Town to leave any piles of debris untouched; on April 9, 2014, he observed several Datre trucks and workers alongside freshly spread dirt and trail marks on the soccer fields; on April 11, 2014, together with Lt. Lapinski, he observed a "large debris field of C&D spread out into the recharge basin"; on April 28, 2014, Detective Severino and three Enviroscience consultants took samples of C&D that confirmed asbestos in those materials; and on May 1, 2014, as a result of these asbestos tests, Detective Severino visited the Sage Street Site and picked up two pieces of transite shingle, which were tested and found to contain asbestos. (*Id.* ¶ 129 (quoting Search Warrant dated May 5, 2014).)

6. Park usage in April of 2014

The parties dispute the usage of the Park and, specifically, the status of the areas in contention — the soccer field and the recharge basin — in April of 2014.

Defendants contend that: in January of 2014, the DEC received reports about children sledding into debris in the area of the Park where the recharge area was located, indicating

that "before the illegal dumping, that portion of the Park was used for some forms of public recreation," (Defs.' 56.1 Reply ¶ 72); by April 3, 2014, it was clear that the DEC knew that the public had lost the use of at least a portion of the Park because it was not safe to use those portions due to illegal dumping of solid waste, (*id.* ¶ 76); there is no evidence that anyone from the public used the areas where the C&D debris was dumped — the soccer field and the recharge basin — at any time in April of 2014, (*id.* ¶ 72), and the DEC was not aware of any public use of the Park outside of these areas in April of 2014, (*id.* ¶ 71); it was not safe for the public to use the soccer field and recharge basin at this time, (*id.* ¶ 72); and on April 24, 2014, the Park closed and did not reopen until after the remediation was complete in or about September of 2015, (*id.* ¶ 109).

Plaintiffs allege that the DEC was "not aware one way or the other about whether the public used the Park in April 2014." (Pls.' 56.1 ¶ 71.) Plaintiffs contend that the recharge basin is a low-lying area of the Park where water collects and drains, and it is not normally used for recreation. (*Id.* ¶¶ 72, 76–77.) In addition, Plaintiffs allege that the soccer field has been undergoing rehabilitation since 2013. (*Id.*) Plaintiffs contend that the Town publicly announced that it had "temporarily" closed the park to allow for "a full investigation" of the dumping on April 24, 2014. (*Id.* ¶ 109 (quoting Dep. of Eric Hofmeister, then the Town's Acting Supervisor ("Hofmeister Dep."), Docket Entry No. 415-51).)

***9** On May 6, 2014, the Town issued a press release announcing the long-term, indefinite closure of the Park. (Defs.' 56.1 ¶ 123.) The Park reopened when the remediation was completed in or about September of 2015. (*Id.* ¶ 109.)

b. Procedural background

Plaintiffs commenced this action against thirty-four Defendants on May 4, 2017, alleging violations of CERCLA, New York Real Property Actions and Proceedings Law § 841, and New York common law, against contractors who arranged for the disposal of construction waste from their construction sites, as well as the waste brokers and haulers with whom they dealt. (Compl. ¶ 2.) Plaintiffs grouped Defendants into categories labeled "Operator/Transporter Defendants" and "Arranger Defendants," which include "Broker Defendants." (*Id.* ¶¶ 8–43.) In relevant part, Plaintiffs seek to recover natural resource damages "including the lost use of the Park during the time it was closed." [9] (*Id.* ¶ 230.)

In late 2017, five Defendants — Daytree at Cortland Square Inc. ("Daytree"), IEV Trucking Corp. ("IEV"), New Empire Builder Corp. ("New Empire"), Building Dev Corp. ("Building"), and Dimyon Development Corp. ("Dimyon") — filed motions to dismiss. [10] (*See* Defs.' Mots. to Dismiss, Docket Entry Nos. 268, 272, 279, 284.) Daytree argued that the Court should dismiss the action pursuant to the "first-filed" rule after considering *Town of Islip v. Thomas Datre, Jr. et al.*, 16-CV-2156, a companion case before this Court. (Def. Daytree's Mem. in Supp. of Def.'s Mot. 7–9, Docket Entry No. 268-5.) Daytree also argued that the Court should dismiss Plaintiffs' claims for failure to state a claim upon which relief could be granted. (*Id.* at 10–16.) New Empire argued that Plaintiffs failed to allege valid claims against it. (Def. New Empire's Mem. in Supp. of Def.'s Mot. to Dismiss, Docket Entry No. 272-4.) Building and Dimyon argued that all of Plaintiffs' claims are governed by a three-year statute of limitations and are now time-barred. (Defs. Building & Dimyon's Mem. in Supp. of Defs.' Mot. to Dismiss ("Building & Dimyon Mem.," Docket Entry No. 281.) IEV argued that Plaintiffs' claims were time-barred, (Def. IEV's Mem. in Supp. of Def.'s Mot. to Dismiss ("IEV's Mem."), Docket Entry No. 284-1), that the Complaint should be dismissed under the "first-filed rule," (*id.* at 9–10), that the claims against IEV are not plausible and should be dismissed, (*id.* at 10–11), and that Plaintiffs do not have standing to seek natural resource damages, (*id.* at 11–14), and cannot demonstrate arranger liability, (*id.* at 14–16). IEV also argued that the state causes of action should be dismissed. (*Id.* at 16–17.)

On November 27, 2017, Judge Feuerstein appointed J. Kevin Healy to serve as the Special Master for the purpose of issuing an omnibus report and recommendation concerning the motions to dismiss and/or for judgment on the pleadings that had been and could be filed in the action. (Order dated Nov. 11, 2017, Docket Entry No. 294.) The Special Master filed his report on March 9, 2018, recommending that the Court: find that Plaintiffs have standing to maintain the action; defer the determination of whether the state law claims are subject to a three-year or six-year statute of limitations as the facts were not sufficiently developed; deny Defendants' motions to dismiss the CERCLA claim for failure to state

a claim; deny the motions to dismiss the public nuisance claim; grant the motions to dismiss the negligence claim; deny Daytree's motion to dismiss for failure to state a claim against it; and deny the motions to dismiss based on the "first-to-file rule." (Special Master Report (the "Report"), Docket Entry No. 313; August 2019 Order 3.) Several Defendants filed objections to the Report. (*See* Defs.' Objs., Docket Entry Nos. 315, 316, 317, 318, 319, 320, 321, 323; *see also* Mot. for Recons. filed by Def. Plus K Construction Inc., Docket Entry No. 324.) By order dated September 27, 2018, Judge Feuerstein determined that all of the motions to dismiss would be decided simultaneously by the Court. (Order dated Sept. 27, 2018.) By order dated March 26, 2019, Judge Feuerstein determined that the objections to the Special Master Report and the Motion for Reconsideration would also be determined at the same time. (Order dated Mar. 26, 2019.)

i. The Special Master's recommendation regarding the statute of limitations

***10** The Special Master considered Defendants' contentions that Plaintiffs' natural resource damage claim under CERCLA is barred by the three-year statute of limitations period. (Report 15–22.) He ultimately recommended that the Court deny Defendants' motions to dismiss this claim as time-barred, as the denial would not preclude Defendants from raising the statute of limitations issue after the conclusion of discovery.

In reaching his recommendation, the Special Master noted that, in relevant part, CERCLA's statute of limitations period states that: "no action may be commenced for damages ... unless that action is commenced within [three] years after the ... date of the *discovery* of the *loss* and its connection with the release [of hazardous substances] in question." (*Id.* at 15 (emphasis added) (quoting 42 U.S.C. § 9613(g)(1)(A)).) In determining what constitutes the "loss" in the present case, the Special Master noted that the loss claimed by Plaintiffs is the "lost use of the Park during the time it was closed." (*Id.* at 18 (quoting Compl. ¶¶ 7, 230).) Because "loss" is not defined in CERCLA, the Special Master used a plain meaning definition of "loss." (*Id.* at 17–19.) He recommended that the date of the discovery of the "loss" should be the "date Plaintiffs discovered that such disposal [of hazardous substances] caused the introduction of hazardous substances to the Park at levels precluding its safe utilization for public recreation." (*Id.* at 19.)

Relying on *Merck & Co. v. Reynolds*, 559 U.S. 633, 644–48 (2010), the Special Master recommended that the Court interpret the phrase "date of the discovery" to mean "the date that Plaintiffs first knew or with reasonable diligence would have known of the loss and its connection with the release of [the] hazardous substance in question." (*Id.* at 19–20.) For accrual purposes for the CERCLA claim, the Special Master recommended that the "date of discovery" be the date of constructive and not actual knowledge of the loss. (*Id.* at 20.) He concluded that Plaintiffs were required to commence an action seeking natural resource damages under CERCLA within three years of the date that they "first knew or with reasonable diligence would have known that the dumping caused contamination in the Park at levels precluding its safe use as a recreational resource." (*Id.*) He further declined to endorse Plaintiffs' contention that the "loss" in this case should be the actual closure of the Park for remediation because Plaintiffs could, "through [their] own action or inaction," control the accrual date. (*Id.* at 20 n.12.) He also declined to endorse Plaintiffs' contention that as a matter of law, a "scientific report" is necessarily required for the discovery of an actionable loss, referring to releases such as the wreck of the Exxon Valdez oil tanker. (*Id.*) The Special Master ultimately recommended that the Court deny the motions to dismiss the Complaint's CERCLA claim as time-barred. (*Id.* at 22.)

ii. August 2019 Order

Judge Feuerstein issued an order on August 5, 2019, discussing the Special Master Report and considering in particular the timeliness of Plaintiffs' CERCLA claim. Judge Feuerstein adopted the Special Master's recommendations that for accrual purposes, the date of discovery should be the date of constructive and not actual knowledge of the loss and that the date of accrual was "when [Plaintiffs] first knew, or with reasonable diligence would have known, of the public's loss of use of the Park and that such loss was connected to the release of the hazardous substances in question." (August 2019 Order 6, 8.) Judge Feuerstein considered that a closure of a facility by itself did not support a "loss of use" claim, "as a facility could be closed for many

reasons unconnected to release of hazardous substances." (*Id.* at 8.) Similarly, knowledge that there has been a release would not trigger the statute until a loss connected to that release was discovered. (*Id.*) Judge Feuerstein determined that the "date the Park closed for remediation cannot be viewed in isolation as triggering the statute of limitations." (*Id.*)

***11** After noting that the resolution of this issue may determine the outcome of the case, Judge Feuerstein ordered limited discovery to develop the facts necessary to decide whether the CERCLA claim was timely filed. (*Id.* at 9.) She ordered that the portion of Defendants' motions to dismiss regarding whether the CERCLA claim is barred by the statute of limitations be converted to summary judgment motions on this issue alone and ordered supplemental briefs. (*Id.* at 10.) All other issues raised in Defendants' motions to dismiss were held in abeyance pending resolution of the statute of limitations issue. (*Id.*)

II. Discussion

a. Standard of review

Summary judgment is proper only when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Jingrong v. Chinese Anti-Cult World All. Inc.*, 16 F.4th 47, 57 (2d Cir. 2021); *United States v. Bedi*, 15 F.4th 222, 225 (2d Cir. 2021). The court must "construe the evidence in the light most favorable to the non-moving party" and "resolve all ambiguities and draw all permissible factual inferences in favor of the party against whom summary judgment is sought." *Lenzi v. Systemax, Inc.*, 944 F.3d 97, 107 (2d Cir. 2019) (first quoting *VKK Corp. v. Nat'l Football League*, 244 F.3d 114, 118 (2d Cir. 2001); and then quoting *Johnson v. Goord*, 445 F.3d 532, 534 (2d Cir. 2006)). The role of the court "is not to resolve disputed questions of fact but only to determine whether, as to any material issue, a genuine factual dispute exists." *Rogoz v. City of Hartford*, 796 F.3d 236, 245 (2d Cir. 2015) (first quoting *Kaytor v. Elec. Boat Corp.*, 609 F.3d 537, 545 (2d Cir. 2010); and then citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–50 (1986)). A genuine issue of fact exists when "evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. The "mere existence of a scintilla of evidence" is not sufficient to defeat summary judgment. *Id.* at 252. The court's function is to decide "whether, after resolving all ambiguities and drawing all inferences in favor of the non-moving party, a rational juror could find in favor of that party." *Pinto v. Allstate Ins. Co.*, 221 F.3d 394, 398 (2d Cir. 2000).

b. Timeliness of CERCLA claim

Defendants contend that Plaintiff's CERCLA claim, which has a three-year statute of limitations, is time-barred. (Defs.' Mem. 16–21.) In support, Defendants argue that (1) the SCDA's actual knowledge of the presence of asbestos in the Park on or around April 28, 2014 should be imputed to the DEC; (2) Plaintiffs knew about the loss of the use of the Park due to the presence of hazardous substances in April of 2014; and (3) had Plaintiffs acted with reasonable diligence, they would have known about the presence of hazardous substances in the Park prior to April of 2014. (*Id.*)

Plaintiffs claim that the three-year statute of limitations began to run on May 6, 2014, which means that their Complaint — filed May 7, 2017 — is timely. (*See* Pls.' Opp'n 13–19.) In support, Plaintiffs argue that (1) the SCDA's knowledge cannot be imputed to them because the SCDA does not represent the DEC Commissioner; (2) they did not know about the public's lost use of the Park until May 6, 2014, and they knew or reasonably would have known about the presence of hazardous substances in the Park on that same day; and (3) they acted with reasonable diligence in investigating the complaints in the Park prior to April of 2014. (*Id.*)

CERCLA is a comprehensive federal statute with two primary purposes: "(1) to encourage the timely cleanup of hazardous waste sites; and (2) to place the cost of that cleanup on those responsible for creating or maintaining the hazardous condition." *Price Trucking Corp. v. Norampac Indus.*, 748 F.3d 75, 79 (2d Cir. 2014) (quoting *W.R. Grace & Co.–Conn. v. Zotos Int'l, Inc.*, 559 F.3d 85, 88 (2d Cir. 2009)). The statute is designed to "promote the 'timely cleanup of hazardous waste sites' and to ensure that the costs of such cleanup efforts [a]re borne by those responsible for the contamination." *Burlington N. & Sante Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009) (quoting *Consol. Edison Co. of N.Y., Inc. v. UGI Utils., Inc.*, 423 F.3d 90,

94 (2d Cir. 2005)); *see also MPM Silicones, LLC v. Union Carbide Corp.* (*MPM Silicones II*), 966 F.3d 200, 228 (2d Cir. 2020), *as amended* (Aug. 13, 2020) (noting that "CERCLA's manifest purpose [is] to 'encourag[e] the timely cleanup of hazardous waste sites' by private parties by 'placing the cost of that cleanup on those responsible for creating or maintaining the hazardous condition' " (second alteration in original) (quoting *Consol. Edison Co. of N.Y., Inc.*, 423 F.3d at 94)). "Among other measures, CERCLA 'authoriz[es] private parties to pursue contribution or indemnification from potentially responsible parties ['PRPs'] for expenses incurred responding to environmental threats.' " *MPM Silicones II*, 966 F.3d at 214 (first alteration in original) (quoting *Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321, 326 (2d Cir. 2000)); *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 120 (2d Cir. 2010) ("CERCLA empowers the federal government and the states to initiate comprehensive cleanups and to seek recovery of expenses associated with those cleanups."). The statute "imposes strict liability on facility owners and operators, on persons who arranged for the disposal or treatment of hazardous waste at the relevant site, and on persons who transported hazardous waste to the site, often collectively referred to as [PRPs]." *ASARCO LLC v. Goodwin*, 756 F.3d 191, 198 (2d Cir. 2014). "But CERCLA 'provide[s] property owners an avenue of reprieve; it allows them to seek reimbursement of their cleanup costs from others in the chain of title or from certain polluters — the so-called [PRPs].' " *Id.* (first alteration in original) (quoting *Niagara Mohawk Power Corp.*, 596 F.3d at 120).

***12** Pursuant to CERCLA, upon release of hazardous substances into the environment, liability may be imposed for "damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release." 42 U.S.C. § 9607(a)(4)(C). "The term 'natural resources' means land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by ... any State or local government ...." *Id.* § 9601(16); *see Idaho v. Hanna Mining Co.*, 882 F.2d 392, 394 (9th Cir. 1989) (citing 42 U.S.C. § 9601(16)). Claims under CERCLA for natural resource damages must be commenced within three (3) years of "[t]he date of the discovery of the loss and its connection with the release in question." 42 U.S.C. § 9613(g)(1)(A); *see California v. Montrose Chem. Corp. of Cal.*, 104 F.3d 1507, 1512 (9th Cir. 1997) (quoting 42 U.S.C. § 9613(g)(1)); *Confederated Tribes & Bands of Yakama Nation v. Airgas USA, LLC*, 435 F. Supp. 3d 1103, 1121 (D. Or. 2019) ("Generally, a plaintiff must bring a claim for natural resource damages within three years of the plaintiff's 'discovery of the loss and its connection with the release in question.' " (first quoting 42 U.S.C. § 9613(g)(1)(A); and then citing *United States v. Asarco, Inc.*, 214 F.3d 1104, 1105 (9th Cir. 2000))). "Either the United States or the affected state may sue as trustee on behalf of the public to collect damages for injury to natural resources." *Idaho*, 882 F.2d at 394 (first citing 42 U.S.C. § 9607(f); and then citing Frank B. Cross, *Natural Resource Damages Valuation*, 42 Vand. L. Rev. 269, 273–75 (1989); Note, *Developments in the Law — Toxic Waste Litigation*, 99 Harv. L. Rev. 1458, 1565–73 (1986); Susan T. Zeller & Lisa M. Burke, Note, *Theories of State Recovery Under CERCLA for Injuries to the Environment*, 24 Nat. Res. J. 1101 (1984)).

i. The SCDA's knowledge cannot be imputed to the DEC

Defendants argue that because "Lt. Lapinski was conducting a joint investigation with the SCDA," the knowledge of the SCDA should be imputed to its "client," the State of New York. [11] (Defs.' Mem. 18.)

Plaintiffs argue that the SCDA's knowledge as of April 28 cannot be imputed to the State, as district attorneys are elected by and serve their county, and a county district attorney does not represent the DEC Commissioner as trustee on natural resource damages claims, which only the Commissioner may bring under 42 U.S.C. § 9607(f)(2)(B). (Pls.' Opp'n 18.)

In support of their arguments that the knowledge of the SCDA should be imputed to the DEC, Defendants primarily rely on case law stating that district attorneys represent the State of New York rather than the local counties which they serve. In their opening briefs, Defendants rely on cases addressing whether county legislators can impose term limits on the office of a district attorney, *Hoerger v. Spota*, 21 N.Y.3d 549 (2013), and whether a district attorney is a state or local officer for purposes of section 1983 suits, *Baez v. Hennessy*, 853 F.2d 73 (2d Cir. 1988) and *Claudio v. City of New York*, 423 F. Supp. 2d 170 (S.D.N.Y. 2006). However, these cases, as Plaintiffs argue, "[have] no relevance to whether a district

attorney's knowledge should be imputed to the State for purposes of CERCLA's statute of limitations." (Pls.' Opp'n 19.)

Similarly, the Court finds unpersuasive Defendants' reliance on *In re Agent Orange Product Liability Litigation*, 597 F. Supp. 740, 796 (E.D.N.Y. 1984), *aff'd sub nom.*, 818 F.2d 145 (2d Cir. 1987), to support their argument that the SCDA's knowledge should be imputed to Plaintiffs. In *Agent Orange*, the court explained that the knowledge of employees of one government agency could be imputed to another agency if there was a reason for the agency to seek the information. Unlike the facts before the Court, the government entities in *Agent Orange* were all federal entities within the same branch of government and within a single hierarchical structure consisting of upper and lower echelons. *See Agent Orange*, 597 F. Supp. at 796. As the court noted in *Agent Orange*, "[w]idespread knowledge among lower echelons can be attributed to the Executive." *Id.* The analysis in *Agent Orange* does not support Defendants' claim that the actions of employees of the SCDA, a county prosecutor's office, should be imputed to the DEC, a state agency. [12] Thus, the Court cannot conclude that the DEC knew or should have known of the asbestos in the Park on April 28 based on the SCDA's knowledge of this information.

***13** The Court therefore considers, as Defendants argue, whether Plaintiffs would have known about the hazardous substances in the Park in April of 2014 had they acted with reasonable diligence.

ii. The Court cannot conclude as a matter of law that Plaintiffs discovered or should have discovered the loss of the use of the Park in connection to the hazardous substances in April of 2014

In determining whether Plaintiffs discovered or should have discovered the loss of the use of the Park in connection to the hazardous substances in April of 2014, the Court separately considers when Plaintiffs discovered or with reasonable diligence should have discovered, (1) the loss of the use of the Park and (2) the presence of hazardous substances in the Park.

In her August 2019 Order, Judge Feuerstein adopted the Special Master's recommendations that for accrual purposes, the date of discovery should be the date of constructive and not actual knowledge of the loss of the use of the Park and that Plaintiff's CERCLA claim began accruing "when they first knew, or with reasonable diligence would have known, of the public's loss of use of the Park and that such loss was connected to the release of the hazardous substances in question." (August 2019 Order 6, 8.)

Defendants argue that by April 3, 2014, Plaintiffs knew illegal dumping of a huge volume of C&D "caused the public to lose access to portions of the Park," (Defs.' Mem. 16–17), and that Plaintiffs quickly learned that the C&D debris at the Park contained hazardous substances, (*id.* at 17–19). Thus, Defendants argue, if Plaintiffs had acted with reasonable diligence, they would have known about the hazardous substances in the Park in early April of 2014. [13] (*Id.* at 20–21.)

Plaintiffs argue that the State did not learn until May 6, 2014, when the Suffolk DA announced that he had found asbestos there, that the SCDA had found asbestos in the Park, (Pls.' Opp'n 16–18), and that the State diligently investigated the dumping of C&D at the Park, (*id.* at 19–23).

1. Discovery of the loss of the use of the Park

***14** Because of conflicting evidence, the Court cannot determine that Plaintiffs discovered or should have discovered the loss of the use of the Park in connection to the hazardous substances in April of 2014.

Defendants argue that by April 3, 2014, Plaintiffs knew that the soccer field and the recharge basin where the C&D debris was dumped "were not safe for the public to use and the areas had to be shut down." (Defs.' Mem. 16–17.) The DEC advised the Town to "cease all activity at the site until the material could be examined or analyzed" the following week. (*Id.* at 17.) Defendants claim that Plaintiffs never saw any member of the public using the Park in April of 2014. (*Id.*) In addition, Defendants argue that the fact that the Town did not announce the "long-term closure of the Park until May 6, 2014" is irrelevant because, as Judge Feuerstein held in her August 2019 Order, permitting the date of closure to control the accrual of the claim would permit a plaintiff to control the accrual of the claim. (*Id.*)

Plaintiffs argue that their claim is for natural resource damages for lost use of the entire Park, rather than the specific areas of the soccer field and recharge basin, and further argue that Defendants provide no authority that would permit them to reconfigure their claim. (Pls.' Opp'n 14–15.) Plaintiffs contend that Defendants' argument, at best, would bar the State from seeking natural resource damages for the portions of the Park that were not usable before May 6. In addition, Plaintiffs argue that the recharge basin "is not used by the public" and the soccer field had been "undergoing rehabilitation since 2013," and thus Defendants have not shown that the community lost the use of the soccer field and recharge basin in April of 2014 because of the C&D. (*Id.* at 15.)

The evidence as to when Plaintiffs should have discovered the "loss" of the use of the Park is conflicting, and drawing all inferences in favor of Plaintiffs as the non-moving party, the Court cannot conclude that the loss occurred in early April as Defendants argue. The evidence does not demonstrate whether individuals were using these areas or the Park more generally at the time in question, the extent of rehabilitation of the soccer field, or pre-existing usages of the field prior to and during April of 2014, and, even assuming lack of usage, it does not show that any such lack of usage was caused by the C&D. Defendants argue that in January of 2014, the DEC received reports about children sledding into debris in the area of the Park where the recharge area was located, indicating that "before the illegal dumping, that portion of the Park was used for some forms of public recreation," (Defs.' 56.1 Reply ¶ 72), and also argue that there is no evidence that anyone from the public used the areas where the C&D debris was dumped — the soccer field and the recharge basin — or anywhere else in the Park at any time in April of 2014, (Defs.' 56.1 ¶ 71–72). However, Plaintiffs present evidence that the DEC was "not aware one way or the other about whether the public used the Park in April [of] 2014"; that the recharge basin is a low-lying area of the Park where water collects and drains and is not normally used for recreation; and that the soccer field had been undergoing "rehabilitation" since 2013, [14] (Pls.' 56.1 ¶¶ 71, 72, 76–77), suggesting that it was not being used because of rehabilitation rather than contamination.

***15** In addition to the conflicting evidence regarding the use of the Park in April, on April 24, 2014 when the Park was closed temporarily for "investigation," the DEC had not conducted any testing of samples, and neither the DEC nor the SCDA had performed any chemical analyses. The DEC knew about C&D and solid waste violations, which were violations in their own right but were not the hazardous substances violations at issue before the Court. The fact that construction waste from New York City can "potentially" contain hazardous substances, (Rahman Dep. 60:5–24), and that the presence of C&D debris in solid waste, when comingled with other materials, could be an indicator that the waste contains hazardous substances, (Defs.' 56.1 ¶ 23), supports the inference that without testing, Plaintiffs would be speculating regarding the presence of hazardous substances in the Park. C&D debris by itself in a public park constitutes a solid waste violation, (Defs.' 56.1 ¶ 10), and dumping solid waste can be a crime even if the material does not contain hazardous substances, (Pls.' Counter-Stmt. ¶ 4). Thus, while there were clear indicators of a violation, there was no evidence that there had been a release of hazardous substances in the Park. Because Plaintiffs' CERCLA claim accrued "when they first knew, or with reasonable diligence would have known, of the public's loss of use of the Park and that such loss was connected to the release of the hazardous substances in question," (August 2019 Order 8), the DEC's knowledge of C&D debris does not support the inference that it would have known with reasonable diligence of the loss of the use of the Park because of the hazardous substances. [15]

When the Park closed on May 6, 2014, it was as a result of the asbestos sampling and was therefore connected to the release of the hazardous substances in question. As Judge Feuerstein noted in her August 2019 Order, the "date the Park closed for remediation cannot be viewed in isolation as triggering the statute of limitations" because potential plaintiffs should not be able to control their dates of accrual based on action or inaction. (August 2019 Order 8.) When considered in the context of the asbestos sampling rather than in "isolation," the date that the Park closed for remediation is a potential date of the discovery of the "loss" of the use of the Park.

2. Plaintiffs' discovery of hazardous substances in the Park

As to the discovery of hazardous substances in the Park, the record does not clearly indicate when Plaintiffs knew or should have reasonably known about the presence of hazardous substance in the Park in April of 2014.

Defendants note that the DEC took an informal sample on April 3 but never tested the sample and contend that "[t]here is no reason the DEC could not have ... arranged for comprehensive testing on or about April 4, the day after they confirmed a solid waste violation involving C&D debris at the Park, and received the results of that testing within seven days." (Defs.' Mem. 21.) In addition, Defendants argue that by mid-April, Plaintiffs were aware that the C&D materials contained hazardous substances, as the presence of C&D debris in solid waste indicates that the material contains hazardous substances, the majority of soil in New York City contains hazardous substances, C&D debris from construction waste in the New York City metropolitan area typically contains hazardous substances, and Lt. Lapinski learned and confirmed that the debris was from New York City. (Defs.' Mem. 17–18.) Defendants also argue that the State knew that there was asbestos in the Park by April 28 because the SCDA learned about the presence of asbestos that day and Lt. Lapinski testified to learning of those results "on or around that day." (Defs.' 56.1 ¶ 112 (citing Lapinski Dep. 98:11–100:5).)

Plaintiffs contend that comprehensive sampling and testing for waste material for law enforcement purposes take time to plan and implement. (Pls.' Opp'n 22.) After the initial sample was taken for visual inspection, a sampling and testing protocol was established, pursuant to DEC protocol, and the DEC moved forward to "conduct comprehensive sampling of the C&D at the Park but the [SCDA] implemented its contractor's sampling for the [SC]DA's criminal investigation before [the] DEC implemented its sampling program." (*Id.*) Plaintiffs argue that based on what Lt. Lapinski had learned by April 14, 2014, Lapinski knew that it was "likely" that the C&D in the Park had come from New York City and that C&D from New York City was "likely" to contain hazardous substances at some concentrations, as they are ubiquitous in urban environments. (*Id.* at 16.) In addition, Plaintiffs argue that the State would not actually know or constructively know that hazardous substances had been disposed at the Park or that they would present concerns for human health until Enviroscience confirmed the C&D in the Park contained asbestos. (*Id.* at 17.)

***16** On April 9, during his first visit to the Park, Lt. Lapinski was concerned that "anything" could be in the material, which is why he wanted it sampled. (Lapinski Dep. 123:9–124:4.) On or about April 9, Lt. Lapinski recognized that there was a "good possibility" that hazardous substances could be in the materials dumped at the Park. (*Id.*) When ECO Hull visited the Park at the beginning of April, his photographs showed solid waste, including "processed concrete, fines, a pile of dark brown material, and bricks." (Email dated April 2, 2014, annexed to Defs.' Mot. as Ex. 23, Docket Entry No. 415-24.) While solid waste may contain hazardous material, this is not always the case. (Rahman Dep. 42:18–22.) In fact, the record demonstrates that solid waste can be contaminated and nevertheless not contain any hazardous substances. (*Id.* at 44:11–18.) Although Plaintiffs could have speculated as to the presence or absence of hazardous substances in the Park, until scientific testing occurs, whether and to what extent material is chemically contaminated is unknown. [16] (*See* Lapinski Dep. 236:7–10 ("Figuring out where the origination was, there's a good chance of it. But until you see [the result], you know, it's all speculative.").)

By mid-April, Lt. Lapinski had a "hypothesis" that the debris that was at the Park actually came from Brooklyn or Queens. (Lapinski Dep. 280:15–25.) Lt. Lapinski testified that it could be concluded that he learned of the asbestos sampling results at the April 29, 2014 meeting with the SCDA, (Defs.' 56.1 ¶ 116), but also testified during the same deposition that he thought he "had been informed of the results before the search warrant [on May 5, 2014] ... [b]ut apparently [he] wasn't," (Lapinski Dep. 262:11–13). When asked about the meeting with the SCDA the day after Enviroscience provided the results, Lt. Lapinski stated that the SCDA did not share any test results with him at the meeting on April 29, 2014. (*Id.* at 97:17–20.) The evidence demonstrates that by May 6, 2014, when the Park was closed indefinitely, Plaintiffs must have known about the presence of hazardous substances in the Park. Whether Plaintiffs should have known between April and May of 2014, and before May 6, 2014, cannot be determined as a matter of law. Drawing all reasonable inferences in Plaintiffs' favor, the record, which indicates that there were dozens of events compressed into a few short weeks in April and May of 2014, supports the conclusion that Plaintiffs acted with reasonable diligence, or at the least, that there are disputed issues of material fact about reasonable

diligence that cannot be decided by the Court. Construing the facts in the light most favorable to the non-moving party, there exists a genuine issue of material fact as to when Plaintiffs knew or should have known about the presence of hazardous substances in the Park.

iii. **The Court cannot conclude as a matter of law that Plaintiffs failed to act with reasonable diligence and should have known about the presence of hazardous substances prior to April of 2014**

There are disputed issues of material fact as to whether Plaintiffs failed to act with reasonable diligence and should have known that there were hazardous substances in the C&D debris in the Park by early April of 2014, precluding the Court from granting Defendants' motion for summary judgment.

Defendants argue that if Plaintiffs had acted with reasonable diligence in investigating the illegal dumping in the relevant area of Brentwood starting in July of 2013, they would have known that there were hazardous substances in the C&D debris in the Park by early April of 2014. (Defs.' Mem. 20–21.) Specifically, Defendants argue that Plaintiffs should have further investigated (1) the Sage Street Site and (2) the January 2014 complaint to the DEC about the Park.

***17** Plaintiffs claim that the State diligently investigated the dumping of C&D at the Park. (Pls.' Opp'n 19–23.)

When "discovery" is written directly into a statute, courts have typically interpreted the word to refer not only to actual discovery, but also to the "hypothetical" discovery of facts a reasonably diligent plaintiff would know. *Merck*, 559 U.S. at 645. Reasonable diligence is defined as "[a] fair degree of diligence expected from someone of ordinary prudence under circumstances like those at issue." *Reasonable Diligence*, Black's Law Dictionary (11th ed. 2019). Black's Law Dictionary also considers "reasonable diligence" synonymous with "due diligence," which is defined in relevant part as "[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation." *Due Diligence*, Black's Law Dictionary (11th ed. 2019). The plain meaning of "due diligence" is the "care that a reasonable person exercises to avoid harm to other persons or their property." *Due Diligence*, Merriam-Webster (11th ed. 2014). [17]

1. July 2013 Sage Street investigation

Defendants argue that that Plaintiffs should have further investigated the Sage Street Site following July of 2013. On July 26, 2013, Daniel visited the Sage Street Site, about a mile and a half from the Park. (Defs.' 56.1 ¶ 36.) Because the DEC did not have access to the site, (*id.* ¶ 48), the DEC did not sample or test the waste of the Sage Street Site until in or after May 2014, (*id.* ¶ 47.) On May 1, 2014, Detective Severino found two pieces of "transite shingle" that had spilled out onto Sage Street from the Sage Street Site. (*Id.* ¶¶ 50, 121.) Within one day, tests showed that one sample contained 16% asbestos. (Defs.' 56.1 ¶¶ 51, 122; Pls.' 56.1 ¶ 51.)

While the DEC might have been able to detect hazardous substances at the Sage Street Site between July of 2013 and April of 2014, the Sage Street Site is a mile and a half away from the Park and Plaintiffs are not claiming natural resource damages based on that Site. Moreover, the State took a number of steps in investigating the Sage Street Site, including having Daniel return to the Site, attempting to serve the property owner (including waiting outside the post office where the owner had a personal P.O. Box, (Hull Dep. 61:17–62:5)), potentially reaching out to an attorney that the owner had in a prior matter, (Blaising Dep. 79:2–8), and asking the SCDA to issue a search warrant for the Sage Street Site. The Court finds that the DEC's decision to not further investigate the Sage Street Site is not determinative of whether the State knew or should have known about the release of hazardous substances at the Park and the loss of use of the Park.

2. January 2014 Park investigation

Defendants also argue that Plaintiffs should have further investigated the January 2014 complaint to the DEC that a truck belonging to a company affiliated with Datre had been "dropping off" potentially illegal solid waste at the Park. (Defs.' 56.1 ¶ 53.)

***18** After being unable to gain access to the Park when he visited the Park on January 24, 2014, and not being

able to verify the presence of C&D because of the snow on the ground, ECO Gross questioned the Town as to whether there was C&D in the Park. (Defs.' 56.1 ¶ 55.) Joseph Montuori, who was at that time the Commissioner of the Town's Department of Parks, Recreation, and Cultural Affairs, represented to the DEC that the placement of C&D debris had been an error and that the material would be removed. (*Id.*) The DEC closed the case on or about February 7, 2014. (*Id.*)

Based on the information available in the record, there is no indication that the State failed to act with "reasonable diligence" in investigating and eventually closing the January 2014 complaint. ECO Gross investigated the complaint and visited the Park, could not enter, could not make any observations of C&D debris because of snow on the ground, and later made an inquiry of the Town. The Commissioner of the Town's Department of Parks, Recreation, and Cultural Affairs represented to the DEC that the placement of C&D debris had been an error and that the material would be removed. The State acted with reasonable diligence, or at the very least, there is a genuine question as to whether the State acted with reasonable diligence, in conducting its investigation and relying on the assurances of the Town official who was responsible for the Park that the material would be removed.

Because the Court cannot determine as a matter of law that Plaintiffs knew or reasonably should have known about the public's loss of use of the Park and that such loss was connected to the release of hazardous substances, the Court denies Defendants' motion for summary judgment based on timeliness.

III. Conclusion

For the foregoing reasons, the Court denies Defendants' motion for summary judgment.

SO ORDERED:

All Citations

Slip Copy, 2022 WL 219960

Footnotes

1 The case was reassigned to the undersigned on May 3, 2021. (Order dated May 3, 2021.)

2 Twenty-one Defendants initially moved for partial summary judgment: Building Dev Corp.; Dimyon Development Corp.; IEV Trucking Corp.; New Empire Builder Corp.; COD Services Corp.; Touchstone Homes LLC; New York Major Construction Inc.; M & Y Developers Inc.; Atria Builders, LLC; Monaco Construction Corp.; Sparrow Construction Corp.; East Coast Drilling NY Inc.; Cipriano Excavation Inc.; Plus K Construction Inc.; 158 Franklin Ave. LLC; Alef Construction Inc.; All Island Masonry & Concrete, Inc.; ILE Construction Group, Inc.; Daytree at Cortland Square, Inc.; East End Materials, Inc.; and Triton Construction Company, LLC. (Defs.' Mot. for Summ. J. 1, Docket Entry No. 415.) However, nine of these Defendants — IEV Trucking Corp.; M & Y Developers Inc.; COD Services Corp.; Touchstone Homes LLC; Atria Builders, LLC; Monaco Construction Corp.; 158 Franklin Ave. LLC; Alef Construction Inc.; and Triton Construction Company, LLC — have since settled through Court-approved consent decrees and are no longer parties to this action. (Min. Entry dated July 28, 2021, Docket Entry No. 455; Fourth Suppl. Consent Decree, Docket Entry No. 458.)

3 (Defs.' Stmt. of Undisputed Facts Pursuant to Local Rule 56.1 ("Defs.' 56.1"), Docket Entry No. 415-41; Pls.' Resp. to Defs.' 56.1 ("Pls.' 56.1"), Docket Entry No. 415-43, at 1–38; Pls.' Counter-Stmt. of Undisputed Facts ("Pls.' Counter-Stmt."), Docket Entry No. 415-43, at 39–67; Defs.' Reply to Pls.' 56.1 ("Defs.' 56.1 Reply"), Docket Entry No. 415-94, at 1–26; Defs.' Resp. to Pls.' Counter-Stmt. ("Defs.' Counter-Stmt. Resp."), Docket Entry No. 415-94, at 27–58.)

4 Plaintiffs contend that there are visual indicators that solid waste could possibly contain hazardous substances, but unless and until a sample undergoes laboratory analysis, it is unknown whether the material

is actually contaminated with hazardous substances, and to what degree. (Pls.' 56.1 ¶ 22.) They also contend that some solid waste may not undergo sampling for chemical analysis if it contains visually recognizable materials, including uncontaminated concrete, asphalt, rocks, bricks, and soil. (*Id.* ¶ 18.)

5 Plaintiffs contend that the presence of asbestos-containing material cannot be visually observed with the human eye and must instead be analyzed in a laboratory under a microscope. (*Id.* ¶ 27.)

6 The parties dispute the definitions of "fines" and "slag." Defendants contend that "fines" are "small remnants of materials, including metals, rust, slag, and other eroded substances that often rise to the surface after a rain event." (Defs.' 56.1 ¶ 29.) Plaintiffs claim that " 'fines' is a term that is used differently by different people" and that can mean something "less than an inch or three-eighths of an inch or half an inch" or "very small pieces of material, like powdered sand." (Pls.' 56.1 ¶ 29 (first quoting Dep. of Syed H. Rahman, DEC Environmental Engineer 3 ("Rahman Dep.") 58:4–7, annexed to Pls.' Opp'n as Ex. 1, Docket Entry No. 415-46; and then quoting Lapinski Dep. 10:21–11:3).) Defendants define slag as a byproduct of coal burning and welding, and as an indicator that material may contain contaminants and materials such as lead. (Defs.' 56.1 ¶ 30.) Plaintiffs similarly claim that the term slag is used differently by different people, as it can be a byproduct of smelting, (Pls.' 56.1 ¶ 30 (citing Dep. of Matthew Blaising, DLE Patrol Supervisor ("Blaising Dep.") 38:2–4, annexed to Pls.' Opp'n as Ex. 5, Docket Entry No. 415-50)), or can come from welding, (*id.* (citing Lapinski Dep. 33:11–15)).

7 Although Plaintiffs contend that grab samples are simply for preliminary analysis and are not sent to the laboratories for testing, (Pls.' Counter-Stmt. ¶ 18), there was no scientific reason that the DEC could not test this sample for hazardous substances, (*id.* ¶ 79).

8 Plaintiffs dispute this, as Lt. Lapinski also testified that the possibility that the material came from New York City was merely his "hypothesis." (Pls.' 56.1 ¶ 106 (quoting Lapinski Dep. 279:20–281:19, 236:11–15).)

9 Plaintiffs do not seek recovery of remediation or removal costs.

10 Former Defendant COD Services Corp. also filed a Motion to Dismiss, but because it is no longer a party, the Court does not consider its motion. (*See* Docket Entry No. 277.)

11 Defendants also raise the fact that Lt. Lapinski admitted that it would be reasonable to conclude that he learned of the asbestos results "on or before the April 29 meeting." (Defs.' Mem. 18 (quoting Defs.' 56.1 ¶ 116).) Plaintiffs, in their 56.1 opposition, contend that although Lt. Lapinski testified that he learned of the results of the initial asbestos testing around April 28, during the same deposition, he later corrected his testimony to state that he could not recall the DA doing that prior to the search warrant. (Pls.' 56.1 ¶ 112.)

12 To the extent that the parties' argument that the SCDA's conduct can be imputed to Plaintiffs could be read to imply reliance on an agency relationship, such reliance is misplaced. Under New York agency law, "an agency relationship 'results from a manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and the consent by the other to act.' " *N.Y. Marine & Gen. Ins. Co. v. Tradeline, L.L.C.*, 266 F.3d 112, 122 (2d Cir. 2001) (quoting *Meese v. Miller*, 436 N.Y.S.2d 496, 499 (4th Dep't 1981)); *see Great Minds v. Fedex Off. & Print Servs., Inc.*, 886 F.3d 91, 95 (2d Cir. 2018) (noting that there is a "fundamental principle" that the acts of agents, while acting in the scope of their authority, are presumptively imputed to their principals (quoting *Kirschner v. KPMG LP*, 912 N.Y.S.2d 508 (2010))). Knowledge acquired by an agent acting within the scope of its agency is imputed to the principal, even if the information was never actually communicated. *See N.Y. Marine & Gen. Ins. Co*, 266 F.3d at 122 (citing *Christopher S. v. Douglaston Club*, 713 N.Y.S.22d 542, 543 (2d Dep't 2000)); *Cromer Fin. Ltd. v. Berger*, 245 F. Supp. 2d 552, 560 (S.D.N.Y. 2003) (same). In a governmental structure, the knowledge of employees of one agency may be imputed to those of another if there is some relationship between the agencies, either some reason for the agency without knowledge to seek the information or a reason for the knowledgeable agency to transmit the information. *See In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 796 (E.D.N.Y. Sep. 25, 1984), *aff'd sub nom.*, 818 F.2d 145 (2d Cir. 1987). For example, knowledge can be imputed to a prosecutor where the evidence is "known to other members of the 'prosecution team,' " which "includes information known to other

prosecutors in the same office," *Odle v. Calderon*, 65 F. Supp. 2d 1065, 1071 (N.D. Cal. 1999), and to others at an agency if working with the prosecution, *see* *United States v. Zuno-Arce*, 44 F.3d 1420, 1427 (9th Cir. 1995) ("[T]he prosecutor is 'deemed to have knowledge of and access to anything in the custody or control of any federal agency participating in the same investigation of the defendant.' " (quoting *United States v. Bryan*, 868 F.2d 1032, 1036 (9th Cir. 1989))); *United States v. Meregildo*, 920 F. Supp. 2d 434, 440–41 (S.D.N.Y. 2013) (holding that imputation is only proper when an agency can be considered " 'an arm of the prosecutor' or part of the 'prosecution team' " (first quoting *United States v. Gil*, 297 F.3d 93, 106 (2d Cir. 2002); then citing *United States v. Morell*, 524 F.2d 550, 555 (2d Cir. 1975); and then citing *United States v. Bin Laden*, 397 F. Supp. 2d 465, 481 (S.D.N.Y.2005))), *aff'd sub nom. United States v. Pierce*, 785 F.3d 832 (2d Cir. 2015). In addition, whether a particular government agency will be considered a part of the prosecution depends on its level of involvement and cooperation with the prosecuting agency. *See* *Odle*, 65 F. Supp. 2d at 1072; *see also* *Meregildo*, 920 F. Supp. 2d at 441. When the concept extends to knowledge held by agencies "interested in the prosecution," other circuits have considered this in the context of federal prosecutors working with federal executive agencies. *See* *United States v. Wood*, 57 F.3d 733, 737 (9th Cir. 1995).

The record demonstrates that there was cooperation and collaboration between the DEC and the SCDA. Lt. Lapinski, who led the project in the Park after April 9, 2014, testified to speaking with Detective Severino "fairly regularly." (Lapinski Dep. 269:11–21.) Lt. Lapinski routinely notified and worked with the SCDA when environmental crimes arose. (*Id.* at 72:10–19.) In addition, Lt. Lapinski assisted Detective Severino in serving a subpoena on the Town. (Defs.' 56.1 ¶ 108; Pls.' 56.1 ¶ 108.) Although Plaintiff contends that it was the SCDA that executed the search warrant on Datre Construction's headquarters and that Lt. Lapinski only assisted, the DEC and the SCDA "[p]articipat[ed] in the [w]arrant," which was issued on behalf of the State of New York. (DLE Significant Incident Report, annexed to Defs.' Mot. as Ex. 39, Docket Entry No. 415-40.) There was a meeting on April 29, 2014, where Lt. Lapinski was in attendance and may have received the results of the asbestos sampling. (*See* Lapinski Dep. 7:12–20, 251:3–7, 262:2–21.) When the Town temporarily shut down the Park on April 24, 2014, the announcement stated that the Town was grateful for the "involvement of both the [SCDA] and the [DEC]." (Press Release dated April 24, 2014, annexed to Pls.' Opp'n as Ex. 20, Docket Entry No. 415-65.) Thus, the record supports the conclusion that the DEC and the SCDA worked together in conducting the investigation of the dumping at the Park.

Despite this cooperation, the evidence does not support a determination that the SCDA's knowledge should be imputed to the DEC. Based on traditional principles of agency law, it does not appear from the record that either the DEC or the SCDA was "subject to [the other's] control" and that there was consent by the other to act. *N.Y. Marine & Gen. Ins. Co.*, 266 F.3d at 122. It is also unclear how the State can be considered the "client" of the SCDA, and Defendants do not offer any facts or relevant law to support this conclusion. (*See* Defs.' Mem. 18.) While it is true that either a district attorney's office or the state attorney general's office can commence a criminal case for an environmental violation, (Defs.' 56.1 ¶ 102), as Plaintiffs argue, only the DEC Commissioner may bring CERCLA natural resource damages claims, (Pls.' Opp'n 19 (citing 2 U.S.C. § 9607(f)(2)(B)).) Moreover, even if the State could be considered the SCDA's "client" in the SCDA's criminal prosecutions, the SCDA could not represent the DEC Commissioner on CERCLA claims. Thus, even under an agency theory, the Court cannot conclude that the knowledge of the SCDA can be imputed to the DEC for purposes of deciding when the DEC discovered the loss of the Park.

13 As Defendants acknowledge, there are few cases interpreting the statutes of limitations for CERCLA's natural resource damages. In their reply brief, Defendants ask the Court to consider CPLR § 214-c(2), the statute of limitations for New York State law claims based on environmental contamination, which uses a constructive knowledge standard. (Defs.' Reply 17–18.) Because Defendants raised this argument for the first time in their reply papers, the Court declines to consider it. *See* *United States v. Canada*, 858 F. App'x 436, 441 n.3 (2d Cir. 2021) ("We generally treat arguments raised for the first time in a reply brief as waived." (quoting *United States v. George*, 779 F.3d 113, 119 (2d Cir. 2015))); *Jericho Group Ltd. v. Mid-Town Dev. Ltd. P'ship*, 816 F.

App'x 559, 564 (2d Cir. 2020) (citing *JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. v. C.V.*, 412 F.3d 418, 428 (2d Cir. 2005) (explaining that courts generally do not consider arguments raised for the first time in reply briefs); *Aviva Trucking Special Lines v. Ashe*, 400 F. Supp. 3d 76, 80 (S.D.N.Y. 2019) ("Generally, 'a court should not consider arguments that are raised for the first time in a reply brief.' " (quoting *Clubside, Inc. v. Valentin*, 468 F.3d 144, 159 n.5 (2d Cir. 2006) (Sotomayor, J.))).

14 Detective Severino's affidavit in support of the search warrant issued on May 5, 2014, states that an individual whom he interviewed in April of 2013 said that the Town gave permission for a nearby church to "fill holes, put grass seed down and make minor repairs." (Search Warrant dated May 5, 2014 at 9.)

15 As discussed *infra* pp. 33–35, there is a genuine question of material fact as to whether Plaintiffs were reasonably diligent in their discovery of the hazardous substances in the Park during April of 2014.

16 The Special Master declined to endorse Plaintiffs' contention that as a matter of law, a "scientific report" is necessarily required for the discovery of an actionable loss, referring to releases such as the wreck of the Exxon Valdez oil tanker. (Report 20 n.12.) In her August 2019 Order, Judge Feuerstein agreed with the Special Master. (August 2019 Order at 8.) The Court does not purport to hold that scientific testing is "necessarily required" for the discovery of an actionable loss. However, based on the facts that emerged during the limited discovery, including information about DEC protocol, the Court cannot conclude that the DEC knew or should have known with reasonable diligence of the presence of hazardous substances prior to chemical testing and sampling.

17 The Court notes that the parties did not provide definitions of "reasonable diligence." As a result, the Court relies on its plain meaning.