

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of,	X
	:
	:
RESTAURANT ACTION ALLIANCE NYC,	:
CECILIO ALBAYERO, JOSE CASTILLO,	:
MAXIMILIANO GONZALES, ANDRES	:
JAVIER-MORALES, ARISMENDY JEREZ,	:
TONY JUELA, RUPERTO MOROCHO, ASTRID	:
PORTILLO, LUCIANO RAMOS, SERGIO	:
SANCHEZ, ESMERALDA VALENCIA,	:
PLASTICS RECYCLING INC., DART	:
CONTAINER CORPORATION, PACTIV LLC,	:
GENPAK LLC, COMMODORE PLASTICS LLC,	:
and REYNOLDS CONSUMER PRODUCTS LLC,	:
	:
Petitioners,	:
	:
For Judgment Pursuant to CPLR Article 78	:
– against –	:
	:
THE CITY OF NEW YORK; KATHRYN	:
GARCIA, in her official capacity as Commissioner	:
of the New York City Department of Sanitation; the	:
NEW YORK CITY DEPARTMENT OF	:
SANITATION, a charter-mandated agency; and	:
BILL DE BLASIO, in his official capacity as	:
Mayor of the City of New York,	:
	:
Respondents.	X

**PETITIONERS’ MEMORANDUM OF LAW IN SUPPORT OF THEIR
ARTICLE 78 PETITION, ORDER TO SHOW CAUSE FOR EXPEDITED
DISCOVERY, AND, AS NECESSARY, EMERGENCY INJUNCTIVE RELIEF
TO PREVENT THE CITY FROM BANNING EPS SOFT FOAM
DURING THE PENDENCY OF THIS ACTION**

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TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT.....	1
A. Because Recycling EPS Is Environmentally Effective And Economically Feasible, Local Law 142 Mandates That The City Implement Recycling.	2
B. The Commissioner’s Determination Is Arbitrary and Capricious, an Abuse of Discretion, and a Violation of Local Law 142.	8
FACTUAL BACKGROUND.....	11
A. The New York City Administrative Code Mandates Recycling.	11
B. Mayor Bloomberg’s Proposal to Ban Foodservice Foam Failed, Because the City Favors Recycling.....	11
C. The City’s “Dirty Little Secret” Continues: Since 2013, the City Has Collected Rigid Polystyrene for Recycling, But Sent it All to Landfill.	12
D. Local Law 142 Requires the Sanitation Commissioner to Recycle Soft Foam So Long As “Environmentally Effective” and “Economically Feasible.”	13
E. Upon Taking Office, Mayor de Blasio Promised to Ban Soft Foam.....	15
F. Petitioners Presented an Incontrovertible Record to the Commissioner that Soft Foam “Can Be Recycled” “Safely,” “Effectively” and “Feasibly” as Part of a Comprehensive Recycling Plan Covering All Polystyrene Products.....	16
1. Under the Recycling Plan, DSNY Trucks Would Collect Polystyrene from Residences and Deliver It to Sims at No Additional Cost to the City.	17
2. Under the Recycling Plan, Sims Would Recover Polystyrene at Industry-Best Rates and Deliver It to PRI.	18
3. Under the Recycling Plan, PRI Would Buy, Clean, and Process All of the City’s Polystyrene, and the Materials Would Then Be Recycled for Use in the Manufacture of New Products.	19
4. This Recycling Plan Would Ensure the Recycling of Polystyrene into New, Marketable Products Without Any Significant Amount of Material Accepted for Recycling Ending Up Being Landfilled.	23
5. In Late 2014, at the Commissioner’s Behest, Sims, PRI, And Dart Struck a Deal to Recycle All of New York City’s Polystyrene.....	25
G. In January 2015, at the Mayor’s Direction, the Commissioner Issues a Sham Determination, Banning Food Foam and Relegating the Rest of the City’s Polystyrene to Landfills.	26

TABLE OF CONTENTS

	<u>Page</u>
LEGAL STANDARD.....	28
ARGUMENT.....	30
A. The Record Before the Commissioner Compels the Conclusion that EPS Can Be Recycled in a Manner that is “Economically Feasible,” “Environmentally Effective,” and “Safe for Employees.”.....	31
1. Recycling is “Safe for Employees.”.....	33
2. Recycling is “Economically Feasible.”.....	33
3. Recycling is “Environmentally Effective.”.....	35
B. The Commissioner’s Determination Must Be Reversed Because it is Belied by the Indisputable Factual Record.....	38
1. Despite the Record Evidence Compelling the Conclusion that Recycling Foam is “Economically Feasible,” the Commissioner Arbitrarily and Capriciously Determined that It Was Not.....	39
a. The Commissioner’s Determination Arbitrarily and Capriciously Required that Economic Feasibility be “Guaranteed,” Ignoring PRI’s Commitment to Buy All Recyclable Polystyrene and the “Robust” Markets that Exist for the City’s EPS.....	39
b. The Commissioner Irrationally Considered Costs that the City Would Not Incur.....	40
2. Despite the Record Evidence Compelling the Conclusion that Recycling Foam is “Environmentally Effective,” the Commissioner Arbitrarily and Capriciously Determined that It Was Not.....	42
a. The Commissioner’s Determination Arbitrarily and Capriciously Required that Environmental Effectiveness be “Guaranteed,” then Disregarded the Fact that PRI Would Recycle Virtually All of the EPS It Would Be Able to Obtain.....	43
b. The Commissioner’s Determination Also Misstates How Much EPS Sims Would Recover with New, Privately Financed, State-of-the-Art Sorting Equipment.....	44
c. The Commissioner Arbitrarily and Capriciously Ignored End-Users’ “Robust” Demand for Post-Consumer Recycled Polystyrene.....	45
C. Local Law 142 Mandates EPS Recycling Because It “Can Be Recycled”; Hence, the Commissioner Had No Discretion to Ban Soft Foam.....	48

TABLE OF CONTENTS

	<u>Page</u>
D. The Commissioner Violated Local Law 142 by Engrafting Additional Requirements onto the Statute Nowhere to Be Found in its Plain Language, Including that Any Recycling Plan Had to Be “Guaranteed” and in Effect Before the Commissioner’s Recycling Determination Was Even Made.	50
E. The Outcome Here Was Illegally Predetermined by the Mayor’s Office.	50
F. The Petitioners Are Entitled to Discovery and to Production of Records under FOIL to Reveal the Extent of the City’s Illegal Decision-making.	51
1. Petitioners Are Entitled to Targeted Discovery in Order to Demonstrate that the Outcome of the Commissioner’s Decision Was Either Illegally Predetermined by the Mayor’s Office or Based on False Information	52
a. The Petitioners Are Entitled to Discovery Showing How the Commissioner’s Decision was Predetermined by the Mayor.....	53
b. The Petitioners Are Also Entitled to Discovery Showing How the Determination Was Based on a Bad-Faith Review of the Evidence.	54
2. The Petitioners Are Entitled to an Order Compelling Production of the Documents They Duly Requested under FOIL.....	57
a. The Sanitation Department Has Strung Petitioners Along, Seeking to Forestall Exposure.	58
b. The Mayor’s Office Has Completely Stonewalled Petitioners, Abandoning Any Pretense of Compliance with its FOIL Obligations.	60
G. The Ban on Soft Foam Must Be Enjoined As Necessary to Prevent Irreparable Harm.....	61
H. The Court Should Hold an Evidentiary Hearing, as Necessary, to Resolve Any Material Factual Disputes.	63
CONCLUSION.....	66

TABLE OF AUTHORITIES

	<u>Page(s)</u>
Cases	
<i>Anonymous v. Commissioner of Health,</i> 21 A.D.3d 841 (1st Dep't 2005)	65
<i>Bnei Emunim & Talmud Toradh Bnei Simon Israel v. Town of Fallsburg,</i> 78 N.Y.2d 194 (1991)	52
<i>Chem. Specialties Mfrs. Ass'n v. Jorling,</i> 85 N.Y.2d 382 (1995)	10, 30, 51
<i>Council of Trade Waste Ass'ns, Inc. v. City of New York,</i> 579 N.Y.S.2d 330 (1st Dep't 1992)	41
<i>Data Tree, LLC v. Romaine,</i> 9 N.Y.3d 454 (2007)	59
<i>Four Times Square Assocs. v. Cigna Invs., Inc.,</i> 306 A.D.2d 4 (1st Dep't 2003)	62
<i>Gerber Prods. Co. v. N.Y. State Dept. of Health,</i> No. 1628-14, 2014 WL 7745848 (Sup. Ct. Albany County Aug. 21, 2014)	30, 57, 58
<i>Herald Co. v. Feurstein,</i> 3 Misc. 3d 885, 779 N.Y.S.2d 333 (Sup. Ct. N.Y. County 2004)	59
<i>JRT Inc. v. STG Props., LLC,</i> 798 N.Y.S.2d 345 (Sup. Ct. N.Y. County. 2004)	64
<i>Lally v. Johnson City Cent. School Dist.,</i> 962 N.Y.S.2d 508 (3d Dep't 2013)	55
<i>Lee v. N.Y.C. Dep't of Hous. Pres. & Dev.,</i> 162 Misc. 2d 901, 614 N.Y.S.2d 694 (Sup. Ct. N.Y. County 1994)	63
<i>N.Y. Const. Materials Ass'n, Inc. v. N.Y. State Dept. of Env'tl.,</i> 921 N.Y.S.2d 686 (3rd Dep't 2011)	51
<i>N.Y. Skyline, Inc. v. City of New York,</i> 939 N.Y.S.2d 42 (1st Dep't 2012)	36
<i>N.Y. State Chapter, Assoc'd Gen. Contractors of Am. v. N.Y. State Thruway Auth.,</i> 88 N.Y.2d 56 (1996)	10, 31, 52

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<i>N.Y. Statewide Coalition of Hispanic Chambers of Commerce v. N.Y. City Dep’t of Health and Mental Hygiene</i> , 110 A.D.3d 1 (1st Dep’t 2013)	30, 31, 50, 52
<i>Natural Res. Def. Council, Inc. v. N.Y. City Dep’t of Sanitation</i> , 83 N.Y.2d 215 (1994)	50
<i>Nespoli v. Doherty</i> , 851 N.Y.S.2d 64, 2007 WL 3084870 (Sup. Ct. N.Y. County Sep. 28, 2007)	54, 56, 58
<i>Nestle Waters N. Am., Inc. v. City of New York</i> , 990 N.Y.S.2d 512 (1st Dep’t 2014)	8, 29, 32
<i>Newsday, Inc. v. Empire State Dev. Corp.</i> , 98 N.Y.2d 359 (2002)	58
<i>O’Henry’s Film Works, Inc. v. Bureau of Ferry & Gen. Aviation Operations</i> , 111 Misc. 2d 464, 444 N.Y.S.2d 509 (Sup. Ct. N.Y. County 1981)	63
<i>Parkmed Co. v. Pro-Life Counselling, Inc.</i> , 91 A.D.2d 551 (1st Dep’t 1982)	63
<i>Raritan Dev. Corp. v. Silva</i> , 91 N.Y.2d 98 (1997)	10, 30, 51
<i>Reuschenberg v. Town of Huntington</i> , 16 A.D.3d 568 (2d Dep’t 2005)	64
<i>Rizk v. Long Term Disability Plan of Dun Bradstreet Corp.</i> , 862 F. Supp. 783 (E.D.N.Y. 1994)	30
<i>Roberts v. Tishman Speyer Properties, L.P.</i> , 874 N.Y.S.2d 97 (1st Dep’t 2009)	31, 51
<i>Sau Thi Ma v. Xuan T. Lien</i> , 198 A.D.2d 186 (1st Dep’t 1993)	64
<i>Schenectady Chems Inc. v. Flacke</i> , 83 A.D.2d 460 (3d Dep’t 1982)	52
<i>Second on Second Café, Inc. v. Hing Sing Trading, Inc.</i> , 66 A.D.3d 255 (1st Dep’t 2009)	64

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<i>Sierra Club v. U.S. Army Corps of Eng'rs</i> , 614 F. Supp. 1475 (S.D.N.Y. 1985)	9, 30, 44, 45, 52
<i>Sierra Club v. U.S. Army Corps of Eng'rs</i> , 701 F.2d 1011 (2d Cir. 1983)	53
<i>Stop BHOD v. City of New York</i> , 881 N.Y.S.2d 367, 2009 WL 692080 (Sup. Ct. Kings County. 2009)	54
<i>Sylmark Holdings, Ltd. v. Silicone Zone Int'l Ltd.</i> , 783 N.Y.S.2d 758 (Sup. Ct. N.Y. County 2004)	54
<i>Town of Pleasant Valley v. N.Y. State Bd. of Real Prop. Servs.</i> , 253 A.D.2d 8 (2d Dep't 1999)	54, 56, 58
<i>Willis of N.Y., Inc. v. DeFelice</i> , 299 A.D.2d 240 (1st Dep't 2002)	64

PRELIMINARY STATEMENT

This case challenges the New York City Sanitation Commissioner’s decision to ban all food-service products made of expanded polystyrene foam (“EPS” or “soft foam”), in violation of a clear statutory mandate requiring recycling and an indisputable record confirming that EPS foam can be recycled to the City’s economic and environmental benefit.¹ As a result of the Commissioner’s irrational, arbitrary, and capricious decision, contrary to law and fact, starting on July 1, 2015, restaurants throughout New York City will no longer be able to use cost-effective, highly functional, and preferred food-service “soft foam” items, such as cups, plates, trays, and containers, when serving their customers; manufacturers and stores will no longer be able to sell or even possess such products in the City; and the City will be denied an opportunity to advance its recycling goals in a manner that is more economically feasible and environmentally effective than this soft foam ban.²

The Petitioners here are a coalition of New York City businesses who use EPS products, manufacturers who produce EPS products sold in the City, and manufacturers who would use recycled EPS recovered from New York City’s waste stream to make new and marketable products—all of whom will be irreparably harmed if this ban goes into effect on July 1, 2015. Accordingly, they now join together to file this Article 78 petition seeking to reverse the Commissioner’s irrational decision and compel the City to implement statutorily-required EPS

¹ Letter from Sanitation Commissioner Kathryn Garcia to Mayor Bill de Blasio, *Determination on the Recyclability of Expanded Polystyrene*, dated Jan. 1, 2015 (“Determination”), a true and correct copy of which is attached as Exhibit A to the Affirmation of Randy M. Mastro, dated Apr. 28, 2015 (“Mastro Aff.”). All references to Exhibits refer to Exhibits to the Mastro Affirmation, unless otherwise stated.

² Expanded polystyrene (“EPS”) “soft foam” (sometimes referred to as “Styrofoam,” a registered trademark of the Dow Chemical Company), is an inexpensive, lightweight, insulating, and shock-absorbing material used for food service, industrial packaging, and home insulation. See Berkeley Research Group, *Market Analysis of End-uses for Recycled Post-Consumer Expanded Polystyrene Foodware* (Oct. 9, 2014) (“BRG Report”), a true and correct copy of which is attached as Exhibit B, at 2. Soft foam’s use in the food service industry is well known: it is used to make takeaway food containers, such as coffee cups, school lunch trays, and egg cartons. Owing to its light weight, insulating properties, and low cost, it is the material of choice for many restaurants and food trucks in New York City.

recycling. In the interim, Petitioners seek discovery to expose the Commissioner's determination for the sham that it was and, as necessary, a preliminary injunction to block the ban during the pendency of this litigation.

A. Because Recycling EPS Is Environmentally Effective And Economically Feasible, Local Law 142 Mandates That The City Implement Recycling.

The local law that the City Council passed in December 2013 to address the future of expanded polystyrene in New York City could not have been clearer: It required the Sanitation Commissioner alone to “determine, after consulting with the department’s designated recycling contractor . . . , manufacturers and recyclers of expanded polystyrene, and . . . any other person or group having expertise on expanded polystyrene, whether expanded polystyrene single service articles,” such as foam cups, plates, trays and containers, “can be recycled . . . in a manner that is environmentally effective, economically feasible, and safe for employees.”³ Assuming EPS is “recyclable” within those parameters, the law compels the Commissioner to “adopt and implement rules designating expanded polystyrene single service articles . . . as a recyclable material” in New York City. Only in the absence of such a showing can there be any restriction on the possession, sale, or use of “single service articles that consist of expanded polystyrene.”⁴ The Commissioner was given until January 1, 2015, to consult with these market participants and issue her determination.

What followed was a farce. While the Commissioner spent months gathering evidence confirming EPS's recyclability and receiving commitments from market participants that they would process, buy, and recycle all of New York City's polystyrene, City Hall had other ideas and campaign promises to keep. So at the end of the day, the Commissioner was not permitted to make this decision based on an objective review, as the City Council directed. Instead, City Hall made the decision for her, based on Mayor de Blasio's political predisposition—which is

³ Local Law 142 of 2013 (“Local Law 142”) (codified at N.Y. City Admin. Code § 16-329), a true and correct copy of which is attached as Exhibit C.

⁴ *Id.*

the antithesis of the reasoned process required under this statute.

Indeed, in the months before this law was enacted in 2013, Bill de Blasio campaigned “against” foam products and promised he would “get rid of them” when he took office because he thought they “really cause[] environmental harm.”⁵ And on March 15, 2014—at the press conference where he announced his appointment of Sanitation Commissioner Garcia—Mayor de Blasio reiterated his commitment to “eliminating the use of styrofoam ‘in city government, then try[ing] to get it out of our society writ large.”⁶ No wonder, then, that the Commissioner, who was poised to find that “foam can be recycled,” was summoned to City Hall in mid-December 2014 and given marching orders to ban soft foam, no matter what her “research confirm[ed].”⁷

In January 2015, the Commissioner did as commanded, issuing a decision banning soft foam that was rife with inaccuracies and outright falsehoods. If the Commissioner had rendered a dispassionate, reasoned determination based on the evidence before her, as the City Council required, she would have had to adopt and implement rules to include EPS in the City’s residential recycling program. That is because the evidence presented to her permitted but one conclusion—namely, that it is “safe for employees,” “environmentally effective,” and “economically feasible” for the City to recycle EPS.

That EPS foam is capable of being “recycled” in New York City, consistent with the statutory standard set by the City Council, is beyond credible dispute. In fact, the Sanitation Department was working with industry representatives—including Petitioner Dart Container Corporation (“Dart”), a foam manufacturer; Petitioner Plastic Recycling, Inc. (“PRI”), a

⁵ See Huffington Post, *Bill De Blasio, “Progressive” Democrat, Fighting His Way Back Into Bid For NYC Mayor* (Aug. 11, 2013), a true and correct copy of which is attached as Exhibit D; Jeremy Tanner and Mario Diaz, *De Blasio says he’s a fan of Mayor Bloomberg’s Styrofoam ban*, PIX 11 (Nov. 25, 2013), a true and correct copy of which is attached as Exhibit E; DecideNYC, *Candidate Profile: Bill de Blasio (D, Working Families)*, a true and correct copy of which is attached as Exhibit F.

⁶ See Azi Paybarah, *The de Blasio way to clean a street*, Capital New York (Mar. 17, 2014), a true and correct copy of which is attached as Exhibit G.

⁷ Emails between Michael Westerfield (Dart) and Gregory Anderson (DSNY), dated Sep. 18-Oct. 14, 2014, a true and correct copy of which is attached as Exhibit H.

polystyrene recycler; and Sims Municipal Recycling (“Sims”), the City’s “designated recycling contractor”—to develop a comprehensive plan to recycle not only the City’s soft foam food-service items, but also all of the City’s “hard” polystyrene products (such as hard-foam packing material for big-box electronics and hard plastics made of rigid polystyrene).⁸ This comprehensive plan would advance the City’s long-standing, overarching statutory objective of increasing citywide residential recycling.⁹ It would also expose and address one of the City’s “dirty little secrets”: While the City added rigid polystyrene to the list of materials residents are required to separate for recycling in 2013, the City has since recycled none of the thousands of tons of such waste its trucks have collected, because the City never developed a plan to actually recycle it.¹⁰ In other words, all of that waste has ended up being landfilled anyway. Under the comprehensive plan Dart and other market participants presented to the Commissioner, all of that rigid polystyrene waste would now be recycled, along with soft foam, meaning less polystyrene overall would be landfilled than under the soft foam ban alone.

By December 2014, all of the pieces were in place for the City to implement a successful recycling program not just for the material targeted in Local Law 142 but for all polystyrene, exceeding Local Law 142’s EPS recycling focus. That month, both Dart and Sims confirmed to the Commissioner that Dart and Sims had reached an agreement in principle, under which Sims would sort for recycling any EPS or rigid polystyrene delivered by the City.¹¹ Also, by that time, PRI, a leading polystyrene recycler, had already written and met with the Commissioner to

⁸ Rigid polystyrene is not foam but, rather, a hard plastic material that becomes hard or soft foam when air is injected into it. Unexpanded rigid polystyrene is commonly used to make forks, knives, and spoons, as well as plastic office supplies, such as containers, tape dispensers, rulers, and pens.

⁹ N.Y. City Admin. Code § 16-302.

¹⁰ See Erik Engquist, *The City’s Dirty Recycling Secret*, Crain’s New York Business (Nov. 25, 2013), a true and correct copy of which is attached as Exhibit I; NYC 2013 Waste Characterization Study (“2013 Waste Study”), as produced pursuant to FOIL on February 4, 2015, a true and correct copy of which is attached as Exhibit J, at 9.

¹¹ See Dart Letter to DSNY, dated Dec. 24, 2014, a true and correct copy of which is attached as Exhibit K, at 2; Emails between Dart and Sims, dated Dec. 12-19, 2014, a true and correct copy of which is attached as Exhibit L.

confirm PRI's "intent to purchase and recycle not only New York City's foam polystyrene (PS) but also your rigid PS sorted by Sims."¹²

Moreover, the Commissioner had the benefit of an independent research group's market analysis, which "readily identified" dozens of U.S. companies processing and/or using recycled EPS material to make new products, proving that improved "technologies . . . have created real and sustainable markets for recycled EPS foodware."¹³ But the de Blasio Administration scuttled that prospect simply to advance the Mayor's political agenda of banning all soft foam products in New York City, regardless of the facts and contrary to the City Council's recycling mandate. That epitomizes arbitrary and capricious government action that cannot survive scrutiny.

For the reasons explained here and made known to the Commissioner in 2014, EPS foam and other polystyrene "can be recycled . . . in a manner that is environmentally effective, economically feasible, and safe for employees."¹⁴ Commissioner Garcia's determination acknowledged that it "would be safe for employees" to recycle this material¹⁵, but found the other conditions unmet because they could not be "guarantee[d]"¹⁶—a standard nowhere to be found in the statute itself. Based on the record before the Commissioner—which included PRI's commitment to recycle all of the polystyrene delivered by Sims, guaranteeing a net financial gain to the City—the only rational conclusion to be reached here is that recycling EPS is "economically feasible" and "environmentally effective."

Economically Feasible. The privately-funded, comprehensive recycling plan that Dart and other market participants presented to the Sanitation Department would surely be "economically feasible" for the City. The statute defines "economically feasible" as "cost

¹² PRI Letter to DSNY, dated Sep. 29, 2014, a true and correct copy of which is attached as Exhibit M.

¹³ See Ex. B (BRG Report) at 1.

¹⁴ See Ex. C (N.Y. City Admin. Code § 16-329(b)).

¹⁵ Ex. A (Determination) at 5.

¹⁶ *Id.* at 2-3, 9.

effective based on consideration of factors including, but not limited to, direct and avoided costs such as whether the material is capable of being collected by the department in the same truck as source separated metal, glass and plastic recyclable material, and shall include consideration of markets for recycled material.”¹⁷ The Commissioner found that soft foam could be collected on the same trucks as materials in the existing program, at no incremental cost.¹⁸ Furthermore, Dart would be underwriting 100% of the costs for new infrastructure at the City’s two contracted sorting facilities operated by Sims, assuring Sims and the City a guaranteed financial return and cost savings for the next five years. In other words, by implementing this plan, the City would reap a multi-million dollar windfall on these newfound recyclables and avoided landfill costs.¹⁹ Moreover, market demand for recycled EPS is so “robust” that a single buyer, PRI, readily committed to purchase all of New York City’s recyclable polystyrene (both hard and soft foam), Dart obtained for PRI a “right of first refusal” over competitors to be able to purchase these recyclables, and PRI further assured the Commissioner that it already has “enough demand to handle a 100% recycling rate for a city five times the size of NYC.”²⁰ In short, the economic feasibility of this recycling plan is beyond dispute.

Environmentally Effective. Because this comprehensive recycling plan would minimize the EPS foam lost during the recycling process while capturing other polystyrene recyclables—resulting in even less polystyrene waste going to landfills than under a soft foam ban alone—this recycling plan was not only “environmentally effective;” it was more effective than a soft foam ban would be. The statute defines “environmentally effective” as meaning “not having negative environmental consequences including, but not limited to, having the capability to be recycled into new and marketable products without a significant amount of material

¹⁷ Ex. C (N.Y. City Admin. Code § 16-329).

¹⁸ Ex. A (Determination) at 7.

¹⁹ *See, e.g.*, Dart Letter to DSNY, dated May 14, 2014, a true and correct copy of which is attached as Exhibit N, at 2.

²⁰ Ex. M (PRI Letter to DSNY, dated Sep. 29, 2014) at 1; *see also* Dart Letter to DSNY, dated Nov. 20, 2014, a true and correct copy of which is attached as Exhibit O.

accepted for recycling being delivered to landfills or incinerators.”²¹ Under this plan, Dart would privately purchase for Sims, and Sims would use, a state-of-the-art optical sorter and associated infrastructure that would recover 75% of the polystyrene delivered to it within weeks of installation and more than 90% over time, producing higher recovery rates than those currently being achieved for many other products in the City’s residential recycling program.²² PRI would then accept for recycling and effectively process virtually all of that polystyrene, thereby ensuring that only a minimal amount of the polystyrene material accepted for recycling ever ended up being landfilled.²³ PRI and its customers would turn that processed, recycled polystyrene into “new and marketable products,” such as office supplies, decorative molding, picture frames, and plastic spools used by the paper industry. In other words, no “significant amount of material accepted for recycling” would end up “being delivered to landfills or incinerators.”²⁴ In fact, because this plan would cover more than the products targeted by Local Law 142, including rigid material—which is currently being sorted for potential recycling but then landfilled in its entirety—the initiative would actually result in less polystyrene waste “being delivered to landfills” than a ban on soft foam alone. Thus, the environmental effectiveness of this plan is also beyond dispute.

This comprehensive recycling plan offers the prospect of a major expansion of the City’s recycling program, lower landfill costs for the City, reductions in the amount of polystyrene the City has to send to landfills exceeding those associated with a soft foam ban, millions in net gains for the City’s coffers, and welcome relief for New York City business owners and consumers, who would otherwise have to bear the costs of replacing less-expensive soft foam food-service items with higher-priced, non-recyclable products made of paper covered with

²¹ Ex. C (N.Y. City Admin. Code § 16-329).

²² *See, e.g.*, Ex. N (Dart Letter to DSNY, dated May 14, 2014); Dart Letter to DSNY, dated Aug. 27, 2014, a true and correct copy of which is attached as Exhibit P.

²³ Affidavit of Brandon Shaw, dated Apr. 28, 2015 (“Shaw Aff.”) ¶ 7.

²⁴ *See* Ex. C (N.Y. City Admin. Code § 16-329).

polyethylene plastic wax, such as coated coffee cups. It makes no sense to leave money on the table while sending recyclable material to landfills, which is precisely what will happen if the City is permitted to impose its misguided ban on a portion of soft foam, instead of implementing this comprehensive plan to recycle all of the City's foam and rigid polystyrene.

Indeed, it is that irrational outcome that the City Council sought to avoid when it required the City to recycle EPS, rather than ban it, if “environmentally effective” and “economically feasible” to do so. Because it is now undeniable that New York's polystyrene can and will “be recycled into new and marketable products” if made available for recycling,²⁵ the City Council has mandated that it be recycled. That should end the inquiry here.

B. The Commissioner's Determination Is Arbitrary and Capricious, an Abuse of Discretion, and a Violation of Local Law 142.

The Commissioner's decision banning EPS on the purported basis that it is not “economically feasible” and “environmentally effective” to recycle it is belied by the factual record before her, contrary to the plain meaning and intent of Local Law 142, arbitrary and capricious, and an abuse of discretion, requiring reversal on multiple independent grounds, including but not limited to the following:

(a) The Commissioner's determination must be reversed because it was rendered “without a sound basis in reason and generally without regard to the facts.” *Nestle Waters N. Am., Inc. v. City of New York*, 990 N.Y.S.2d 512, 514 (1st Dep't 2014). The Commissioner's “findings” regarding economic feasibility and environmental effectiveness are riddled with factual errors, false assumptions, material omissions and misrepresentations. Most egregiously, she predicates her “findings” on a big lie that she repeats over and over again: the fundamentally false premise that there are “no economic markets in existence” that would “purchase and recycle the EPS that would be collected” in New York City, so these materials would end up having to be “landfilled.”²⁶ That is a misstatement she cannot have made in good faith—not

²⁵ See Ex. C (N.Y. City Admin. Code § 16-329(b)).

²⁶ Ex. A (Determination) at 1, 9.

after what Dart and Sims and PRI and the independent Berkeley Research Group unanimously told her over the course of her review process. Indeed, she knew from them that PRI was prepared to buy *all* of the City’s EPS recyclables from Sims, and that “the markets for the material . . . are robust,” that improved “technologies . . . have created real and sustainable markets for recycled EPS foodware,” and that these major market participants committed dollars and other resources to ensure this recycling program would inure to the City’s economic and environmental benefit.²⁷ But the Commissioner ignored all of that and, worse, misrepresented it in trying to rationalize this misguided decision. But at bottom, her “findings” amount to nothing more than misleading and obvious attempts to avoid the full impact of the facts. As such, they cannot have been “arrived at in good faith or in a rational and reasoned manner,” rendering them “necessarily arbitrary.” *Sierra Club v. U.S. Army Corps of Eng’rs*, 614 F. Supp. 1475, 151§(S.D.N.Y. 1985).

(b) This ban on soft foam violates Local Law 142’s mandate requiring recycling here. The City Council made its directive crystal clear: Assuming it is “economically feasible” and “environmentally effective” to do so, the City “shall adopt and implement” a recycling program for expanded polystyrene.²⁸ Therefore, based on the record before her, the Commissioner is statutorily required to recycle EPS, not ban it.

(c) The Commissioner twisted this clear statutory standard beyond recognition, claiming that she could not make the requisite findings because “there are no guarantees of the ultimate economic feasibility or environmental effectiveness of the proposed Dart program.”²⁹ But the statute says nothing about “guarantees”; it speaks only to “feasibility” and “effectiveness.” Moreover, the Commissioner rejected this comprehensive recycling plan on the pretext that it “cannot be implemented by January 2015”—which is not a statutory requirement,

²⁷ Exs. M (PRI Letter to DSNY, dated Sep. 29, 2014) & B (BRG Report); *see also, e.g.*, Ex. N (Dart Letter to DSNY, dated May 14, 2014).

²⁸ Ex. C (N.Y. City Admin. Code § 16-329(b)).

²⁹ Ex. A (Determination) at 9.

nor could it have been, since market participants were awaiting the Commissioner's decision, which was not even due to be rendered until January 2015. In other words, the Commissioner set up bars impossible to reach that are nowhere to be found in the statute itself. But "[n]ew language cannot be imported into a statute to give it a meaning not otherwise found therein." *Chem. Specialties Mfrs. Ass'n v. Jorling*, 85 N.Y.2d 382, 394 (1995); *accord*, *Raritan Dev. Corp. v. Silva*, 91 N.Y.2d 98, 104 (1997). On that basis as well, this decision is contrary to law and cannot stand.

(d) This determination was not made by the Sanitation Commissioner following an objective review, as local law required. Rather, it was imposed on her by City Hall to further the political agenda of a Mayor who vowed as a candidate to ban foam.³⁰ Indeed, after her top aide acknowledged that "the Commissioner's research confirms foam can be recycled,"³¹ the Commissioner was summoned to City Hall in mid-December 2014 and directed to ban soft foam to further the Mayor's political agenda, regardless of the evidence. Perhaps that explains the tortured logic of the decision ultimately issued under her name, but this much is clear: resort to "[p]ost hoc rationalization" to reach a predetermined outcome "cannot substitute" for the "considered" judgment the law requires of government decision-makers. *N.Y. State Chapter, Assoc'd Gen. Contractors of Am. v. N.Y. State Thruway Auth.*, 88 N.Y.2d 56, 75 (1996).

Accordingly, pursuant to CPLR §§ 7803-06, Petitioners respectfully request that this Court: (i) declare the Sanitation Commissioner's decision null and void as affected by errors of law, arbitrary and capricious, and an abuse of discretion; (ii) compel the Commissioner to implement the statutorily-required recycling of expanded polystyrene; (iii) in the interim, grant immediate discovery concerning the City's "sham" decision-making process and order the City respondents to fully comply with their FOIL obligations; (iv) as necessary, grant emergency injunctive relief blocking this ban from going into effect during the pendency of this litigation;

³⁰ See Ex. G (*The de Blasio Way to Clean a Street*).

³¹ See Ex. H (Emails between Michael Westerfield (Dart) and Gregory Anderson (DSNY), dated Sep. 18-Oct. 14, 2014).

and (v) hold an evidentiary hearing to resolve any material factual disputes.

FACTUAL BACKGROUND

A. The New York City Administrative Code Mandates Recycling.

New York City’s policy in favor of recycling is enshrined in its Administrative Code:

It is hereby declared to be the public policy of the city to reduce environmental pollution and dangers to health, to decrease the demand for scarce landfill space, to minimize the size and cost of the proposed resource recovery program, and to encourage the conservation of valuable natural resources and energy. It is the policy of the city to promote the recovery of materials from the New York city solid waste stream for the purpose of recycling such materials and returning them to the economy.

N.Y. City Admin. Code § 16-302.

Further illustrating the City’s commitment to recycling, the City’s Administrative Code even sets specific goals for recycling residential and public facility waste, which is managed by the New York City Department of Sanitation (“DSNY”). *Id.* § 16–305. In 2010, the City committed to recycle 19% of its annual residential waste by July 1, 2014, and 21% by July 1, 2016. *Id.* § 16–305(a)(2)(iii-iv). In April 2015, Mayor Bill de Blasio announced an even more ambitious plan for the City, promising to “send zero waste to landfills by 2030” by, among other things, “offering single-stream recycling” for all of the City’s recyclables.³²

B. Mayor Bloomberg’s Proposal to Ban Foodservice Foam Failed, Because the City Favors Recycling.

Late in his administration in 2013, Mayor Bloomberg embarked on an aggressive campaign to ban foodservice foam instead of recycling it.³³ In his February 14, 2013 State of the City address, he claimed that EPS foam is “virtually impossible to recycle” and proposed

³² City of New York, *One New York: The Plan for a Strong and Just City* (2015) (“One New York”) (excerpt), a true and correct copy of which is attached as Exhibit Q, at 176, 180.

³³ See Michael M. Grynbaum, *To Go: Plastic-Foam Containers, if the Mayor Gets His Way*, N.Y. Times (Feb. 13, 2013), a true and correct copy of which is attached as Exhibit R.

legislation calling for its ban.³⁴ Mayor Bloomberg further maintained that recycling foam would require added routes for DSNY trucks and cost the City \$70 million per year.³⁵ Both of those claims were false.³⁶

Because City law favors recycling, the City Council rejected Mayor Bloomberg's proposal and, instead, passed Local law 142, which calls for the recycling of soft foam.

C. The City's "Dirty Little Secret" Continues: Since 2013, the City Has Collected Rigid Polystyrene for Recycling, But Sent it All to Landfill.

On April 24, 2013, Mayor Bloomberg announced that the City would begin collecting rigid polystyrene as part of the City's commingled recycling program.³⁷ What Mayor Bloomberg did not say on that day was that there was no plan to actually recycle that rigid polystyrene. To this day, Sims sorts out the rigid polystyrene and then sends it to landfills.³⁸ Under Mayor de Blasio, the City has continued that practice: it fails to recycle any of the approximately 25,000 tons of rigid polystyrene deposited in the waste stream annually.³⁹ Petitioners' comprehensive recycling plan would recycle both rigid and expanded polystyrene, furthering the City's overarching recycling goals.

³⁴ See Henry Goldman, *Bloomberg Pushes for Plastic-Foam Ban in "State of the City"*, BLOOMBERG BUSINESS (Feb. 14, 2013), a true and correct copy of which is attached as Exhibit S.

³⁵ See Kia Gregory, *The Takeout Item Left on Bloomberg's Plates*, N.Y. Times (Dec. 8, 2013), a true and correct copy of which is attached as Exhibit T.

³⁶ Contrary to the Mayor's assertions, "sixty-five cities in California—with a combined New York City-equivalent population of 8 million—manage to recycle polystyrene foam. Closer to home, Yonkers recycles polystyrene." See N.Y. Post, *Another Foamy Excuse* (Jan. 8, 2015), a true and correct copy of which is attached as Exhibit U; see also Home for Foam, *Foam Recycling Programs*, a true and correct copy of which is attached as Exhibit V (showing map of cities across United States where EPS foam is collected for recycling). And as explained below, Petitioners' plan for recycling polystyrene would come at no net cost to the City.

³⁷ See Press Release, *Mayor Bloomberg Announces Start of Expanded Recycling Program to Include All Rigid Plastics for the First Time* (Apr. 24, 2013), a true and correct copy of which is attached as Exhibit W.

³⁸ Ex. I (*The City's Dirty Recycling Secret*).

³⁹ See Ex. N (Dart Letter to DSNY, dated May 14, 2014) at 2 (explaining that without "Dart's offer," rigid polystyrene will continue to be landfilled); Ex. J (2013 Waste Study) at 9.

D. Local Law 142 Requires the Sanitation Commissioner to Recycle Soft Foam So Long As “Environmentally Effective” and “Economically Feasible.”

In keeping with the City’s longstanding recycling goals, the City Council passed Local Law 142—now N.Y. City Admin. Code § 16-329—on December 19, 2013. Local Law 142 requires the Sanitation Commissioner to “adopt and implement rules designating expanded polystyrene single-service food articles” recyclable in New York City, and to require such recycling of soft foam within the DSNY-managed waste stream, provided that EPS “can be recycled” in a manner that is “environmentally effective, economically feasible, and safe for employees.” To inform this decision, the law requires the Commissioner to consult with the City’s recycling contractor (*i.e.*, Sims), foam manufacturers and recyclers (*e.g.*, Dart, PRI, and PRI’s customers), and any other person or group having expertise on expanded polystyrene, and to publicly report her findings by January 1, 2015.

Specifically, Local Law 142 states:

No later than January first, two thousand fifteen, the commissioner shall determine, after consulting with the department’s designated recycling contractor for metal, glass and plastic materials, manufacturers and recyclers of expanded polystyrene, and, in the commissioner’s discretion, any other person or group having expertise on expanded polystyrene, whether expanded polystyrene single service articles can be recycled at the designated recycling processing facility at the South Brooklyn Marine Terminal in a manner that is environmentally effective, economically feasible, and safe for employees. At such time, the commissioner shall report to the mayor and the council on such determination. If the commissioner determines that expanded polystyrene single service articles can be recycled in such manner, the commissioner shall adopt and implement rules designating expanded polystyrene single service articles and, as appropriate, other expanded polystyrene products, as a recyclable material and require the source separation of such expanded polystyrene for department-managed recycling.⁴⁰

Thus, Local Law 142 requires recycling soft foam if it can be done in a manner that is “environmentally effective, economically feasible, and safe for employees.”

⁴⁰ Ex. C (N.Y. City Admin. Code § 16-329(b)).

In determining whether soft foam can be recycled in an “environmentally effective” manner, the statute directs the Commissioner to focus on how much of the soft foam foodware sent to recycling processors (under Petitioners’ plan, PRI) would be turned into new and marketable material, and how much would have to be discarded to landfills or incinerators:

“Environmentally effective” means not having negative environmental consequences including, but not limited to, having the capability to be recycled into new and marketable products without a significant amount of material accepted for recycling being delivered to landfills or incinerators.⁴¹

In determining whether soft foam can be recycled in an “economically feasible” manner, the statute directs the Commissioner to focus on whether the City will incur additional costs to pick up soft foam from residences and curbside:

“Economically feasible” means cost effective based on consideration of factors including, but not limited to, direct and avoided costs such as whether the material is capable of being collected by the department in the same truck as source separated metal, glass and plastic recyclable material, and shall include consideration of markets for recycled material.⁴²

Finally, Local Law 142 requires the Commissioner to consider whether EPS foam can be

⁴¹ Ex. C (N.Y. City Admin. Code § 16-329(a)). The City Council included this definition to address the Bloomberg Administration’s other stated concern—that New York City’s post-consumer soft foam would be too “dirty” from food contamination to be effectively washed and recycled into useful products. *See* Committee on Sanitation and Solid Waste Management 11/25/13 Hearing Tr. (“Hearing Tr.”) (excerpt), a true and correct copy of which is attached as Exhibit X, at 30:25-31:4. As discussed below and as explained to the Commissioner, PRI has been washing used polystyrene before restoring it to its original pelletized state for more than 25 years. In general, post-consumer plastics are always cleaned or washed as part of the recycling process.

⁴² Ex. C (N.Y. City Admin. Code § 16-329(a)). The City Council included this definition of “economically feasible” to address one of the Bloomberg Administration’s two stated concerns about recycling EPS. In 2013, the Bloomberg Administration estimated that “an EPS foam curbside recycling program would require the addition of the minimum of . . . 1,000 additional truck routes at a cost of [\$]70 million per year.” Ex. X (Hearing Tr.) at 27:24-28:4. It was clear from the beginning, however, that the recycling plan proposed in 2014 would allow soft and hard foam to be commingled with other recyclable metal, glass and plastic, and delivered to Sims on the same trucks currently dedicated to that purpose. The Commissioner agreed with that assessment. *See* Ex. A (Determination) at 7 (stating that “the recycling of EPS would not add additional recycling or refuse collection truck mileage due to the relatively low weight of EPS in the system, and the current excess capacity per truck shift”).

recycled in a manner that is “safe for employees”:

“Safe for employees” means that, among other factors, the collection and sorting of any source separated material does not pose a greater risk to the health and safety of persons 5 involved in such collection and sorting than the risk associated with the collection and sorting of any other source separated recyclable material in the metal, glass and plastic recycling stream.⁴³

Under Local Law 142, certain of the City’s soft foam products can be banned, but only if the Commissioner determines that soft foam foodware cannot be recycled in a “safe,” environmentally effective,” and “economically feasible” manner.⁴⁴ Notably, the Commissioner does not have discretion to ban any foam if single-service foam articles “can be” recycled within these parameters.⁴⁵

The Commissioner was to make a determination on recyclability, one way or the other, by January 1, 2015. If a negative determination, it would then be illegal to “possess, sell, or offer for use” EPS foam “single-service articles” or to “sell or offer for sale” packing peanuts in New York City starting on July 1, 2015.⁴⁶ Local Law 142 did not provide for a ban on any other foam or rigid polystyrene products.⁴⁷

E. Upon Taking Office, Mayor de Blasio Promised to Ban Soft Foam.

⁴³ Ex. C (N.Y. City Admin. Code § 16-329(a)).

⁴⁴ Local Law 142 provides that if the Commissioner determines that EPS is not recyclable, EPS “single service articles” and “polystyrene loose fill packaging” will be banned. Ex. C (N.Y. City Admin. Code § 16-329(c)). The law defines “single services articles” as “cups, containers, lids, closures, trays, plates, knives, spoons, stoppers, paddles, straws, place mats, napkins, doilies, wrapping materials, toothpicks and all similar articles that are intended by the manufacturer to be used once for eating or drinking or that are generally recognized by the public as items to be discarded after one use,” and explains that “polystyrene loose fill packaging” products are “commonly known as packing peanuts.” *Id.* § 16-329(a). The law further provides that the ban would not include “expanded polystyrene containers used for prepackaged food that have been filled and sealed prior to receipt by [a] food service establishment, mobile food commissary, or store; “ and “expanded polystyrene containers used to store raw meat, pork, fish, seafood or poultry sold from a butcher case or similar retail appliance.” *Id.* § 16-329(c).

⁴⁵ Ex. C (N.Y. City Admin. Code § 16-329(a)).

⁴⁶ Ex. C (N.Y. City Admin. Code § 16-329(c)).

⁴⁷ *Id.*

On January 1, 2014, Bill de Blasio became Mayor of New York City. When it came to soft foam, he had an agenda: instead of complying with the City’s recycling mandate, he decided to double down on a campaign promise and compel the Sanitation Department to ban soft foam.⁴⁸

On March 15, 2014, Mayor de Blasio appointed Kathryn Garcia to serve as Sanitation Commissioner. As he introduced Commissioner Garcia to the public at a press conference that day, Mayor de Blasio declared his intention to “eliminat[e] the use of styrofoam ‘in city government, then try[] to get it out of our society writ large.’”⁴⁹

By dictating the outcome as his new Commissioner took office, Mayor de Blasio flouted Local Law 142’s directive that the Commissioner alone make this recycling determination, after consulting with Sims, foam manufacturers, recyclers, and other experts.⁵⁰

F. Petitioners Presented an Incontrovertible Record to the Commissioner that Soft Foam “Can Be Recycled” “Safely,” “Effectively” and “Feasibly” as Part of a Comprehensive Recycling Plan Covering All Polystyrene Products.

That soft foam “can be recycled” in New York City, consistent with the statutory standard set by the City Council, is beyond credible dispute. After Local Law 142’s adoption, over the course of several months, Dart, Sims, and PRI presented a comprehensive recycling plan to the Sanitation Department. By September 2014, Gregory Anderson, Commissioner Garcia’s Chief of Staff, acknowledged that the “Commissioner’s research confirms foam can be

⁴⁸ When the bill that became Local Law 142 was pending before the City Council in the second half of 2013, then Public Advocate de Blasio came out “against” foam products and promised he would “get rid of them” when he took office because he believed they “really cause[] environmental harm.” Ex. D (*Bill De Blasio, “Progressive” Democrat, Fighting His Way Back Into Bid For NYC Mayor*); Ex. E (*De Blasio says he’s a fan of Mayor Bloomberg’s Styrofoam ban*). In fact, Mayor de Blasio personally spoke out in favor of a soft foam ban before assuming office and long advocated strict limits on the use of “Styrofoam” by New Yorkers. *See id.*; *see also* Ryan Sit and Erin Durkin, *As Bloomberg tries to ban Styrofoam cups, the opposition sounds off*, Daily News (Nov. 25, 2013), a true and correct copy of which is attached as Exhibit Y.

⁴⁹ Ex. G (*The de Blasio way to clean a street*).

⁵⁰ Ex. C (N.Y. City Admin. Code § 16-329(b-c)).

recycled in your residential program and that it can also be sorted at Sims.”⁵¹

At that point, the Commissioner’s focus shifted towards the details of the actual plan that would be implemented after a positive determination. DSNY employees worked with market participants identified in the statute—Dart (a “manufacturer[] . . . of expanded polystyrene”), PRI (a “recycler[] of expanded polystyrene”) and Sims (“the department’s designated recycling contractor”)—to develop a comprehensive plan that not only confirmed recycling of soft foam can be “safe,” “effective” and “feasible,” but also did so in a manner that is beneficial for the City, guaranteeing it a net financial return and expanding its recycling program to cover all polystyrene.

In other words, Petitioners laid out a concrete proposal for how recycling foam in New York City *would* work, and contemplated implementation in 2015 after the Commissioner issued a positive determination and “adopt[ed] and implement[ed] rules designating expanded polystyrene single service articles and, as appropriate, other expanded polystyrene products, as a recyclable material and require the source separation of such expanded polystyrene for department-managed recycling.”⁵²

1. Under the Recycling Plan, DSNY Trucks Would Collect Polystyrene from Residences and Deliver It to Sims at No Additional Cost to the City.

In May 2014, Dart wrote to and then met with the Commissioner and her staff. Dart informed the Commissioner that because polystyrene can be separated from other materials using optical sorting machines, the City could collect polystyrene “in the same truck as source separated metal, glass and plastic recyclables.”⁵³ Dart also described the successful recycling

⁵¹ Ex. H (Emails between Michael Westerfield (Dart) and Gregory Anderson (DSNY), dated Sep. 18-Oct. 14, 2014); *see also* Affidavit of Brandon Shaw, dated Apr. 28, 2015 (“Shaw Aff.”) ¶ 11 (“I distinctly remember that at the October 15 meeting, Sanitation Commissioner Garcia agreed that polystyrene could be recycled and that it could be collected by DSNY at no additional cost.”); Katie Pyzyk, *The Foam Fight*, Scrap (Mar./Apr. 2014), a true and correct copy of which is attached as Exhibit Z.

⁵² Ex. C (N.Y. City Admin. Code § 16-329(b)).

⁵³ Ex. N (Dart Letter to DSNY, dated May 14, 2014) at 2.

programs implemented for foam food containers in California by Dart and Burrtec Waste Industries.⁵⁴

As explained to the Commissioner in May 2014, this recycling plan would be seamlessly integrated into the City's longstanding metal, glass, and plastic ("MGP") curbside pickup program, meaning no additional trucks would be needed to deliver recyclable soft foam and other polystyrene to Sims.⁵⁵ Under this Plan, if a New York City resident disposed of a polystyrene container in a residential recycling bin, DSNY workers would collect it at curbside and deliver it along with other commingled recyclables to one of Sims's two facilities in Jersey City and South Brooklyn.⁵⁶ After that, Sims employees would use machines to sort and collect polystyrene.⁵⁷ By September 18, 2014, the Commissioner's staff agreed that foam could be placed on the same trucks as all other materials in the MGP stream and that Sims could sort the materials at no additional cost to the City.⁵⁸

2. Under the Recycling Plan, Sims Would Recover Polystyrene at Industry-Best Rates and Deliver It to PRI.

Dart committed under this plan to purchase for Sims a state-of-the-art optical sorter that would recover at least 75% of the rigid and EPS polystyrene delivered to it within weeks of

⁵⁴ *Id.*; see also Burrtec Letter to DSNY, dated May 13, 2014, a true and correct copy of which is attached as Exhibit AA, at 1 (describing Burrtec's successful residential curbside collection of foam, stating that "[w]e have successfully collected foam without adding new trucks, routes, or personnel," and explaining that the Burrtec facilities serve 1.5 million people and sort approximately 10,000 pounds of foam per month).

⁵⁵ New York City's recycling program is limited to waste from residential and public properties such as schools. See The Official Website of the City of New York, *Commercial Waste Disposal*, a true and correct copy of which is attached as Exhibit BB; The New York City Department of Sanitation, *A Summary of Sanitation Rules and Regulations* (Jan. 2015), a true and correct copy of which is attached as Exhibit CC, at 6.

⁵⁶ The "capture rate" measures the amount of a recyclable material that is separated in this manner and delivered to a materials recovery facility such as Sims.

⁵⁷ The "recovery rate" measures the amount of a given recyclable material that Sims would be able to sort out and collect with like materials.

⁵⁸ See Ex. H (Emails between Michael Westerfield (Dart) and Gregory Anderson (DSNY), dated Sep. 18-Oct. 14, 2014); Ex. A (Determination) at 7.

installation and more than 90% over time, producing higher recovery rates than those currently being achieved for many other products in the City’s residential recycling program.⁵⁹ Dart also offered to train Sims employees on the proper use of the sorter to maximize efficiency, and Sims and Dart agreed that Dart would pay to cover the cost of four additional employees.⁶⁰

Because Dart would be paying the incremental costs of implementing the plan by funding capital improvements at the Sims facilities in South Brooklyn and Jersey City, “the allocated costs [for Sims] should be lower than virtually any other material being sorted by a machine that Sims has purchased.”⁶¹

3. Under the Recycling Plan, PRI Would Buy, Clean, and Process All of the City’s Polystyrene, and the Materials Would Then Be Recycled for Use in the Manufacture of New Products.

On June 9, 2014, PRI, a polystyrene recycler located in Indianapolis, wrote to the Commissioner and explained that it was “eager” to buy *all* of Sims’s recovered polystyrene.⁶² PRI already recycles all of the types of polystyrene that could be recovered at Sims, including products targeted by Local Law 142 like soft foam foodware as well as products not targeted including other expanded polystyrene products like foam coolers and packing materials, and

⁵⁹ See Ex. P (Dart Letter to DSNY, dated Aug. 27, 2014) at 1; Ex. N (Dart Letter to DSNY, dated May 14, 2014) at 2. As Dart explained in its May 14 letter to the Commissioner, that optical sorter has been used by other MRFs to identify and capture between 90% and 95% of foam foodservice containers, with comparable recovery rates for other polystyrene items. *Id.* Titus, a materials recovery facility located in Los Angeles, currently uses the same optical sorter to sort EPS foam and has a 90-95% recovery rate. Affidavit of Mike Centers, dated Apr. 27, 2015 (“Centers Aff.”) ¶ 6.

⁶⁰ See Dart Letter to DSNY, dated June 17, 2014, a true and correct copy of which is attached as Exhibit DD, at 2 (explaining that “programming an optical sorter requires a commitment to continually work with the equipment to teach it to successfully sort certain materials” and that “[t]he manufacturer representative for their optical sorter should be present and Dart will pay for their time to properly program the sorter”); Ex. L (Emails between Dart and Sims, dated Dec. 12-19, 2014).

⁶¹ Ex. N (Dart Letter to DSNY, dated May 14, 2014) at 2.

⁶² PRI Letter to DSNY, dated June 9, 2014, a true and correct copy of which is attached as Exhibit EE, at 1. In 2013, PRI approached Dart seeking to identify potential new sources of polystyrene. PRI told Dart that the markets for post-industrial scrap foam were tapped out and that to meet PRI’s customer’s demand for raw material, PRI needed to access sources of post-consumer foam and other polystyrene.

rigid polystyrene plastics.⁶³

PRI, which has recycled polystyrene since 1988, has the technology, the capacity, and the incentive to recycle all of New York City’s polystyrene.⁶⁴ Indeed, in 2014, PRI “washed and processed approximately 70 million pounds of used plastic, approximately 50 million pounds of which was used expanded polystyrene and rigid polystyrene,” including “both post-industrial and post-consumer” polystyrene.⁶⁵ In addition, PRI currently recycles other plastics including high density polyethylene and polypropylene and has “dealt with contaminated streams for many years with many different plastics and [has] cleaned food-contaminated bales of expanded polystyrene from collection drop-off sites before.”⁶⁶ “The process [PRI] would use to process Sims’ bales is nothing new,” as PRI does it “every day materials including high density polyethylene, polypropylene, and polystyrene.”⁶⁷

PRI explained to the Sanitation Department that its customer demand for polystyrene is five times greater than the amount of polystyrene waste produced by New York City.⁶⁸

That PRI has the facilities to handle this waste is also assured. In an August 27, 2014 letter to the Commissioner, Dart explained that it had partnered with PRI to invest in a multi-million dollar recycling facility “dedicated specifically to recycling post-consumer foam cups,

⁶³ *Id.* (discussing PRI’s offer to buy and recycle the City’s “foam cups” and “virtually all of your other foam products,” as well as rigid polystyrene).

⁶⁴ *See* Shaw Aff. ¶¶ 16-22 (describing the process by which PRI would recycle Sims’ bales of mixed polystyrene from start to finish); *see also* Ex. EE (PRI Letter to DSNY, dated June 9, 2014) at 1 (stating that PRI has a “particular expertise” in recycling #6 plastic like foam cups). PRI also gave Sims’ field team a tour of its facilities and demonstrated its process of recycling polystyrene from start to finish. *See, e.g.*, Shaw Aff. ¶ 14 (stating that Mr. Shaw personally “showed the Sims representatives our operations” and that the representatives “indicated that they were impressed with our set-up and how our new facility would work”).

⁶⁵ *Id.* ¶ 3.

⁶⁶ *Id.* ¶¶ 3, 15.

⁶⁷ *Id.* ¶ 15.

⁶⁸ *See id.* ¶ 6 (“We told the Commissioner that we had so much demand for recycled polystyrene that we could ‘handle a 100% recycling rate for a City five times the size of NYC. . . . None of these facts have changed—the City’s recycled polystyrene is still in very high demand.”); Ex. M (PRI Letter to DSNY, dated Sep. 29, 2014) at 1.

foam take-out containers and other used foam and rigid polystyrene materials collected through curbside pick-up programs across the country.”⁶⁹ PRI will complete this build-out in 2015 and have a capacity of 100 million pounds (or 50,000 tons) of material per year.⁷⁰

On November 4, 2014, DSM—a research group commissioned by the Natural Resources Defense Council—toured PRI’s expanding Indianapolis facilities and found that “DART’s financial and technological strength, and PRI’s twenty plus years of PS reclaiming experience” represented a “genuine effort” to address the City’s polystyrene recycling needs.⁷¹

PRI and its customers turn processed, recycled polystyrene into a wide array of “new and marketable products,” such as office supplies, decorative molding, and picture frames.⁷² In addition, Sanitation Department Deputy Commissioner Bridget Anderson and representatives from Sims travelled to Dart’s facilities in Corona, California and to NEPCO, a picture frame manufacturer in Pomona, California, to observe how “dirty” foam is being washed and recycled into “new and marketable products.” Given PRI’s experience and DSNY’s tours of these California facilities, there can be no doubt that “dirty” foam “can be recycled.”⁷³

⁶⁹ Ex. P (Dart Letter to DSNY, dated Aug. 27, 2014) at 1.

⁷⁰ Shaw Aff. ¶ 4.

⁷¹ DSM Environmental Services, Inc., *Review of Economic Feasibility of Adding Food Service EPS to NYC’s Recycling System*, dated Dec. 16, 2014 (“DSM Report”), a true and correct copy of which is attached as Exhibit FF, at 15.

⁷² Shaw Aff. ¶¶ 22-23 (listing various products that PRI’s customers currently manufacture using PRI’s processed polystyrene); Ex. P (Dart Letter to DSNY, dated Aug. 27, 2014) at 2; *see also* Ex. O (Dart Letter to DSNY, dated Nov. 20, 2014) at 2. PRI’s largest customer for finished goods (as opposed to reclaimed raw material) is the office supply manufacturer 3M, which sells recycled polystyrene tape dispensers and other office products. Shaw Aff. ¶ 23.

⁷³ The notion that foam cannot be recycled is an old myth based on stereotypes and outdated technology, which fails to account for the market demand for polystyrene that has driven innovation in this field over the past 20 years. With the limited exception of so-called “packing peanuts,” most types of consumer-use foam can be washed, re-densified, and extruded into raw material useful for new manufacturing. In fact, the properties that make polystyrene such as soft foam a good packaging material for food and liquids also make it easy to clean and recycle into raw material comparable to virgin polystyrene. Environmental economists agree that sorting mixed polystyrene and washing used polystyrene are costs that can be justified by comparatively higher prices for new and post-industrial (clean) scrap polystyrene. *See* Ex. B (BRG Report) at 5-6; Ex. FF (DSM Report) at 11 (stating “It is DSM’s professional opinion that if the wash line functions effectively (from a process,

PRI's customers are driving its expansion. On September 29, 2014, PRI wrote to the Commissioner, detailing manufacturers' demand for post-consumer polystyrene.⁷⁴ PRI's letter explained that the markets for the material are "robust," that PRI recycled 30,000 tons of polystyrene in 2013 alone, and that its customers had a demand of up to 90,000 tons per year.⁷⁵ In contrast, the City produced only 10,325 tons of soft foam foodware waste in 2013.⁷⁶

PRI attached a list of 21 buyers that would compete to purchase the City's materials once PRI processed it.⁷⁷ These customers include not only 3M but affiant Princeton Moulding Group, LLC, a New Jersey-based manufacturer of picture frames and architectural extruded mouldings, with demand of 27,000 tons per year, and affiant MCS Industries, Inc., a polystyrene recycler and the largest manufacturer of picture frames and wall décor in the U.S.⁷⁸

On October 9, 2014, the Foodservice Packaging Institute submitted a report to the Commissioner from independent environmental economists from the Berkeley Research Group ("BRG") confirming that demand for recycled polystyrene is robust. Combining information

yield rate, and cost point of view) that PRI is capable of producing a pelletized PS that is marketable from the resulting washed material.").

⁷⁴ Ex. M (PRI Letter to DSNY, dated Sep. 29, 2014).

⁷⁵ *Id.*

⁷⁶ Ex. J (2013 Waste Study) at 9; *see also, e.g.*, Affidavit of Richard Master, dated Apr. 23, 2015 ("Master Aff.") ¶ 4, 6 (stating that MCS recycles "between 8 and 10 million pounds [4,000 to 5,000 tons] of EPS per year" and that MCS, which is "always seeking more opportunities in the marketplace," has "a demand of 500,000 pounds [2,500 tons] of EPS per month"); Affidavit of Gary Frederick, dated Apr. 27, 2015 ("Frederick Aff.") ¶ 4 ("We want to purchase as much recovered EPS as possible. Currently, demand for polystyrene in the United States exceeds supply."); *see also* Affidavit of Tae Hwang, dated Apr. 27, 2015 ("Hwang Aff.") ¶ 11 ("[A]t the right price, we could buy unlimited polystyrene. We have enough demand to sell any amount of surplus processed EPS.").

⁷⁷ Ex. M (PRI Letter to DSNY, dated Sep. 29, 2014) at 2-4; *see also* Shaw Aff. ¶¶ 4-6 (stating that PRI has a "current demand of more than 15 million pounds per month" and has identified "many companies that would purchase recycled polystyrene from PRI").

⁷⁸ *See* Frederick Aff. ¶ 3 (co-owner of Princeton Moulding stating that "Princeton was eager to purchase for recycled polystyrene from PRI in Indiana" and that Princeton "has a high demand for recovered polystyrene, and . . . currently process[es] between 300,000 and 400,000 per month"); Master Aff. ¶¶ 2, 6 (CEO of the largest manufacturer of wall décor and picture frames in North America stating that if "PRI offered EPS to us at a favorable price, we would have bought recycled polystyrene from PRI, and we told PRI that we have a demand of 500,000 pounds of EPS per month"); *see also* Hwang Aff. ¶ 11 (stating that NEPCO could buy "unlimited polystyrene" "at the right price").

from New York State, industry groups, and independent investigation, BRG’s report identified 135 companies in the United States that buy or reclaim recycled polystyrene for manufacturing purposes.⁷⁹ That list included PRI, as well as many of its competitors, demonstrating the reason PRI has been willing to invest in washing post-consumer soft foam foodware and tapping New York City’s entire polystyrene supply.⁸⁰

On October 15, 2014, PRI, Dart, and Sims representatives met with DSNY officials. At that meeting, PRI reiterated that it had capacity to process 12,500 tons of polystyrene per year and made clear that it would add capacity in anticipation of Sims’s high recovery rates. For its part, Sims explained that it sorted a test bale of mixed polystyrene the previous day and that it “looked good,” meaning that it would meet PRI’s specifications. DSNY officials encouraged these market participants to continue advancing their recycling plan.

On November 11, 2014, Sims toured the PRI facility. According to PRI’s Brandon Shaw: “After I showed the Sims representatives our operations, they indicated that they were impressed with our set-up and how our new facility would work.”⁸¹ A week later, on November 18, 2014, Sims and Dart representatives met with the Commissioner to further discuss the recycling plan.

4. This Recycling Plan Would Ensure the Recycling of Polystyrene into New, Marketable Products Without Any Significant Amount of Material Accepted for Recycling Ending Up Being Landfilled.

At that time, Petitioners explained to the Commissioner that the City’s polystyrene could be turned into “new and marketable products without a significant amount of material accepted for recycling being delivered to landfill.”⁸² PRI committed that it would process all of the polystyrene it purchased from Sims and that virtually none of the polystyrene it “accepted for

⁷⁹ Ex. B (BRG Report) at Attachment B.

⁸⁰ *See id.*

⁸¹ *Id.*

⁸² *See* Ex. C (N.Y. City Admin. Code § 16-329(a)).

recycling” would be sent to landfill.⁸³ As PRI’s Brandon Shaw recalled from the October 15, 2014 meeting,

I distinctly remember that at the October 15 meeting, Sanitation Commissioner Garcia agreed that polystyrene could be recycled and that it could be collected by DSNY at no additional cost. The only concern the Commissioner expressed is that she wanted to be sure that we would not be simply disposing of NYC’s materials in landfills before our build-out was complete, and we responded that no material sent to us would be landfilled. We explained that we would warehouse any excess polystyrene until we were prepared to process it.⁸⁴

Shaw added:

The Commissioner’s statement in the ‘Determination on the Recyclability of Expanded Polystyrene’ that PRI would process only 25% of the material it receives from Sims is completely false and without any basis whatsoever. We did not tell and never would have told that to anyone—including Dart and/or the Commissioner—because the only materials that PRI would intentionally discard to landfill are contaminants, such as food residue and other non-polystyrene material, in the bales purchased from Sims. As described above, all of the polystyrene we received from Sims would be intended for recycling and only an insignificant amount would be landfilled.⁸⁵

Thus, the recycled foam processed by PRI would not have been landfilled to any significant degree. Based on its continuing expansion and excess capacity, PRI has committed to being “ready and able to buy and recycle all of Sims’ polystyrene if the Commissioner’s determination is reversed.”⁸⁶

During 2014, Petitioners also explained to the Commissioner how foam can be recycled in an economically feasible manner. Dart assured the Commissioner that “markets for recycled

⁸³ *Id.* ¶ 7 (“PRI assured the Commissioner that it expected all or virtually all of the EPS it accepted for recycling to be used to manufacture new products, and thus, no significant amount of the EPS that PRI accepted for recycling would end up being landfilled or delivered to incinerators”).

⁸⁴ *Id.* ¶ 11.

⁸⁵ *Id.* ¶ 10.

⁸⁶ *Id.* ¶ 25.

material” are “robust” and that Sims would have a guaranteed buyer for all of the foam it recovered.⁸⁷ Dart also explained that it has “successfully sold all of the material [Dart has] processed” at its California facilities, and that similar foam recycling programs lose only a “minimal” amount of material due to contamination.⁸⁸

5. In Late 2014, at the Commissioner’s Behest, Sims, PRI, And Dart Struck a Deal to Recycle All of New York City’s Polystyrene.

By late 2014, all of the pieces of the recycling plan were in place. After Commissioner Garcia’s Chief of Staff, Gregory Anderson, confided that “the Commissioner’s research confirms foam can be recycled,”⁸⁹ Dart representatives pressed to meet again with the Commissioner. At the November 18, 2014 meeting, she expressed a desire to move forward with the recycling plan and urged Dart to negotiate a contract with Sims to buy the City’s polystyrene. The Commissioner told Dart that a deal with Sims would “go a long way” to giving her the support she needed when confronted by environmental groups, City Council members, and the de Blasio Administration to approve a recycling program for soft foam.

On December 12, 2014, PRI, Sims, and Dart reached an agreement in principle whereby PRI would buy *all* of the mixed polystyrene sorted and baled by Sims, at a favorable market price guaranteed by Dart.⁹⁰ For the first five years of the recycling plan, PRI would purchase all of Sims’s mixed bales at a favorable market price. Sims retained the right to sell the bales for even more if other buyers outbid PRI, and Dart obtained for PRI a “right of first refusal.”

The parties agreed to go to contract once the Commissioner declared EPS foam

⁸⁷ Ex. N (Dart Letter to DSNY, dated May 14, 2014) at 2 (stating that Dart will guarantee Sims a favorable market price for five years and that for food foam alone, that could “generate approximately \$1,000,000 revenue” for Sims); *see also* Ex. M (PRI Letter to DSNY, dated Sep. 29, 2014).

⁸⁸ *See* Ex. N (Dart Letter to DSNY, dated May 14, 2014) at 1.

⁸⁹ *See* Ex. H (Emails between Michael Westerfield (Dart) and Gregory Anderson (DSNY), dated Sep. 18-Oct. 14, 2014).

⁹⁰ *See* Ex. L (Emails between Dart and Sims, dated Dec. 12-19, 2014) (detailing Dart’s agreement to pay Sims a minimum of \$35,000 per month to cover “the costs [Sims] described, including but not limited to, 4 staff persons, machinery, electricity charges, and compressors”).

recyclable in New York, which would ensure a long-term supply of such material. Dart and Sims scheduled a joint meeting with the Commissioner on December 19, 2014 to finalize the details of the recycling plan.⁹¹

G. In January 2015, at the Mayor’s Direction, the Commissioner Issues a Sham Determination, Banning Food Foam and Relegating the Rest of the City’s Polystyrene to Landfills.

As Sims, PRI, and Dart were finalizing plans to add polystyrene to New York City’s recycling program and to rectify the City’s problem of rigid polystyrene piling up in local landfills, Mayor de Blasio intervened to impose his will on the Commissioner. On December 18, 2014, the day before the Commissioner was set to sit down with Sims and Dart, so that Sims and Dart could share that a deal had been reached in principle, the Mayor’s Office summoned the Commissioner to City Hall for a closed-door meeting. The Commissioner left that meeting with the Mayor’s marching orders: DSNY was to ban soft foam, regardless of the merits of recycling it.

It was the Mayor’s Office that instructed the Commissioner to issue a negative Determination. Despite repeated FOIL requests and appeals, both the Mayor’s Office and DSNY have refused to produce relevant communications. Indeed, the Mayor’s Office has failed to respond at all to Petitioners’ FOIL appeal, in violation of Section 89(4)(a) of the Public Officers Law. A high-ranking government official privately confirmed that the Mayor’s staff held a meeting with the Commissioner to discuss Local Law 142 on December 18. Furthermore, a person close to DSNY confirmed that he has been informed by a high-ranking DSNY official that the Commissioner was prepared to issue a positive determination on recycling, based on the record evidence, but the Mayor’s Office intervened to direct her to ban soft foam.

On January 1, 2015, the Commissioner issued her decision banning EPS.⁹² While acknowledging that it would be “safe for [DSNY and Sims] employees” to collect EPS, she

⁹¹ See *id.*

⁹² See Ex. A (Determination).

concluded that it was neither “economically feasible” nor “environmentally effective” for the City to recycled EPS.⁹³

The Commissioner’s “findings” regarding economic feasibility and environmental effectiveness are riddled with factual errors, false assumptions, material omissions, and misrepresentations unsupported anywhere in the record. Her written Determination reflects a post-hoc rationalization to try to justify a predetermined decision. Most egregiously, the Commissioner predicates her “findings” regarding economic feasibility and environmental effectiveness on the fundamentally false premise that there are “no economic markets in existence” that would “purchase and recycle the EPS that would be collected” in New York City, so these materials would end up having to be “landfilled.”⁹⁴

The Commissioner also distorts the data provided by Dart, Sims, and PRI to suggest that foam cannot be recycled in an “environmentally effective” manner. Her written determination falsely claims that “[a]ccording to Dart,” PRI will initially capture and clean only 25% of the EPS material from New York City, suggesting that “a significant majority of the NYC EPS would be landfilled by either [Sims] or by PRI.”⁹⁵ Neither Dart nor PRI told her any such thing.⁹⁶ Indeed, PRI confirmed to her that “we would process effectively 100% of the polystyrene we receive” and none of what it “accepted for recycling” would be sent to landfill.⁹⁷

The Commissioner’s determination contains a slew of other errors and falsehoods, as detailed in Appendix A to the Petition.

Rather than opining on the recyclability of foam itself, as Local Law 142 required, the

⁹³ *Id.* at 4, 5, 7.

⁹⁴ *Id.* at 1, 9.

⁹⁵ *Id.* at 6.

⁹⁶ *See Shaw Aff.* ¶ 10 (“The Commissioner’s statement in the ‘Determination on the Recyclability of Expanded Polystyrene’ that PRI would process only 25% of the material it receives from Sims is completely false and without any basis whatsoever. We did not tell and never would have told that to anyone—including Dart and/or the Commissioner—because the only materials that PRI would intentionally discard to landfill are contaminants.”).

⁹⁷ *See id.* ¶ 7.

Commissioner emphasized instead that “the proposed [recycling] program does not provide enough guarantees” and could not be implemented “as of January 1, 2015.”⁹⁸ In other ways, the Commissioner based her determination on conditions that simply do not exist in the statutory framework at all.

Indeed this law did not require “guarantees.” It simply required the Commissioner to recycle if recycling was “economically feasible” and “environmentally effective.” Here, it is indisputable that a buyer existed, that an agreed-upon price had been reached, and that the foam would have been recycled and turned into new, marketable products, not landfilled.

This law also did not require any drop-dead date by which recycling must begin; it only required a date by which the Commissioner must make a determination. And it certainly could not have required such a recycling plan to be in place on January 1, 2015, which is the date by which the Commissioner was to decide on recycling. Market participants were waiting to act upon that decision, not implementing might never be adopted. Again, this is evidence of the Commissioner manufacturing “reasons” nowhere to be found in the statutory standard, to try to justify her negative determination.

LEGAL STANDARD

Article 78 of the New York Civil Practice Law and Rules authorizes Petitioners to bring this special proceeding to (i) compel the Commissioner to “perform a duty enjoined on it by law,” and (ii) to annul this “determination,” which was “made in violation of lawful procedure,” “affected by an error of law,” “arbitrary and capricious,” and “an abuse of discretion.” CPLR § 7803(1); *id.* § 7803(3). An action is arbitrary if it is taken “without a sound basis in reason and generally without regard to the facts.” *Nestle Waters N. Am., Inc. v. City of New York*, 990 N.Y.S.2d 512, 514 (1st Dep’t 2014). The test for whether an agency acted arbitrarily and capriciously is “whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.” *Id.* (internal quotations omitted). This

⁹⁸ Ex. A (Determination) at 9.

Court's review of the determination must be "more than a[] perfunctory review of the factual record in order to determine whether the record could conceivably support the decision." *See Rizk v. Long Term Disability Plan of Dun Bradstreet Corp.*, 862 F. Supp. 783, 789 (E.D.N.Y. 1994).

First, an agency's determination may not rest on fundamental errors of fact. *See Sierra Club*, 701 F.2d at 1035 (finding that where a determination was "made in reliance on false information, developed without an effort in objective good faith to obtain accurate information," it "cannot be accepted as a 'reasoned' decision"); *see also Gerber Prods. Co. v. N.Y. State Dept. of Health*, No. 1628-14, 2014 WL 7745848, at *3 (Sup. Ct. Albany County Aug. 21, 2014) (holding that agency must explain key numerical criteria of its decision). Avoidance of material facts renders an action "necessarily arbitrary." *See Sierra Club*, 614 F. Supp. at 1516 (finding agency's decision arbitrary where it relied on conclusions in an environmental impact statement that were not developed in good faith).

Second, when there is a clear duty to perform a given act, the fact that some exercise of discretion must be made in the course of performing it does not prevent a court from entertaining mandamus to see that the act is performed. *See* David D. Siegel, *N.Y. Prac.* §560 (5th ed.) ("[T]he fact that exercises of discretion lie along the way does not prevent the courts from making sure the department takes the trip."); *Natural Res. Def. Council, Inc. v. N.Y. City Dep't of Sanitation*, 83 N.Y.2d 215, 221 (1994) ("The clear import of the word[] used [*i.e.*, 'shall'] is one of duty, not discretion."). Any action taken by an administrative agency must be consistent with the policies contemplated by the legislature—including laws that mandate the promulgation of rules. *See N.Y. Statewide Coalition of Hispanic Chambers of Commerce v. N.Y. City Dep't of Health and Mental Hygiene*, 110 A.D.3d 1, 9 (1st Dep't 2013). Furthermore, agencies may not engage in broad-based public policy determinations which are properly left to the legislative body. *See id.* at 7-8 (enjoining respondent New York City Board of Health from enforcing ban on large sodas where agency acted in excess of its statutory authority).

Third, "[n]ew language cannot be imported into a statute to give it a meaning not

otherwise found therein.” *Chem. Specialties Mfrs. Ass’n v. Jorling*, 85 N.Y.2d 382, 394 (1995); *accord, Raritan Dev. Corp. v. Silva*, 91 N.Y.2d 98, 104 (1997). Questions of pure statutory reading and analysis require no deference to the agency’s determination. *See Roberts v. Tishman Speyer Properties, L.P.*, 874 N.Y.S.2d 97, 104 (1st Dep’t 2009).

Fourth, an agency may not pre-judge an issue when its enabling statute requires consultation and review. *See Sierra Club*, 701 F.2d at 1032 (finding agency decision to issue permit arbitrary, capricious, and an abuse of discretion where decision could “only be explained as resulting from an almost fixed predetermination.”). Resort to “[p]ost hoc rationalization” to reach a predetermined outcome “cannot substitute” for the “considered” judgment the law requires of government decision-makers during the initial review process. *N.Y. State Chapter, Assoc’d Gen. Contractors of Am. v. N.Y. State Thruway Auth.*, 88 N.Y.2d 56, 75 (1996). Nor can an administrative agency do the bidding of an executive shut out of the legislative process. *See N.Y. Statewide Coalition of Hispanic Chambers of Commerce*, 110 A.D.3d at 8.

ARGUMENT

The Commissioner had before her a recycling plan developed by market participants that met all of the statutory criteria for recycling. Hence, the City Council mandated that she implement soft foam recycling in that circumstance. Her refusal to do so and her decision to instead impose a ban on soft foam at the Mayor’s behest cannot stand.

The City’s soft foam ban must be reversed for multiple, independent reasons. First, applying the clear statutory standard of Local Law 142 to the indisputable facts here, soft foam “can be recycled” in a manner that is “environmentally effective,” “economically feasible,” and “safe for employees.”⁹⁹ Second, because market participants (including Petitioners Dart and PRI) committed to the Commissioner that they would recycle soft foam at a net financial return to the City and without any substantial portion of it “accepted for recycling” ending up in landfills, the Commissioner was mandated under Local Law 142 to adopt and implement a

⁹⁹ Ex. C (N.Y. City Admin. Code § 16-329).

recycling plan; she had no authority to ban soft foam at that point. Third, the Commissioner misapplied Local Law 142 and twisted it beyond recognition by engrafting new requirements onto the statute nowhere to be found in its plain language—namely, that any recycling plan had to be “guaranteed” and in place by January 1, 2015. Fourth, the Mayor’s Office predetermined the outcome here for the Mayor’s own political reasons, regardless of what the evidence showed about the feasibility and effectiveness of recycling, which is the antithesis of the reasoned, objective process the City Council required of the Sanitation Commissioner.

For each and every one of these independent reasons, the Commissioner was required to implement a soft foam recycling plan and should now be compelled to do so, consistent with Local Law 142’s mandate. At the very least, the Commissioner’s determination to ban soft foam because it is supposedly not recyclable must be reversed as contrary to Local Law 142 and “without a sound basis on reason and generally without regard to the facts.” *Nestle Waters N. Am. Inc. v. City of New York*, 990 N.Y.S.2d 512, 514 (1st Dep’t 2014).

Moreover, in the interim, Petitioners respectfully request discovery to reveal the “sham” process that was conducted here and (including an order requiring the City Respondents to fully comply with their FOIL obligations), as necessary, an emergency injunction preventing this soft foam ban from going into effect during the pendency of this litigation and an evidentiary hearing to resolve any material factual disputes.

A. The Record Before the Commissioner Compels the Conclusion that EPS Can Be Recycled in a Manner that is “Economically Feasible,” “Environmentally Effective,” and “Safe for Employees.”

Local Law 142’s mandate could not have been clearer: It required the Commissioner to “determine . . . whether expanded polystyrene single service articles can be recycled . . . in a manner that is environmentally effective, economically feasible, and safe for employees.”¹⁰⁰ In making that determination, the Commissioner was to “consult[] with the department’s designated recycling contractor [Sims] . . . , manufacturers and recyclers of expanded polystyrene [such as

¹⁰⁰ Ex. C (N.Y. City Admin. Code § 16-329(b)).

Dart and PRI], and . . . any other person or group having expertise on expanded polystyrene [such as BRG].”¹⁰¹ Once presented with those three elements, the Commissioner was commanded by the City Council to “adopt and implement rules” for recycling soft foam in New York City.¹⁰²

The evidence presented to the Commissioner by those industry representatives could not have been clearer, establishing each of those elements beyond any doubt. The comprehensive recycling plan that they presented to the Commissioner would not only cost the City nothing; it would actually save the City millions of dollars in landfilling fees, recycling revenue and state-of-the-art equipment that Dart committed to privately finance in order to maximize the City’s ability to recycle plastics. Likewise, this plan would not only minimize the amount of EPS soft foam subject to Local Law 142 that would have to be landfilled; it would result in less polystyrene of all types, including foam and rigid polystyrene not affected by Local Law 142 from being landfilled. That is because this proposal called for recycling not only foodservice foam but all soft foam and rigid polystyrene, which the City was supposed to recycle since 2013 but never implemented a plan to do so, such that all of that more abundant rigid polystyrene waste has continued to end up being landfilled. In fact, Dart committed to this plan for the next five years, assuring a minimum annual return to process the City’s EPS waste for recycling; and PRI, a leading recycler and manufacturer of recycled products, committed to purchase all of that product for recycling.¹⁰³ The City doesn’t have such a guarantee for any of the metal, glass, or plastic that it accepts for recycling.

Indeed, the market for recyclable EPS was so robust, according to the expert report submitted to the Commissioner by an independent research firm (BRG), that Dart and PRI went further, getting a “right of first refusal” in order to be able to purchase all of the City’s supply.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *See, e.g.*, Ex. EE (PRI Letter to DSNY, dated June 9, 2014) at 1, 4; Shaw Aff. ¶¶ 5-6, 25.

Given that these market participants put before the Commissioner a proposal that assured the City both economic benefit to the City's coffers and environmental benefit resulting in less polystyrene of all types being landfilled, there was no question that this plan was "economically feasible" and "environmentally effective." And the Commissioner acknowledged EPS recycling would be "safe for employees." Hence, Local Law 142 required the City to recycle EPS soft foam.

In short, any rational "consideration of the markets for [this] recycled material" would have to have concluded that New York City's EPS soft foam "can be recycled" in an "environmentally effective," "economically feasible," and "safe" manner.¹⁰⁴ All of the evidence that industry representatives put before the Commissioner supported this conclusion:

1. Recycling is "Safe for Employees."

Based on the record before her, the Commissioner agreed that soft foam can be recycled in a manner that is "safe for employees."¹⁰⁵

2. Recycling is "Economically Feasible."

The Commissioner had before her uncontroverted evidence that recycling would be "economically feasible," which is defined in statute as "cost effective."¹⁰⁶ Here, the recycling plan presented by market participants would be more than "economically feasible" for the City; it would be immediately profitable, costing the City nothing and, in fact, admittedly reducing its landfill costs.

First, as previously explained, the principal consideration in determining the economic feasibility of EPS recycling for the City—namely, whether foam can be "collected" by the "same

¹⁰⁴ See Ex. C (N.Y. City Admin. Code § 16-329(a)).

¹⁰⁵ Ex. A (Determination) at 4-5 (concluding that "collection of EPS in the MGP program would not create additional hazards for Sanitation [w]orkers" and that Sims "determined that the process to sort EPS at the South Brooklyn Marine Terminal would be safe for its employees").

¹⁰⁶ See Ex. C (N.Y. City Admin. Code § 16-329(a)).

truck[s]” as those collecting the rest of the MGP stream¹⁰⁷—is conceded by the Commissioner in her determination. There, she acknowledged that “due to the relatively low weight of EPS in the system, and the current excess capacity per truck per shift,” recycling EPS would not “add additional recycling or refuse collection truck mileage” and thus would not add incremental costs.¹⁰⁸

In fact, the industry’s privately-financed recycling plan would cost the City nothing, because the City’s financial commitment would start and end with getting the City’s residential waste polystyrene to Sims. After that, market participants committed to cover the costs of adding New York City’s polystyrene to their recycling processes. Moreover, this plan would result in substantial savings for the City, which would avoid at least \$1.25 million per year in landfilling costs while spending less than \$857,000 to process that same material at Sims, for an annual savings of about \$400,000.¹⁰⁹ Furthermore, because the polystyrene being added to the City’s recycling stream would be sold to PRI at favorable market prices, the City would be entitled to a discount on the “tipping fees” it must pay Sims, pursuant to a revenue-sharing provision in Sims’s contract with the City.¹¹⁰ These savings, likely amounting to millions of dollars over the next five years alone, would be another windfall to the City’s coffers.

¹⁰⁷ Ex. C (N.Y. City Admin. Code § 16-329(a)). In advocating for a soft foam ban in 2013, Mayor Bloomberg erroneously told the City that recycling foam would require added routes for DSNY trucks and cost the City \$70 million per year. *See* Ex. T (*The Takeout Item Left on Bloomberg’s Plates*).

¹⁰⁸ *See* Ex. A (Determination) at 7; Ex. C (N.Y. City Admin. Code § 16-329(a)).

¹⁰⁹ The Determination correctly states that the City would save approximately \$400,000 per year by recycling food foam instead of landfilling it. Ex. A (Determination) at 7-8. Specifically, the Commissioner writes that the City’s “28,500 tons of EPS costs on average \$3.14 million to dispose of in landfills and at waste-to-energy facilities,” and that if “EPS was captured in the MGP program at the rate of 40% [*i.e.*, 11,400 tons], the cost to the City to process it for recycling would be \$857,000,” meaning the City could expect net savings of approximately \$400,000 per year. *Id.* Those savings prove that the recycling plan would be “economically feasible.” *See* Ex. C (N.Y. City Admin. Code § 16-329(a)).

¹¹⁰ *See* City of New York Department of Sanitation Contract with Sims Municipal Recycling of New York, LLC, Attachment B (Payment Provisions; Record Keeping; Adjustments for Inflation), dated Aug. 19, 2008, a true and correct copy of which is attached as Exhibit SS.

As industry representatives and independent experts explained to the Commissioner, “markets for recycled material” are “robust.” Indeed, there is no question here that the material recovered by Sims and sold to PRI (or others) would then be coveted for use to manufacture recycled goods, because PRI committed to buy it all and use it for that purpose.¹¹¹ Moreover, scores of companies in the United States are currently processing post-consumer expanded and rigid polystyrene with great success. BRG identified 25 companies that are end-use manufacturers (“end-users”) of processed EPS, 22 companies that are end-users as well as processors of recovered EPS foam, and 76 companies that are dedicated processors, all within the United States.¹¹² Nine of the end-users that BRG identified are located in New York State.¹¹³ Given this potential ample competition for Sims’s polystyrene, PRI not only committed to buy it all; Dart obtained a “right of first refusal” for PRI in its contract with Sims, in order to be assured of it.

Accordingly, on this uncontroverted record—where the Commissioner has acknowledged no cost to the City from recycling EPS and market participants have committed to the Commissioner to assure a robust market for these recyclables—the only conclusion that could rationally be reached here is that it is “economically feasible” for the City to recycle EPS.¹¹⁴

3. Recycling is “Environmentally Effective.”

The Commissioner also received uncontroverted evidence that recycling would be “environmentally effective,” defined in the statute as meaning EPS “accepted for recycling” would predominantly be recycled, rather than ending up in landfills.¹¹⁵ In fact, the recycling plan

¹¹¹ See, e.g., Ex. M (PRI Letter to DSNY, dated Sep. 29, 2014) at 1, 4.

¹¹² See Ex. B (BRG Report) at 1, 5, Attachment B.

¹¹³ See *id.* at Attachment B.

¹¹⁴ See Ex. C (N.Y. City Admin. Code § 16-329(a)) (defining “economically feasible” as “cost effective”); *N.Y. Skyline, Inc. v. City of New York*, 939 N.Y.S.2d 42, 45 (1st Dep’t 2012) (explaining that the “starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof”).

¹¹⁵ See Ex. C (N.Y. City Admin. Code § 16-329(a)).

that market participants presented to the Commissioner would result in less polystyrene going to landfills than under a soft foam ban alone. That is because this plan would recycle much more than Local Law 142 targeted. It would recycle virtually all forms of polystyrene—rigid and soft foam—instead of it all ending up in landfills, as it currently does. If the true measure of environmental effectiveness is avoiding having to landfill non-biodegradable polystyrene, then this plan is unquestionably more environmentally effective than a soft foam ban alone.

Consistent with the plain statutory text, no “significant” amount of EPS soft foam “accepted for recycling” would end up being landfilled. That is because PRI, which has committed to buy any made available to it, apprised the Commissioner that it will be able to recycle into new products virtually all of the EPS it is able to purchase for recycling. As PRI reported to the Commissioner, its washing and densifying process preserves virtually all of the recyclable polystyrene it accepts for recycling.¹¹⁶ Because PRI committed to make “new and marketable products” out of all the New York City polystyrene it received from Sims, the recycling rate for “material accepted for recycling” from Sims would essentially be 100%.¹¹⁷ In addition, under this recycling plan, Sims would divert much more rigid polystyrene from landfills faster than any soft foam unable to be recycled, resulting in a net reduction in landfill use by New York City. In other words, the recycling plan would actually result in less polystyrene recyclable material being delivered to landfills.¹¹⁸

¹¹⁶ See Ex. EE (PRI Letter to Commissioner, dated June 9, 2014) at 1; *see also* Shaw Aff. ¶¶ 16-22 (describing method for cleaning and processing polystyrene and how the material would be used to manufacture new products).

¹¹⁷ See Ex. EE (PRI Letter to Commissioner, dated June 9, 2014) at 1; Shaw Aff. ¶¶ 22-23. Anything approaching 100% efficiency is far beyond the standards established for other successful recycling programs in New York City. As Dart explained in a letter to the Commissioner, “yields for PET [plastic] curbside programs average 65%.” Ex. N (Dart Letter to DSNY, dated May 14, 2014) at 1.

¹¹⁸ Using the City’s own numbers, it is clear that by recycling the City’s rigid polystyrene at PRI, recycling foam would reduce the amount of rigid polystyrene sent to landfills (by the City or Sims) by about 7,731 tons per year to start (assuming an initial recovery rate of 75% at Sims). See Ex. J (2013 Waste Study) at 9; Ex. A (Determination) at 5. By contrast, soft foam lost by Sims during the sorting process would result in only about 3,097 tons of soft foam sent to landfill—meaning that for every ton of soft foam that Sims would lose to landfill, more than two tons of rigid polystyrene would be

Moreover, this recycling plan would supply end-users with highly in-demand, usable material reclaimed from the New York City’s residential waste stream.¹¹⁹ Petitioners Dart and PRI each submitted evidence to the Commissioner establishing what is well known in the industry—namely, that post-consumer food-service foam can be and is used to make longer-lasting, environmentally safe products, such as picture frames, decorative molding, plastic spoons for industrial and commercial paper, office supplies such as pens, rulers, and tape dispensers.¹²⁰ In meetings with and letters to DSNY officials, PRI explained how it uses recycled polystyrene to manufacture new products and how it would use all of the polystyrene it would be able to acquire from the City in this constructive manner.¹²¹ Furthermore, on a tour of NEPCO’s facility, a DSNY representative observed an “end-user” recycling foam.¹²²

The Commissioner was also provided with BRG’s independent expert report, which described the “broad[] market for recycled post-consumer EPS.”¹²³ BRG identified 47 manufacturers in the U.S. that use re-densified foam to make new products, including Petitioners PRI and Pactiv and affiants MCS, NEPCO, and Princeton.¹²⁴ BRG also identified 98 domestic processors that provide these manufacturers with recycled raw materials, including Petitioner

sent to PRI instead of to a landfill. On net, the recycling plan decreases landfill waste. *See* Ex. J (2013 Waste Study) at 9.

¹¹⁹ Ex. M (PRI Letter to DSNY, dated Sep. 29, 2014) at 1.

¹²⁰ *See* Ex. N (Dart Letter to DSNY, dated May 14, 2014) at 2; Ex. M (PRI Letter to DSNY, dated Sep. 29, 2014) at 2-4; Shaw Aff. ¶¶ 22-23.

¹²¹ Shaw Aff. ¶¶ 5-6, 22-23.

¹²² *See* Hwang Aff. ¶¶ 5-6 (describing how NEPCO processes EPS and then turns it into picture frame mouldings used in frames sold at retailers including Wal-Mart, Target, Ross Stores, and T-J Maxx); *see also* Frederick Aff. ¶¶ 1-3, 6, 8; Master Aff. ¶ 3-4; Ex. B (BRG Report) at 3.

¹²³ Ex. B (BRG Report) at 1.

¹²⁴ Ex. B (BRG Report) at Attachment B (“end-users” list); *see also id.* at 6 (“The CEO of MCS Industries, Inc., a picture frame manufacturer, agrees that “[t]he motivation is cost because virgin prices for PS have skyrocketed from 40-50 cents per pound to the high 80s and 90s in the last 10 years. Recycled PS is half that.”); *id.* (“Likewise, picture frame manufacturer NEPCO cites a higher demand for recycled PS in picture frames because EPS is less expensive than wood. NEPCO officials state, ‘The only thing that is inhibiting more growth is the supply. We could use five times more material.’”).

PRI and affiant NEPCO.¹²⁵

Accordingly, on this uncontroverted record—where market participants have committed to the Commissioner to recycle all polystyrene, resulting in less polystyrene waste ending up in landfills than under a partial soft foam ban alone, and assured the Commissioner of a robust market prepared to purchase all such recyclable waste, with virtually all polystyrene “accepted for recycling” being recycled—the only conclusion that could rationally be reached here is that it is also “environmentally effective” for the City to recycle EPS. Hence, because soft foam “can be recycled” in New York City, Local Law 142 mandates that it must be recycled.

So how did the Sanitation Commissioner get it so wrong? Because this result was dictated to her by the Mayor’s Office. The Commissioner was supposed to do an objective review, as local law required. Instead, this result was imposed upon her by City Hall to further the political agenda of the Mayor, who vowed as a candidate to ban foam and reiterated his intention to ban foam when he introduced the new DSNY Commissioner at her press conference.¹²⁶

B. The Commissioner’s Determination Must Be Reversed Because it is Belied by the Indisputable Factual Record.

The Commissioner acquiesced in the Mayor’s predetermined outcome, instead of issuing the only logical determination that was supported by the record before her. As a result, the Commissioner issued a written determination that arbitrarily and capriciously misstates this record and consists of irrational “findings” based on false assumptions and misstatements of fact. These egregious errors cannot support the Commissioner’s negative determination, which must be reversed.

¹²⁵ Ex. B (BRG Report) at Attachment B. This robust market is hardly a secret. A majority of the manufacturers and processors identified by BRG were located through the Northeast Recycling Council, a research organization that New York State supports. BRG identified and verified an additional 16 entities independently. *Id.*

¹²⁶ Ex. G (*The de Blasio way to clean a street*).

1. Despite the Record Evidence Compelling the Conclusion that Recycling Foam is “Economically Feasible,” the Commissioner Arbitrarily and Capriciously Determined that It Was Not.

The Commissioner conceded in her decision that the City would not need to add trucks or incur any additional costs to collect polystyrene for recycling, thereby satisfying the animating purpose of Local Law 142’s “economic feasibility” requirement. Nonetheless, the Commissioner relied on arbitrary and capricious assumptions to justify her claim that recycling EPS is not “economically feasible.” But each of these unfounded assumptions is belied by the record evidence before her and cannot undermine the inescapable conclusion that recycling EPS is “economically feasible.”

a. The Commissioner’s Determination Arbitrarily and Capriciously Required that Economic Feasibility be “Guaranteed,” Ignoring PRI’s Commitment to Buy All Recyclable Polystyrene and the “Robust” Markets that Exist for the City’s EPS.

The Commissioner imposed a requirement that is nowhere to be found in the statute—namely, that the economics of EPS recycling be “guaranteed” here. To the contrary, Local Law 142 required only that it be shown to be “feasible.” Moreover, the Commissioner claimed that “[t]here is a lack of buyers and markets that would purchase EPS from the MGP program.”¹²⁷ But that “finding” is belied by the record, as PRI, an experienced recycler, reported to her during the review process that it intended to buy all of the City’s polystyrene for the foreseeable future—and at a guaranteed price for five years—in an unparalleled deal for Sims and the City. Indeed, PRI’s Brandon Shaw recalls that, on October 15, 2014, “a DSNY employee” told him that “it was ‘very good’ that [PRI] attended” the meeting “and that if Sims was on board with [PRI’s] proposal, DSNY would be on board as well.”¹²⁸

The Commissioner’s determination arbitrarily ignores PRI’s purchase commitment and the fact that, for the first five years, Dart guaranteed Sims a favorable price—ensuring that

¹²⁷ Ex. A (Determination) at 7.

¹²⁸ Shaw Aff. ¶ 8.

“markets for recycled material” would exist and persist.¹²⁹ With that one deal alone, the recycling plan assured that there would be a recycling market and demand for Sims’s recovered material. For that reason alone, the Commissioner’s determination cannot stand. *See, e.g., Council of Trade Waste Ass’ns, Inc. v. City of New York*, 579 N.Y.S.2d 330, 332 (1st Dep’t 1992).

Moreover, the claim that “outreach to potential buyers confirmed that there is no current demand for EPS from NYC,”¹³⁰ is a red herring, as PRI had already committed to buy all of the City’s polystyrene. In fact, Dart obtained for PRI a “right of first refusal” in its contract with Sims. In any event, an independent research group (BRG) confirmed to the Commissioner that there was robust demand for recovered polystyrene—regardless of DSNY’s eleventh-hour phone calls to unspecified parties.¹³¹

b. The Commissioner Irrationally Considered Costs that the City Would Not Incur.

The Commissioner’s Determination also arbitrarily counts certain costs that the recycling plan ensured the City would not incur.¹³² For example, Dart promised the City in writing that it would cover what the Commissioner describes as the “significant up front capital and ongoing operational costs” for “equipment and technologies . . . [used] to sort EPS from a commingled

¹²⁹ Ex. K (Dart Letter to DSNY, dated Dec. 24, 2014) at 2-3.

¹³⁰ Ex. A (Determination) at 6.

¹³¹ Ex. B (BRG Report) at 1, 5. In a further attempt to undermine the economic reality justifying this plan, the Determination misleadingly emphasizes that recovered EPS material “needs to be washed and sorted before anyone will want to buy it.” Ex. A (Determination) at 8. This neglects the fact that PRI committed to purchase and wash Sims’s mixed bales of polystyrene, which would still contain food and other residue when shipped to PRI. *See Shaw Aff.* ¶ 15 (stating that “[w]e have dealt with contaminated streams for many years”). Because PRI’s business focuses on such material, PRI was unfazed by the purported purity issues that the Commissioner relies on in her written determination. *See id.* ¶¶ 10, 15. As PRI explained to the Commissioner, PRI washed 25,000 tons of recovered polystyrene in 2014 alone. *See id.* ¶ 3. BRG also concluded in its independent report to the Commissioner that “[e]nhanced washing technologies, in combination with steady collection of post-consumer EPS foodware, have created real and sustainable markets for recycled EPS foodware,” which are “expected to grow as demand for recycled EPS materials increases.” Ex. B(BRG Report) at 1.

¹³² *See* Ex. A (Determination) at 7.

load of recyclables” at Sims.¹³³ Similarly, Sims told the Commissioner that it was on board with the recycling plan and that it was prepared to hire the “two additional staff per shift” the Commissioner claims would be “required to support additional sorting lines at the facilities.”¹³⁴ It was therefore also arbitrary and capricious to count these voluntary, privately-financed costs as reasons the City could not afford to recycle soft foam.

Similarly, in addressing the clear savings the City would enjoy from recycling polystyrene instead of landfilling it, the Commissioner writes these savings off as “temporary and . . . accompanied by other future costs.”¹³⁵ But there are no such future costs, and demand for recycled polystyrene is so strong that these savings are only likely to increase. Indeed, the Commissioner does not articulate what these “costs and complications of having designated EPS as recyclable” might be—let alone provide a reason why they would outweigh the savings generated by the recycling plan.¹³⁶ Nor, in fact, does the Commissioner provide any reason to conclude that these costs would be a result of the recycling plan, and not costs the City would incur in any event or under a ban on soft foam. Under any scenario, for the foreseeable future, there would still be less polystyrene in landfills and more money in the City’s coffers.

On the other hand, the Commissioner arbitrarily and capriciously failed to consider the direct costs of *not* recycling polystyrene under Local Law 142, including the incremental direct costs of: (a) forcing City agencies, including schools and correctional facilities, to switch from foam to alternatives; and (b) landfilling (or recycling) these relatively heavier, and thus more expensive to dispose of, alternatives. One economic study published for the City before Local Law 142 took effect calculated the costs for alternatives as \$11.2 million annually—before the

¹³³ See Ex. O (Dart Letter to DSNY, dated Nov. 20, 2014) at 2; Ex. A (Determination) at 8.

¹³⁴ See Ex. L (Emails between Dart and Sims, dated Dec. 12-19, 2014); Ex. A (Determination) at 7.

¹³⁵ Ex. A (Determination) at 8.

¹³⁶ *Id.*

City even disposes of that waste in a landfill or at Sims.¹³⁷ As the independent experts from BRG explained, “One cannot perform a reasonable cost-effectiveness or cost-benefit analysis of a policy option without considering the potential costs of the policy alternative—in this case, a ban on EPS foodware.”¹³⁸ Ignoring these costs of banning foam, while pretending as though the City would bear other direct costs under the recycling plan that it would not, is the height of irrationality.

In short, the Commissioner’s convoluted attempt to justify her “finding” that it would not be “economically feasible” to recycle EPS simply reinforces that her decision was irrational.

2. Despite the Record Evidence Compelling the Conclusion that Recycling Foam is “Environmentally Effective,” the Commissioner Arbitrarily and Capriciously Determined that It Was Not.

If “environmental effectiveness” means anything, it means less polystyrene ending up in landfills. Here, the recycling plan that industry representatives presented to the Commissioner would result in less overall polystyrene going to landfills than a soft foam ban alone, because this recycling plan would include rigid polystyrene, which is readily recyclable and even more plentiful in the waste stream than soft foam, but currently being sent to landfills in the absence of any City program to actually recycle it. The Commissioner failed to take into account this recycling windfall entirely. She ignored that rigid polystyrene would also be “accepted for recycling,” meaning less overall polystyrene would end up being landfilled than a soft foam ban. Ignoring that dispositive fact, she somehow concluded this recycling plan would not be “environmentally effective.” That conclusion could not have been more irrational, and her

¹³⁷ M.B. Public Affairs, *Fiscal & Economic Impacts of a Ban on Plastic Foam Foodservice and Drink Containers in New York City* (March 2013), a true and correct copy of which is attached as Exhibit GG, at 4.

¹³⁸ Affidavit of Robin Cantor (BRG), dated Apr. 27, 2015 (“BRG Aff.”) ¶ 9; Berkeley Research Group, *Review of December 1, 2015 DSNY Determination on the Recyclability of Expanded Polystyrene* (Apr. 27, 2015) (“BRG Supp. Report”), a true and correct copy of which is attached as Exhibit HH, at 1 (“The current DSNY and DSM analyses do not consider the resulting long-term conditions for the recycling system with a ban, or fully consider the implications for the recycling end product if EPS were allowed in the recycling system.”); see also N.Y. City Admin. Code § 16-329.

attempt to “avoid the full impact of the facts” in front of her cannot stand. *See Sierra Club v. U.S. Army Corps of Eng’rs*, 614 F. Supp. 1475, 1516 (S.D.N.Y. 1985) (agency decision cannot avoid full impact of the facts).

Moreover, the Commissioner was simply wrong in claiming that “a significant majority” of the EPS “material accepted for recycling” by PRI would be “delivered to landfills,” instead of recycled into “new and marketable products.”¹³⁹ That claim is predicated on erroneous assumptions belied by the plain record before her. Indeed, under the recycling plan presented to her, market participants assured her that virtually all of the soft foam “accepted for recycling” would be recycled.

a. The Commissioner’s Determination Arbitrarily and Capriciously Required that Environmental Effectiveness be “Guaranteed,” then Disregarded the Fact that PRI Would Recycle Virtually All of the EPS It Would Be Able to Obtain.

Here, again, the Commissioner imposed a requirement that is nowhere to be found in the statute—namely, that the “environmental” benefits of this recycling plan had to be “guaranteed.”¹⁴⁰ To the contrary, the statute spoke only to a showing of “effectiveness,” which was amply met here. Moreover, the Commissioner ignored that PRI did, in fact, commit to recycle virtually all of the EPS it “accepted for recycling,” meaning no “significant” amount of that material would end up going to landfills.

The Commissioner erroneously claims that “[a]ccording to Dart, the PRI facility will initially capture and clean 25% of the EPS material brought to the facility by NYC.”¹⁴¹ But that is simply false, and nothing in the record supports that assertion.¹⁴² In fact, PRI promised in

¹³⁹ Ex. A (Determination) at 5-6.

¹⁴⁰ *Id.* at 2-3, 9.

¹⁴¹ *Id.* at 2.

¹⁴² *See Shaw Aff.* ¶ 10 (“The Commissioner’s statement in the ‘Determination on the Recyclability of Expanded Polystyrene’ that PRI would process only 25% of the material it receives from Sims is completely false and without any basis whatsoever. We did not tell and never would have told that to anyone—including Dart and/or the Commissioner—because the only materials that PRI would intentionally discard to landfill are contaminants, such as food residue and other non-polystyrene

writing to bring all of the EPS material it “accepted for recycling” to market, going so far as to promise that it would not landfill any recoverable polystyrene delivered to it by Sims.¹⁴³

On October 15, 2014, PRI told the Commissioner that “no material sent to PRI would be landfilled” and, moreover, that PRI would recycle virtually all of the polystyrene it received from the City. These commitments were effective immediately, meaning that even under the Commissioner’s arbitrary and irrational requirement that the recycling plan be implemented by January 1, 2015, PRI would still not have sent significant amounts of polystyrene accepted for recycling to landfill.¹⁴⁴ The Commissioner’s Determination, “made in reliance on false information” about this critical issue, “cannot be accepted.” *Sierra Club*, 701 F.2d at 1035 (2d Cir. 1983).

b. The Commissioner’s Determination Also Misstates How Much EPS Sims Would Recover with New, Privately Financed, State-of-the-Art Sorting Equipment.

The Commissioner miscasts Sims’s “proof of concept” using existing sorting equipment as a test of Sims’s actual capacity to recover polystyrene over time using the new, state-of-the-art equipment Dart committed to purchase for it to sort EPS. On the basis of that “concept” run, the Commissioner claimed that Sims would recover only “between 39% and 45%” of the polystyrene it received from DSNY trucks.¹⁴⁵ But the October 2014 test on which the Commissioner bases that conclusion used Sims’s existing optical sorters, which were not optimized to recover polystyrene.¹⁴⁶ The Determination also misstates Sims’s own estimates on

material, in the bales purchased from Sims.”); *see also* Ex. EE (PRI Letter to DSNY, dated June 9, 2014) at 1.

¹⁴³ *See* Shaw Aff. ¶ 11.

¹⁴⁴ *See id.*

¹⁴⁵ *See* Ex. A (Determination) at 5.

¹⁴⁶ The Commissioner’s misstatements are a mangled interpretation of events that occurred during the Commissioner’s review. On two days in October 2014, Sims demonstrated its ability to recover polystyrene by removing rigid polystyrene and EPS foam from two bales of commingled recyclables that had been delivered to Sims.

this point, suggesting that Sims considers its maximum recovery rate to be 75%.¹⁴⁷

Based on these misstatements, the Commissioner erroneously concluded that “over half of the EPS material sent to the [Sims] facility would be landfilled.”¹⁴⁸ In fact, a significant majority of such material would be processed and sent to PRI for recycling. As explained to the Commissioner, once Sims installed its new optical sorter, its *initial* recovery rate would be approximately 75%. Furthermore, Dart and Sims would target 90-95% recovery rates within weeks—long before rules designating EPS recyclable could be implemented.¹⁴⁹

c. The Commissioner Arbitrarily and Capriciously Ignored End-Users’ “Robust” Demand for Post-Consumer Recycled Polystyrene.

In the face of robust demand by manufacturers that turn recycled polystyrene into finished products, the Commissioner falsely reported that recycled polystyrene is “very low in value.”¹⁵⁰ The Commissioner also claimed that DSNY and Sims were unable to fund current find buyers of post-consumer foam. In fact, manufacturers eager for new sources of recycled

¹⁴⁷ See *id.* Internal DSNY documents produced subject to a Freedom of Information Law request reflect that the Commissioner gave credence to Sims’s actual *initial* recovery estimate of 75%. See DSNY FOIL Production, dated Mar. 5, 2015, a true and correct copy of which is attached as Exhibit II. But the written Determination downgrades Sims’s professional estimate to mere “anticipat[ion] that it could improve the recovery rate to as high as 75% over time as it fine-tunes the equipment and operations.” Ex. A (Determination) at 5. Even the DSM report contradicts this “finding,” finding instead that Sims’s losses “can be assumed to run from 20 to 30 percent of the EPS single-use food and beverage containers entering the SIMS facility.” Ex. FF (DSM Report) at 8. Moreover, a third-party audit of Dart’s Corona, California facility—which uses older machines—found that “at least 69%” of soft foam mixed with “food waste, liquid waste, and other nonplastic” can be recovered. Ex. N (Dart Letter to DSNY, dated May 14, 2014).

¹⁴⁸ See Ex. A (Determination) at 5.

¹⁴⁹ See Ex. N (Dart Letter to DSNY, dated May 14, 2014) at 2; see also Centers Aff. ¶ 6.

¹⁵⁰ Ex. A (Determination) at 6. Without consulting with NEPCO officials, the Commissioner falsely reported that NEPCO does not pay for the recycled material it re-manufactures and re-sells. *Id.* This report is simply, and egregiously, false. NEPCO purchases 60% of its material from Dart in the form of post-consumer food-service EPS washed and processed at Dart’s Corona, California facility. Hwang Aff. ¶ 5 (“[W]e purchase used EPS from various suppliers, including Dart Container Corporation (‘Dart’), who supplies us with 60% of the material that we process.”). There is no merit to the Commissioner’s claim that NEPCO’s business is subsidized, and it is disingenuous to claim that fact is based on “consulting” with NEPCO, when no such consultation occurred. *Id.* ¶ 9 (“[N]o Department [of Sanitation] representative spoke with me, and I supervise all of NEPCO’s operations.”); *id.* ¶ 10 (“NEPCO pays and has always paid Dart for our expanded polystyrene.”).

polystyrene began lining up at PRI's door shortly after the Commissioner's review began.¹⁵¹ These manufacturers—who are still standing by—would turn New York City's used food foam into a variety of “new and marketable products,” as required by Local Law 142.¹⁵²

The Commissioner irrationally determined that the City's polystyrene would not be marketable because it would “be soiled or ‘dirty’ due to being in a commingled load with multiple materials, food residue and other contaminants and/or from being utilized by consumers, creating cost and quality concerns with any attempt to recover the material.” Inexplicably, the Determination refuses to credit the fact that PRI agreed to buy all of Sims's recovered polystyrene at the purity levels Sims anticipated and to turn that recovered polystyrene into new and marketable polystyrene pellets.¹⁵³ Despite evidence that Sims had found a buyer for its “dirty” EPS, the Commissioner rests her negative determination on “contamination from food waste, labels, or other non-polystyrene materials that [Sims] would not be able to remove.”¹⁵⁴

It was arbitrary and capricious to base a negative determination on the need to clean Sims's recovered EPS, because the Commissioner's review showed that it was possible to do so

¹⁵¹ Shaw Aff. ¶ 6.

¹⁵² *Id.*; see also Hwang Aff. ¶¶ 5-6, 11; Master Aff. ¶ 6; Frederick Aff. ¶¶ 3, 6-7.

¹⁵³ See also Shaw Aff. ¶ 7 (“PRI assured the Commissioner that it expected all or virtually all of the EPS it accepted for recycling to be used to manufacture new products, and thus, no significant amount of the EPS that PRI accepted for recycling would end up being landfilled or delivered to incinerators.”); *id.* ¶¶ 5-6.

¹⁵⁴ Ex. A (Determination) at 6. Cleaning post-consumer EPS is not an untested method of reclaiming polystyrene. It is simply a cost of bringing recycled polystyrene to market, like shipping or labor costs. As PRI explained to DSNY in 2014, PRI already cleans that material. Shaw Aff. ¶ 15 (“We have dealt with contaminated streams for many years with many different plastics and have cleaned food-contaminated bales of expanded polystyrene from collection drop-off sites before. The process we would use to process Sims' bales is nothing new—we do it every day for materials including high density polyethylene, polypropylene, and polystyrene.”). Indeed, polystyrene's physical composition lends itself especially well to washing. Unlike paper, which can absorb water, oil, and other residue, foam resists liquids and can be separated from most contaminants by simple agitation in water. “Food contamination is not isolated to EPS foodware; all recyclables are contaminated when they are co-mingled curbside and still they are recycled. The fact that materials are ‘dirty’ didn't prevent NYC from recycling other types of plastic—*e.g.*, film and PET. Today, the market for recycled plastics is thriving, second only to metal.” Ex. HH (BRG Supp. Report) at 2-3.

effectively, PRI committed to do it, and demand from PRI's customers justifies the expense. Indeed, there can be no real dispute that EPS single service articles will be recycled into new and marketable products. As even the anti-recycling DSM report conceded, "PRI is capable of producing a pelletized PS that is marketable from the resulting washed material."¹⁵⁵ Likewise, the independent experts at BRG identified no barriers to entry associated with washing, and concluded that the increased costs of processing "dirty" EPS foam are justified by the still-higher market prices for virgin polystyrene.¹⁵⁶

This soft foam ban is directly at odds with the Mayor's ambitious recycling agenda otherwise. According to the Mayor's "Plan for a Strong and Just City," published just last week, the Mayor declared that it would be the City's policy going forward to "[e]nhance the City's curbside recycling program by offering single-stream recycling by 2020" and to "send zero waste to landfills by 2030."¹⁵⁷ According to the Mayor, the success of such a single-stream recycling program has been made possible by "advances in sorting and recycling technology" that "have made it easier to separate comingled material into high-value, single-commodity streams."¹⁵⁸ Of course, that stream would include all of the "dirty" "contaminants" about which the Commissioner complained throughout her written determination banning soft foam.¹⁵⁹ In fact, the Mayor claims in his latest recycling initiative to be "working with trade associations, industry groups, waste management companies, and some of the world's largest consumer goods manufacturers and retailers" to "create and expand markets for recycled materials."¹⁶⁰ If the Commissioner had pursued that approach—as Local Law 142 required—she would have realized that EPS taken from that single-stream recycling stream, even comingled with "dirty"

¹⁵⁵ Ex. FF (DSM Report) at 11.

¹⁵⁶ Ex. B (BRG Report) at 1.

¹⁵⁷ Ex. Q (One New York) at 176, 180.

¹⁵⁸ *Id.* at 180.

¹⁵⁹ *See* Ex. A (Determination) at 2, 5, 6, 8.

¹⁶⁰ Ex. Q (One New York) at 180.

“contaminants,” can be recycled for “high value.” And she should have credited the obvious advantage to recycling here -- namely, that all polystyrene waste would be recycled, meaning less overall polystyrene waste would be landfilled than under an EPS soft foam ban alone.

In short, the Commissioner’s convoluted attempt to justify her “finding” that it would not be “environmentally effective” to recycle EPS simply reinforces that her decision was irrational.

C. Local Law 142 Mandates EPS Recycling Because It “Can Be Recycled”; Hence, the Commissioner Had No Discretion to Ban Soft Foam.

The City Council made its preference crystal clear in passing Local Law 142. If it is “economically feasible” and “environmentally effective” to do so, the Commissioner:

*shall adopt and implement rules designating expanded polystyrene single service articles, and as appropriate, other expanded polystyrene products as a recyclable material and requiring source separation of such expanded polystyrene for department-managed recycling.*¹⁶¹

Based on the record before her, which demonstrated that EPS “can be recycled . . . in a manner that is environmentally effective, economically feasible, and safe for employees,” *see id.*, the Commissioner was statutorily required to promulgate these rules requiring source separation of soft foam foodware and other polystyrene. Under the statute, on this record, the Commissioner simply had no discretion to ban such material. *Cf. Natural Res. Def. Council, Inc. v. N.Y. City Dep’t of Sanitation*, 83 N.Y.2d 215, 221 (1994)) (requiring implementation of recycling program, but granting discretion within range of options).

Nonetheless, the Commissioner, ignoring the statute’s recycling mandate, imposed a soft foam ban at the Mayor’s behest and made up criteria nowhere to be found in the statute to try to justify her illegal action. For example, the Commissioner claimed that “the subsidized program proposed by Dart cannot be implemented *by January 2015* and there are *no guarantees of the ultimate economic feasibility or environmental effectiveness* of the proposed Dart program

¹⁶¹ Ex. C (N.Y. City Admin. Code § 16-329(b)) (emphases added).

sufficient to warrant a determination that EPS is recyclable as of this date.”¹⁶² Those conditions are nowhere in the statute itself. Indeed, Local Law 142 left her no discretion once industry participants presented her with an “economically feasible” and “environmentally effective” recycling plan: she had to recycle. And she simply has no legal discretion to undermine that legislative directive. *See N.Y. Statewide Coalition of Hispanic Chambers of Commerce*, 110 A.D.3d at 9 (1st Dep’t 2013) (holding that agency discretion cannot fundamentally unmake legislative policy).

Moreover, although not statutorily required to do so, market participants did effectively guarantee that this recycling program would be “economically feasible” and “environmentally effective.” Indeed, Dart provided financial backing and capital investment to support Sims in meeting PRI’s demand, and PRI committed to purchase all of this recyclable waste and put to use virtually all that it “accepted for recycling,” meaning no “significant” amount of it would end up being landfilled.¹⁶³ And the parties agreed to recycle all polystyrene, including the City’s rigid polystyrene waste that currently ends up being landfilled. To our knowledge, the City has never enjoyed such industry support for any other recyclables, and the recycling of all of the City’s polystyrene waste would go far beyond anything required under this statute. And Dart effectively guaranteed that this plan would also provide net economic benefit to the City and these industry participants from Day One. This went above and beyond the statute’s economic feasibility requirement, which was merely concerned with whether there would be any additional cost to the City in terms of trucks and manpower used to collect EPS for recycling. In fact, the City would reap a financial windfall from this recycling program.

Accordingly, because the Commissioner had no discretion to ban foam in response to

¹⁶² Ex. A (Determination) at 9 (emphases added).

¹⁶³ *See, e.g.*, Shaw Aff. ¶ 7 (“[W]e would not lose any significant amount of polystyrene material or send it to landfill.”); *id.* ¶ 11 (“We explained [to DSNY] that we would warehouse any excess polystyrene until we were prepared to process it.”). Dart likewise told DSNY that the recycling plan would be up and running by April 2015. The Determination unduly penalizes Petitioners for putting the recycling plan into action, when only “economic feasibility” needed to be shown.

concerns unrelated to economic feasibility or environmental effectiveness, the Commissioner's decision to ban soft foam must be reversed as contrary to law.

D. The Commissioner Violated Local Law 142 by Engrafting Additional Requirements onto the Statute Nowhere to Be Found in its Plain Language, Including that Any Recycling Plan Had to Be “Guaranteed” and in Effect Before the Commissioner’s Recycling Determination Was Even Made.

The “guarantees” that the Commissioner required of economic and environmental benefit find no support in the plain text of the statute and are belied by its text, which speaks only to “feasibility” and “effectiveness.” Similarly, the Commissioner’s imposition of a January 1, 2015 deadline to commence EPS recycling—an impossibility, since the Commissioner’s decision on recycling would not even be made until that date—is also nowhere to be found in the statute and inconsistent with its plain language. “New language cannot be imported into a statute to give it a meaning not otherwise found therein,” *Chem. Specialties Mfrs. Ass’n v. Jorling*, 85 N.Y.2d 382, 394 (1995), and the Commissioner’s attempt to rewrite Local Law 142 is entitled to no deference whatsoever. *See also Roberts*, 874 N.Y.S.2d at 104; *Raritan Dev. Corp. v. Silva*, 91 N.Y.2d 98, 104 (1997). Because it undermines the will of the legislature, such “engrafting” of additional requirements is barred as a matter of law. *See N.Y. Const. Materials Ass’n, Inc. v. N.Y. State Dept. of Env’tl.*, 921 N.Y.S.2d 686, 691 (3rd Dep’t 2011) (“An administrative agency may not promulgate a regulation that adds a requirement that does not exist under the statute.”) (citing *Bnei Emunim & Talmud Toradh Bnei Simon Israel v. Town of Fallsburg*, 78 N.Y.2d 194, 204 (1991)). On that basis alone, the Commissioner’s decision predicated on such impossible conditions nowhere to be found in the statute itself cannot stand.

E. The Outcome Here Was Illegally Predetermined by the Mayor’s Office.

After the Commissioner’s top aide let it be known “the Commissioner’s research confirms foam can be recycled,”¹⁶⁴ the Commissioner was then summoned to City Hall and directed to ban soft foam in New York City, regardless of the evidence. But the Executive

¹⁶⁴ *See* Ex. H (Emails between Michael Westerfield (Dart) and Gregory Anderson (DSNY), dated Sep. 18-Oct. 14, 2014).

Branch cannot exceed the delegation given it by the legislature simply to achieve a preferred policy objective of the Mayor's. *Cf. N.Y. Statewide Coalition of Hispanic Chambers of Commerce*, 110 A.D.3d at 8 (reversing ban on large soft drinks where City Council had not ceded policymaking authority to Mayor's Office or administrative agency). The statutory mandate imposed on the Executive Branch here, based on this record, simply did not permit a soft foam ban. The City Council required recycling in this circumstance. That the Commissioner acquiesced to the Mayor's demand to ban soft foam therefore explains the irrationality of this decision.

Accordingly, the Commissioner violated her statutory duty under Local Law 142. *See, e.g., Sierra Club*, 701 F.2d at 1032. But a government official may not resort to "[p]ost hoc rationalization" simply to achieve the outcome that the Mayor dictated. The law requires the Commissioner to make a "considered" judgment on the basis of the evidence before her, not to yield to arbitrary political directives. *See N.Y. State Chapter, Assoc'd Gen. Contractors of Am. v. N.Y. State Thruway Auth.*, 88 N.Y.2d 56, 75 (1996) (holding that "[p]ost hoc rationalization . . . cannot substitute for a showing that, prior to deciding in favor" of a policy, "the agency considered the goals" of the legislature); *see also Schenectady Chems Inc. v. Flacke*, 83 A.D.2d 460, 462-63 (3d Dep't 1982).

F. The Petitioners Are Entitled to Discovery and to Production of Records under FOIL to Reveal the Extent of the City's Illegal Decision-making.

Petitioners will seek expedited discovery by order to show cause, to expose the Mayor's flagrant disregard for the legislative mandate of the City Council based on his political views. As someone close to a high-ranking DSNY official has confirmed, DSNY was prepared to comply with City Council's recycling mandate until the Mayor's Office intervened. Discovery in connection with this Article 78 petition would provide Petitioners with the information exposing the Commissioner's determination for what it was—a willing violation of Local Law 142 designed to enhance the Mayor's standing with certain of his constituents, to whom he promised that he would "get" foam "out of society writ large." *See Sierra Club v. U.S. Army*

Corps of Eng'rs, 701 F.2d 1011, 1032 (2d Cir. 1983) (holding that a determination “resulting from an almost fixed predetermination,” “made in reliance on false information,” and “developed without an effort in objective good faith to obtain accurate information” “cannot be accepted as a ‘reasoned’ decision”).

The Court should also order discovery in this case because the City has stonewalled Petitioners by refusing to provide them with information pursuant to the New York State Freedom of Information Law, despite Petitioners’ counsel’s multiple and exhaustive requests under the New York Freedom of Information Law. Both DSNY and the Mayor’s Office have refused to abide by their FOIL obligations, including by refusing to disclose any communications between the Mayor’s Office, DSNY and others concerning Local Law 142 or the recyclability of soft foam. Therefore, Petitioners also seek relief under FOIL and immediate production of the documents requested.

At this time, Petitioners seek only documents related to the recyclability of expanded polystyrene and communications regarding that issue between and among the City’s officials. A copy of Petitioners’ proposed First Requests for Documents is attached as Appendix B.

1. Petitioners Are Entitled to Targeted Discovery in Order to Demonstrate that the Outcome of the Commissioner’s Decision Was Either Illegally Predetermined by the Mayor’s Office or Based on False Information

Because it is beyond credible dispute that soft foam is capable of being recycled in New York City consistent with the standard set by the City Council, discovery is especially warranted in this case. The Mayor and the Commissioner clearly controverted the will of the City Council, and information that proves this is “within the exclusive possession and knowledge of the respondents.” *See Stop BHOD v. City of New York*, 881 N.Y.S.2d 367, 2009 WL 692080, at *14 (Kings Cnty. 2009) (granting expedited discovery in Article 78 proceeding); *Town of Pleasant Valley v. N.Y. State Bd. of Real Prop. Servs.*, 253 A.D.2d 8, 15-16 (2d Dep’t 1999) (“There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action.”). Furthermore, “expedited discovery is warranted where there is ample need for it,”

especially “to determine the extent of [the respondents’] unlawful conduct.” *Stop BHOD*, 881 N.Y.S.2d at *14; *Sylmark Holdings, Ltd. v. Silicone Zone Int’l Ltd.*, 783 N.Y.S.2d 758, 774 (Sup. Ct. N.Y. County 2004).¹⁶⁵

a. The Petitioners Are Entitled to Discovery Showing How the Commissioner’s Decision was Predetermined by the Mayor.

As previously explained, industry representatives were led to believe by DSNY officials that DSNY “wanted to do a deal” to implement recycling. Indeed, one high-ranking DSNY official confirmed that but for the Mayor’s Office’s intervention, DSNY would have complied with the City Council’s mandate to recycle. To prove that the Commissioner’s determination was the product of the Mayor’s bad faith imposition of his will and to establish that the proper determination under Local Law 142 was that soft foam can be recycled, Petitioners seek discovery into communications between the Mayor’s Office, the Sanitation Department, and others, including Sims, and the documents reviewed and prepared by the Sanitation Department during the course of its months-long “review” of Petitioners’ recycling plan.

Since January 2015, the Mayor’s Office and DSNY have refused to disclose three categories of information that, upon information and belief, would show the sources of the errors that infect the Commissioner’s determination:

- Communications between the Mayor’s Office and DSNY regarding Local Law 142 and the Commissioner’s Determination;
- Internal communications in the Mayor’s Office and in DSNY regarding these topics; and
- Communications between the Mayor’s Office or DSNY and third parties, including Sims, regarding the same.

This information is critical to Petitioners’ claim that the Determination was unlawfully

¹⁶⁵ Courts have “broad discretion” in determining whether discovery is warranted. *See Nespoli v. Doherty*, 851 N.Y.S.2d 64, 2007 WL 3084870, at *3 (Sup. Ct. N.Y. County Sep. 28, 2007) (granting petitioners’ application for discovery in Article 78 proceedings against DSNY) (citing *Town of Pleasant Valley*, 253 A.D.2d at 16).

predetermined. *Cf. Lally v. Johnson City Cent. School Dist.*, 962 N.Y.S.2d 508, 512 (3d Dep't 2013) (affirming trial court's finding that further discovery was required before question of respondents' bad faith could be resolved in Article 78 proceeding).

Nor is this a fishing expedition. Given the Mayor's announcement before this review even commenced that he intended to ban soft foam¹⁶⁶ and the Commissioner's abrupt change in position following a mid-December 2014 meeting with the Mayor's Office on the eve of her determination, it is clear that the Petitioners' request for discovery should be granted to expose this sham process and to protect the process the City Council intended when it required the Commissioner alone to make this determination. *See, e.g., Lally*, 962 N.Y.S.2d at 512.

Furthermore, if the Court grants Petitioners' request but the Respondents are unable or unwilling to make a document production that sheds light on this unlawful procedure, then Petitioners should be afforded the right to question the Commissioner, her immediately responsible staff, and those she communicated with regarding the basis for her determination.

b. The Petitioners Are Also Entitled to Discovery Showing How the Determination Was Based on a Bad-Faith Review of the Evidence.

In addition to this evidence of unlawful influence by the Mayor's Office, there is also evidence that the Commissioner failed to fully perform her duty to conduct a reasoned review under Local Law 142. The basis for the Commissioner's Determination is clearly "material and necessary" to the prosecution of Petitioners' broader theory that the Determination is irrational, arbitrary, and capricious. *See Town of Pleasant Valley*, 253 A.D.2d at 16 (granting discovery of worksheets used by State equalization board where such worksheets were "centrally relevant to a determination of whether the . . . equalization rate was rational and supported by substantial evidence").

The data and documents the Commissioner used, the methodology she engaged in, and the individuals and entities she consulted with are at the heart of the inquiry into whether her

¹⁶⁶ Ex. G (*The de Blasio way to clean a street*).

decision was arbitrary and capricious. However, other than 15 heavily redacted pages of data purportedly used for the Determination, DSNY has failed to produce records of its evaluation of the recycling plan.¹⁶⁷ DSNY has refused to disclose the following critical documents that would enable Petitioners to evaluate the basis for assertions in the Commissioner's determination:

- Internal communications within DSNY regarding Local Law 142 and the Commissioner's Determination; and
- Any other evidence relied on by the Commissioner in making her Determination.

Without access to the Commissioner's data, documents, methods, and communications, which are in the sole possession and control of the Respondents, Petitioners will be unfairly prejudiced. *See Stop BHOD*, 2009 WL 692080, at *14. Petitioners should have the opportunity to review and conduct an independent analysis of any and all the information available and analyzed by the Commissioner and all draft interpretive analysis and internal communications about the Commissioner's Determination in order to address and give the Court access to the factual basis for the Commissioner's Determination. *See, e.g., Nespoli*, 2007 WL 3084870, at *3 (granting discovery into data and methodologies behind statistical estimates used by Sanitation Commissioner, where Commissioner's "chosen" defense "rel[ie]d" on those estimates as a basis for denying benefits).

First, the errors apparent on the face of the Determination suggest that the author of the Determination did not actually consider the evidence presented during the Commissioner's review and relied on evidence inconsistent with facts and figures produced by DSNY itself. For example, even though Local Law 142 requires the Commissioner to consult with the City's "designated recycling contractor" on the recyclability of foam, the Determination incorrectly reports that Sims, the City's recycling contractor, expected to recover less than half of the soft

¹⁶⁷ *See* Ex. II ("March 2015 FOIL Production").

foam delivered by City trucks to its facilities.¹⁶⁸ Petitioners are entitled to discovery about why the Determination misstates Sims's expected recovery rate. *Cf. Gerber Products Co. v. N.Y. State Dep't of Health*, No. 1628-14, 2014 WL 7745848, at *3 (Albany Cnty. Aug. 21, 2014) (granting discovery where Department of Health's determination removing petitioners' products from food subsidy program did not explain the cost criteria cited as grounds for determination). If DSNY has an explanation for these errors, Petitioners are entitled to learn what that explanation is.

Second, under Local Law 142 the Commissioner was required to "consider markets for recycled material." However, in deciding that there is no current market for recycled foam, the Commissioner, in her Determination, fails to explain the methodology or questions she used to investigate the demand for the baled mixed polystyrene.¹⁶⁹ Even though the Commissioner predicates her negative Determination on a "lack of markets for [recycled] EPS," the Determination is conspicuously lacking in both substance and methodology. If the City intends to rely on this bare-bones finding in defending the Article 78 challenge, Petitioners are entitled to discovery of the methods and means used to come to that conclusion.

New York courts regularly permit discovery of raw data and methodologies in Article 78 cases. *See, e.g., Town of Pleasant Valley*, 253 A.D.2d at 16; *Nespoli*, 2007 WL 3084870, at *3 (granting discovery into underlying data and methodologies where DSNY Commissioner relied on statistically-based arguments in defending conclusions). Given the Commissioner based her Determination on data inconsistent with the data disclosed through FOIL, the data and the methodologies she employed are clearly "material and necessary" and should be disclosed to the Petitioners and this Court. *See Town of Pleasant Valley*, 253 A.D.2d at 15-16.

¹⁶⁸ Furthermore, the Determination overstates by more than 13% the amount of soft foam deposited in the City's residential waste stream annually, unduly supporting the Commissioner's claim that losses at Sims would result in a "significant majority" of soft foam being sent to landfills under the recycling plan. *Compare* Ex. A (Determination) at 3 ("DSNY Collections" of 28,566 tons) *with* Ex. J (2013 Waste Study) (reflecting only 25,213 tons in waste stream).

¹⁶⁹ *See* Ex. HH (BRG Supp. Report) at 2.

Finally, although DSNY has claimed that counsel's request for drafts of the Commissioner's Determination are exempt under Section 87(2)(g)(iii) of the Public Officer's Law, claimed exemptions under FOIL will not prevent discovery of those records through CPLR § 3101 disclosure devices. *See Gerber Products Co.*, 2014 WL 7745848, at *3 (ordering production of document improperly denied under FOIL during Article 78 proceeding on the merits).

2. The Petitioners Are Entitled to an Order Compelling Production of the Documents They Duly Requested under FOIL.

“The people's right to know the process of governmental decision-making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality.” N.Y. Pub. Off. Law § 84; *see also* *Newsday, Inc. v. Empire State Dev. Corp.*, 98 N.Y.2d 359, 362 (2002) (granting Article 78 petition to compel production of subpoenas requested under FOIL). Since January 2015, the Mayor's Office and the Sanitation Department have refused to “provide access to the record[s] sought,” N.Y. Pub. Off. Law § 89(4)(a), or to otherwise disclose critical information that, upon information and belief, would show the sources of the errors that infect the Commissioner's determination. Such “official secrecy” flouts the public's “vested . . . right to know” and “is anathematic to our form of government.” *Herald Co. v. Feurstein*, 3 Misc. 3d 885, 890, 779 N.Y.S.2d 333, 339 (Sup. Ct. N.Y. County 2004) (quotation omitted).¹⁷⁰

The Petitioners have the right to petition this Court for an order compelling the production of the documents their counsel has requested through FOIL. *See Data Tree, LLC v. Romaine*, 9 N.Y.3d 454, 462-63 (2007) (granting Article 78 petition seeking documents improperly denied under FOIL, because agency did not meet its “burden of demonstrating that [an] exemption applies to the FOIL request” in “more than just a plausible fashion”) (internal

¹⁷⁰ Respondents' utter refusal to comply with their FOIL obligations is not only independent grounds for this Court to compel the production of the requested documents, but also further justifies an order for expedited document discovery under CPLR § 3101.

quotations omitted).

a. The Sanitation Department Has Strung Petitioners Along, Seeking to Forestall Exposure.

On January 20, 2015, counsel for the Petitioners submitted FOIL requests to DSNY, requesting copies of any drafts of the Commissioner’s Determination, any materials, data, or records relating to all tests mentioned in the Determination, any communications between DSNY and the Mayor’s Office regarding EPS, and any internal DSNY communications regarding EPS, among other things.¹⁷¹ Seeking to shed light on the basic math errors pervading the Determination, counsel also requested “[a] copy of all reports referred to” in the Determination, “including but not limited to ‘FY14 DSNY Collections’ and the ‘curbside residential waste characterization study performed in FY13,’” upon which the Commissioner purportedly relied.¹⁷²

On February 6, 2015 DSNY provided the already-published December 18, 2013, Environmental Assessment Statement associated with Local Law 142 itself, but refused to provide any documentation regarding counsel’s request for the version of the materials related to the Determination itself, including the data and records relating to technical tests mentioned in the Determination.¹⁷³ Unsurprisingly, DSNY refused to produce any versions of the Determination that might pre-date Mayor de Blasio’s December intervention, citing Public Officers Law § 87(2)(g)(iii).¹⁷⁴ Strikingly, however, DSNY also refused to produce communications between DSNY and the Mayor’s Office, or any third party, regarding EPS foam or the consultations and determinations required under Local Law 142.¹⁷⁵ Nor did DSNY disavow the existence of such documents.

¹⁷¹ FOIL letter to DSNY, dated Jan. 20, 2015, a true and correct copy of which is attached as Exhibit JJ.

¹⁷² See FOIL letter to DSNY, dated Jan. 19, 2015, a true and correct copy of which is attached as Exhibit KK.

¹⁷³ See DSNY Letter to Gibson Dunn, dated Feb. 6, 2015, a true and correct copy of which is attached as Exhibit LL.

¹⁷⁴ See *id.*

¹⁷⁵ See *id.*

DSNY has continued to string petitioners along, no doubt awaiting the end of the statute of limitations period for challenging the Commissioner's Determination. Regarding counsel's request for copies of "materials, data, or records relating to all tests" mentioned in the Determination, DSNY claimed they were continuing to research the request and would update counsel by February 27, 2015.¹⁷⁶ DSNY did not do so, despite the fact that the specific documents sought by counsel were referenced in the Commissioner's Determination, a publicly released DSNY document. On March 5, 2015, DSNY provided heavily redacted data purportedly used for the Determination.¹⁷⁷

Regarding the "communications between DSNY and the Office of the Mayor," DSNY claimed they would provide an update to counsel by March 11, 2015.¹⁷⁸ DSNY did not do that, either. Regarding requested email communications, DSNY claimed it needed a narrower scope in order to respond to the request. On February 17, in an attempt to expedite production, counsel voluntarily narrowed the scope of employees' communications sought for purposes of that FOIL request, only.¹⁷⁹ On March 5, DSNY informed counsel that DSNY would provide a determination on the requested email communications, but not until on or about May 15, about two weeks after the filing deadline for an Article 78 challenge to the Commissioner's Determination.¹⁸⁰ On April 20, counsel for the Petitioners appealed DSNY's constructive denial of these FOIL requests.¹⁸¹

Despite the fact that Section 89(4)(a) of the Public Officers Law requires the Sanitation

¹⁷⁶ *See id.*

¹⁷⁷ *See* Ex. II (March 2015 FOIL Production).

¹⁷⁸ *See* Ex. LL (DSNY Letter to Gibson Dunn, dated Feb. 6, 2015).

¹⁷⁹ *See* Email from Paul Kremer (Gibson Dunn) to Ellen Cooper (DSNY), dated Feb. 17, 2015, a true and correct copy of which is attached as Exhibit MM.

¹⁸⁰ *See* Email from Ellen Cooper (DSNY) to Paul Kremer (Gibson Dunn), dated Mar. 5, 2015, a true and correct copy of which is attached as Exhibit NN.

¹⁸¹ *See* FOIL Appeal to DSNY, dated Apr. 20, 2015, a true and correct copy of which is attached as Exhibit OO.

Department to either provide access to the requested records or explain the reason for further denial, counsel has received no further communications from DSNY. Petitioners have thus exhausted their administrative remedies for obtaining this information, and the documents requested should be compelled.

b. The Mayor's Office Has Completely Stonewalled Petitioners, Abandoning Any Pretense of Compliance with its FOIL Obligations.

While DSNY has continued to string the Petitioners along in violation of its obligations under FOIL, the Mayor's Office has opted to completely stonewall the Petitioners. The Mayor's Office never responded to counsel's January 20, 2015 FOIL request. Counsel submitted a second FOIL letter on February 4, to which the Mayor's Office responded via email on February 6, 2015, acknowledging receipt of the February 4 letter but, inexplicably, claiming that they had not received the January 20 letter.¹⁸² On February 12, 2015, the Mayor's Office sent another email again disclaiming receipt of the January 20 letter and declaring that it would not immediately produce documents responsive to counsel's requests.¹⁸³ Instead, the Mayor's Office estimated that it would not even provide its position on Petitioners' request until June 9—more than six months after the Determination issued, and more than a month from the filing of the Petition.¹⁸⁴ Counsel appealed the constructive denial of these FOIL requests on March 5, 2015.

Despite the fact that Section 89(4)(a) of the Public Officers Law requires the Mayor's Office to either provide access to the requested records or explain the reason for further denial, counsel has received no further communications from the Mayor's Office. Petitioners have thus exhausted their administrative remedies for obtaining this information, and the documents requested should be compelled.

¹⁸² See Gibson Dunn Letter to the Mayor's Office, dated Feb. 4, 2015, a true and correct copy of which is attached as Exhibit PP; Email from Brandon Joseph (Mayor's Office) to Randy Mastro (Gibson Dunn), dated Feb. 6, 2015, a true and correct copy of which is attached as Exhibit QQ.

¹⁸³ Email from Mayor's Office to Randy Mastro (Gibson Dunn), dated Feb. 12, 2015, a true and correct copy of which is attached as Exhibit RR.

¹⁸⁴ See *id.*

G. The Ban on Soft Foam Must Be Enjoined As Necessary to Prevent Irreparable Harm.

Petitioners further reserve their right to seek a temporary restraining order and, as necessary, a preliminary injunction against the imposition of this soft foam ban during the pendency of this action. Otherwise, they will be irreparably harmed if this ban goes into effect. An emergency injunction is warranted where, as here, the moving party can demonstrate “a likelihood of ultimate success on the merits, irreparable harm absent the granting of the preliminary injunction and a balancing of the equities in its favor.” *Four Times Square Assocs. v. Cigna Invs., Inc.*, 306 A.D.2d 4, 5 (1st Dep’t 2003).¹⁸⁵

Petitioners are likely to succeed on the merits of this appeal. To establish likelihood of success in order to obtain preliminary injunctive relief, Petitioners need only make a “prima facie showing,” not a “certainty of success.” *Parkmed Co. v. Pro-Life Counselling, Inc.*, 91 A.D.2d 551, 553 (1st Dep’t 1982). Indeed, a “governmental entity’s serious substantive and procedural violations of applicable laws are in and of themselves sufficient to establish a likelihood of success on the merits.” *Lee v. N.Y.C. Dep’t of Hous. Pres. & Dev.*, 162 Misc. 2d 901, 909, 614 N.Y.S.2d 694, 699 (Sup. Ct. N.Y. County 1994). In addition, where, as here, the requested “injunctive relief can be tailored to preserve the status quo with little prejudice to either side, the degree of proof required as to the elements, other than irreparable injury and the balancing of the equities, for a preliminary injunction may be accordingly reduced.” *O’Henry’s Film Works, Inc. v. Bureau of Ferry & Gen. Aviation Operations*, 111 Misc. 2d 464, 469, 444 N.Y.S.2d 509, 512-13 (Sup. Ct. N.Y. County 1981).

If a preliminary injunction does not issue, and the ban on soft foam goes into effect on July 1, 2015, Petitioners will suffer irreparable harm in the following ways: (a) the Restaurant

¹⁸⁵ Because this soft foam ban cannot take effect until July 1, 2015, *see* Ex. C (N.Y. City Admin. Code § 16-329), Petitioners do not seek an immediate injunction to prevent it from taking effect. Petitioners are hopeful that this expedited special proceeding can be resolved before they suffer irreparable harm from this illegal ban, and without disrupting the status quo under which Respondents are preparing for a ban, but Petitioners reserve their right to seek such an injunction at a later date if adverse actions give rise to the harms described herein.

Action Alliance NYC and Restaurant Petitioners Cecilio Albayero, Jose Castillo, Maximiliano Gonzales, Andres Javier-Morales, Arismendy Jerez, Tony Juela, Ruperto Morocho, Astrid Portillo, Lucino Ramos, Sergio Sanchez, and Esmeralda Valencia are likely to incur the higher costs of alternatives to foam, which will lead them to raise their prices, lose customers, lay off employees, or even go out of business;¹⁸⁶ (b) Manufacturer Petitioners Dart, Genpak, Pactiv, and Reynolds are likely to lose market share in New York City to manufacturers of foam alternatives that are not banned, and elsewhere around the country in places considering similar bans, and some will have to lay off employees;¹⁸⁷ and (c) Petitioner PRI will unjustly lose an enormous business opportunity to recycle the City’s polystyrene.¹⁸⁸

These parties will never be able to recover what they will have lost during the pendency of this action, even if they ultimately prevail in the litigation. There is no vehicle to make them whole for what happened in the interim. Such irreparable economic harm is a valid basis for injunctive relief, including where a policy causes unquantifiable loss of revenue, *Second on Second Café, Inc. v. Hing Sing Trading, Inc.*, 66 A.D.3d 255, 272 (1st Dep’t 2009), or “threatens to destroy an ongoing business concern,” *Reuschenberg v. Town of Huntington*, 16 A.D.3d 568, 570 (2d Dep’t 2005), or will result in difficulties “attracting new customers or retaining . . . existing customers” in the absence of injunctive relief, *JRT Inc. v. STG Props., LLC*, 798 N.Y.S.2d 345, at *4 (Sup. Ct. N.Y. County 2004). *See also Willis of N.Y., Inc. v. DeFelice*, 299

¹⁸⁶ *See, e.g.*, Affidavit of Eric Wulf dated Apr. 27, 2015 (“Wulf Aff.”) ¶ 10 (discussing likely layoffs at Pactiv); Affidavit of James Reilly, dated Apr. 24, 2015 (“Reilly Aff.”) ¶ 7 (discussing risk that Genpak will be required to lay off one quarter of the employees at its Middletown, New York facility); Affidavit of Jeff Wilkinson, dated Apr. 27, 2015 (“Wilkinson Aff.”) ¶ 6 (stating that the Reynolds “family of companies will be forced to lay off employees” and that Reynolds will lose approximately \$2.1 million in annual revenue because of foam ban).

¹⁸⁷ *See, e.g.*, Affidavit of Tony Juela, dated Apr. 27, 2015 (“Juela Aff.”) ¶ 7 (“If the ban on foam goes forward, my costs will be too high, and I will need to close my restaurant . . . [M]y employees will also be out of a job.”); Affidavit of Astrid Portillo, dated Apr. 23, 2015 (“Portillo Aff.”) ¶ 6 (“If the foam ban goes into effect, I will likely have to lay off an employee”); Affidavit of Maximiliano Gonzalez, dated Apr. 23 (“Gonzalez Aff.”) ¶ 5 (“I am certain that I will lose customers because of the ban on foam.”); Shaw Aff. ¶ 25 (stating that PRI is “ready and able to buy and recycle all of Sims’ polystyrene”).

¹⁸⁸ *See* Shaw Aff. ¶ 25 (stating that PRI is “ready and able to buy and recycle all of Sims’ polystyrene”).

A.D.2d 240, 242 (1st Dep’t 2002) (irreparable damage to plaintiffs is shown where, “in the absence of a restraint . . . plaintiffs would likely sustain a loss of business impossible, or very difficult, to quantify”) (internal citation omitted).

Finally, the equities favor a preliminary injunction. Respondents cannot conceivably assert prejudice from a preliminary injunction that leaves in place a recycling scheme—i.e., one in which expanded polystyrene has been used by consumers but not accepted for recycling—that has been in place since 1989. *See Sau Thi Ma v. Xuan T. Lien*, 198 A.D.2d 186, 186-87 (1st Dep’t 1993) (granting preliminary injunction where court could “perceive no great harm to defendants”). Moreover, this case is likely to be resolved in a matter of months, and under Local Law 142, the City cannot collect revenue from fines until January 1, 2016, meaning a preliminary injunction will not cost the City any revenues.¹⁸⁹

H. The Court Should Hold an Evidentiary Hearing, as Necessary, to Resolve Any Material Factual Disputes.

The record evidence put before the Commissioner by industry representatives belied her “findings” that soft foam cannot be recycled in an “economically feasible” or “environmentally effective” manner. That should end the inquiry, and the Commissioner’s decision should be reversed. But because Local Law 142 compelled the Commissioner to report the bases for her decision, she had to issue a written decision to support the Mayor’s predetermined outcome, which was full of misrepresentations and misstatements of fact. Worst of all was the big lie, which she repeated over and over: that there are “no economic markets in existence” that would “purchase and recycle the EPS that would be collected” in New York City, so those materials would end up having to be “landfilled.”¹⁹⁰ The Commissioner’s decision is predicated on that false foundation. It cannot stand without that disputed premise being tested at an evidentiary hearing. *See* CPLR § 7804(h) (“[I]f a triable issue of fact is raised in a proceeding under this article, it shall be tried forthwith.”); *see also Anonymous v. Commissioner of Health*, 21 A.D.3d

¹⁸⁹ *See* Ex. C (N.Y. City Admin. Code 16-324(f)).

¹⁹⁰ *See* Ex. A (Determination) at 1, 9.

841, 844, 801 (1st Dep’t 2005) (ordering a hearing to resolve whether Health Commissioner acted on improper motives when he refused to execute consent agreement).

The Commissioner’s written Determination contains several other egregious misstatements of fact that warrant an evidentiary hearing, including, for example, the following:

The Commissioner claimed that recycling EPS would not be “environmentally effective” because “[a]ccording to Dart,” PRI would only recycle 25% of the EPS it “accepted for recycling” from Sims.¹⁹¹ But that is false—Dart never said any such thing. And as PRI’s Brandon Shaw has attested, PRI told the Commissioner to her face that virtually all of the EPS it “accepted for recycling” would be recycled.¹⁹² That factual issue warrants a trial.

The Commissioner also claimed that “over half of the EPS material sent to the [Sims] facility would be landfilled,” and the Determination suggests that she came to that conclusion by “consult[ing]” with Titus, a materials recovery facility in Los Angeles that sorts EPS, among others.¹⁹³ This, too, was a sham. Although a DSNY representative may have visited Titus’s Los Angeles location, no one from DSNY ever consulted with the executives who run Titus, or anyone else, to these executives’ knowledge.¹⁹⁴ Had the Commissioner actually consulted with Titus officials, as Local Law 142 directed her to do and as she falsely claims to have done, then she would have realized that Titus uses the same optical sorter Dart committed to purchase for Sims, generating recovery of between 90% and 95% of the polystyrene delivered to it.¹⁹⁵ That factual issue also warrants a trial.

The Commissioner also misrepresented the EPS waste recovery expectations of the City’s own “designated recycling contractor,” Sims, by falsely suggesting that Sims expected to

¹⁹¹ See *id.* at 2.

¹⁹² See Shaw Aff. ¶ 7.

¹⁹³ See Ex. A (Determination) at 4-5.

¹⁹⁴ See Centers Aff. ¶ 5 (“DSNY did not consult with me or, to my knowledge, any other Titus executives regarding expanded polystyrene (‘EPS’) or anything else.”).

¹⁹⁵ See *id.* ¶ 6.

recover only “between 39% and 45%” of the polystyrene it received from DSNY trucks.¹⁹⁶ In fact, those numbers came from a “proof of concept” demonstration performed using existing machinery already installed at Sims and did not represent even how much polystyrene would be recovered Day One. As both Sims and Dart told the Commissioner, with the new state-of-the-art sorting equipment Dart would purchase for Sims, they expected Sims initially to be able to sort out 75% of this waste and 90% or more within weeks.¹⁹⁷ That factual issue also warrants a trial.

At the heart of this case, though, is the “sham” process in which the Commissioner was forced to engage to satisfy the Mayor’s political agenda. The fix was in, the outcome predetermined, and the “post-hoc” attempts to justify it illogical and flawed. That core factual issue also warrants a trial.

In short, the Commissioner’s decision cannot be upheld on the basis of her written determination, riddled as it is with disputed “facts” and outright errors. If the Court were to consider crediting that written determination, it would have to afford Petitioners an evidentiary hearing to explore the false premises upon which it is predicated and the “sham” process that produced it.

¹⁹⁶ See Ex. A (Determination) at 5.

¹⁹⁷ See, e.g., Ex. N (Dart Letter to DSNY, dated May 14, 2014).

CONCLUSION

The Court should order the interim relief requested here, and then grant the Petition and enter judgment, pursuant to Article 78 of the Civil Practice Law and Rules, as follows:

1. Declaring that the Sanitation Commissioner's "Determination on the Recyclability of Expanded Polystyrene" was in violation of lawful procedure, affected by errors of law, arbitrary and capricious, and/or an abuse of discretion;
2. Declaring that the Commissioner misapplied Local Law 142 and misinterpreted "recyclable," as that term is used in the statute;
3. Declaring that expanded polystyrene single service articles "can be recycled" in a manner that is "safe for employees," "economically feasible," and "environmentally effective" under Local Law 142;
4. Ordering Respondents DSNY and Commissioner Kathryn Garcia to adopt and implement rules designating expanded polystyrene single service articles and other polystyrene as recyclable materials in the City of New York, as mandated under Local Law 142;
5. Ordering Respondents DSNY and Mayor Bill de Blasio to immediately produce documents previously requested by Petitioner Dart's counsel pursuant to the New York State Freedom of Information Law;
6. Granting Petitioners expedited discovery, as requested with this Article 78 petition and subsequently in connection with this litigation;
7. Issuing a temporary restraining order and a preliminary injunction, as necessary, to enjoin Respondents from implementing any ban on expanded polystyrene single-service articles during the pendency of this litigation;
8. Holding an evidentiary hearing to resolve any material factual disputes;
9. Ordering Respondents to pay Petitioners their costs, fees, and disbursements incurred in connection with this action, including but not limited to their costs, fees, and disbursement in connection with Petitioner Dart's counsel's requests, appeals, and Article 78 petition for relief under the New York State Freedom of Information Law; and
10. Granting any such other and further relief as the Court deems just and proper.

Dated: New York, New York
April 28, 2015

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

By: Randy M. Mastro /js

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LLC, Genpak LLC, Commodore Plastics LLC, and
Reynolds Consumer Products LLC*

Appendix A

Appendix A

Sanitation Commissioner’s Determination Banning Soft Foam: Myths Versus Reality

Topic	Myths	Reality
Markets for Recycled Foam	<p>“DSNY and [Sims] were unable to find current buyers for post-consumer EPS that had been sorted and baled at [Sims]’s South Brooklyn Marine Terminal Facility.” Ex. A¹ (Commissioner’s January 2015 Determination) at 5.</p>	<p>Sims, PRI, and Dart agreed in principle that PRI would buy all the post-consumer EPS sorted and baled at Sims. Ex. L (Dec. 12-18 Emails between Dart and Sims).</p> <p>PRI identified 21 buyers for its recycled EPS. Ex. M (Sept. 29, 2014 PRI Letter) at 2-4.</p>
	<p>“[T]here are currently no established markets to purchase and recycle the EPS that would be collected in the MGP program.” Ex. A at 1.</p>	<p>PRI committed to buy all of the “dirty” EPS recovered from the City’s MGP program. Shaw Aff. ¶ 5.</p> <p>PRI’s buyers demand more than five times that amount of foam. Ex. M (Sept. 29, 2014 PRI Letter) at 1.</p>
	<p>“EPS that would be collected in the MGP program . . . is considered too ‘dirty’ by current buyers.” Ex. A at 1.</p>	<p>PRI committed to clean the material just as they currently clean polystyrene and other plastics. Shaw Aff. ¶ 15.</p> <p>“Enhanced washing technologies, in combination with steady collection of post-consumer EPS foodware, have created real and sustainable markets for recycled EPS foodware.” Ex. B (BRG Report) at 1.</p> <p>The material PRI would receive from Sims “would be perfect” for PRI’s sister company RTI’s manufacturing of cash register cores. Shaw Aff. ¶ 23.</p>

¹ References to “Ex. ___” are citations to the Affirmation of Randy M. Mastro, dated April 28, 2015.

Topic	Myths	Reality
	<p>“[Sims] conducted outreach to potential buyers and found no current market for mixed polystyrene bales.” Ex. A at 6.</p>	<p>BRG identified 101 processors and end-users of recycled polystyrene, all of which could wash polystyrene or use it once washed. Ex. B (BRG Report) at Attachment B.</p> <p>The Determination fails to state whether Sims contacted actual processors (<i>i.e.</i>, PRI’s competitors) or only end-user manufacturers, which would buy cleaned polystyrene. Ex. A at 6.</p>
	<p>“Buyers of recycled EPS require a clean, homogenous product.” Ex. A at 8.</p>	<p>PRI was prepared to purchase all the City’s bales of mixed rigid and foam polystyrene. Shaw Aff. ¶ 2.</p>
	<p>Recycled EPS from Dart’s program in California “is provided at no cost to NAPCO [sic], a picture frame and molding manufacturer in Pomona, CA.” Ex. A at 6.</p>	<p>“NEPCO pays and has always paid Dart for our expanded polystyrene.” Hwang Aff. ¶ 10.</p>
	<p>Dart’s “small, locally successful efforts to recycle EPS . . . in southern California . . . do not operate at a scale large enough to be considered viable outlets for NYC.” Ex. A at 4.</p>	<p>PRI committed to buy all of NYC’s EPS. Shaw Aff. ¶¶ 5-6.</p>
<p>Costs of Recycling</p>	<p>The City or Sims would require a “capital cost of \$2.46M” to “purchase and install[] new sort lines” at Sims. Ex. A at 7.</p>	<p>Dart committed to cover all of these costs. Ex. L (Dec. 12, 2014 Email between Sims and Dart).</p>
	<p>The City or Sims would incur “additional monthly baseline operating costs” “at least \$25K to \$35K.” Ex. A at 7.</p>	<p>Dart committed to cover all of these costs. Ex. L (Dec. 12, 2014 Email between Sims and Dart).</p>
	<p>Sims would have to hire “two additional staff per shift.” Ex. A at 7.</p>	<p>Dart committed to cover all of these costs. Ex. L (Dec. 12, 2014 Email between Sims and Dart).</p>
	<p>“[T]he quantity of EPS in a NYC recycling program, combined with an undetermined value for the material once sorted and cleaned, does not justify the ongoing investment needed to accommodate EPS in the MGP program over time.” Ex. A at 8.</p>	<p>Dart, PRI, and Sims all agreed to a privately-financed plan because it was in their own rational self-interest.</p>

Topic	Myths	Reality
<p>Amount of Polystyrene Sent to Landfill</p>	<p>“[A] significant majority of the NYC EPS would be landfilled by either [Sims] or by PRI.” Ex. A at 6.</p>	<p>Under the proposed recycling, Sims would initially landfill less than 25% of the EPS it receives and as little as 5% within a short period of time; PRI would then landfill virtually none of the EPS it receives. Shaw Aff. ¶ 7.</p>
	<p>“According to Dart, the PRI facility will initially capture and clean 25% of the EPS material brought to the facility by NYC.” Ex. A at 2.</p>	<p>Dart and PRI committed to process all of New York City’s polystyrene—and to never landfill any excess polystyrene. Shaw Aff. ¶ 7.</p> <p>Under the proposed recycling, Dart and PRI would recycle the rigid polystyrene that currently the City discreetly sends out the back door to landfills. Ex. K (Dec. 24, 2014 Dart Letter) at 2.</p>
	<p>“[Sims] would initially only capture and send to PRI approximately 50% of the EPS collected as part of the MGP program.” Ex. A at 2.</p>	<p>That number is based on “a test” of Sims’s “current optical sorters,” not the new sorters that recover 90-95% of EPS. Ex. N (May 14, 2014 Dart Letter) at 2; Centers Aff. ¶ 6(b).</p>
	<p>“[Sims] confirmed that its facilities are not built to accommodate a cleaning system for EPS.” Ex. A at 8.</p>	<p>PRI would clean Sims’s EPS, just like other plastic are currently handled. Shaw Aff. ¶ 15.</p>
	<p>“Dart has stated that the PRI facility is initially being built with the ability to process 25% of the dirty mixed polystyrene bales collected from NYC’s MGP program.” Ex. A at 5.</p>	<p>PRI would process all of the “material accepted for recycling” from NYC. Shaw Aff. ¶ 7.</p> <p>In 2014, the PRI facility processed 25,000 tons of polystyrene; the Commissioner determined that Sims would send only about 15,000 tons to PRI in the first year. Shaw Aff. ¶ 7.</p>
	<p>“Even if there were buyers for the clean material, the [Dart] facility is much too small to process the anticipated 11,400 tons per year of EPS in a NYC Program.” Ex. A at 6.</p>	<p>The City’s EPS would be processed by PRI in Indiana, not by Dart in California. Shaw Aff. ¶¶ 5-6.</p> <p>Dart’s Corona facility is proof of concept—not part of the proposed recycling.</p>

Topic	Myths	Reality
<p>Recycling Plan Timeline</p>	<p>“[I]f EPS were designated as recyclable, it would continue to be landfilled at this time.” Ex. A at 7.</p>	<p>By law, EPS recycling cannot begin until the designation is made and rules are adopted and implemented. Sims would have had machinery and workers in place before then. Ex. C (N.Y. City Admin. Code §16-329(b)).</p> <p>PRI committed to hold any excess polystyrene until it could be processed at the new facility in April 2015. Shaw Aff. ¶ 11.</p>
	<p>Optical sorter installation at Sims “would take up to two years to fully complete.” Ex. A at 2.</p>	<p>Dart and PRI told the City they would start recycling any PS Sims could sort beginning in 2015.</p>
	<p>“If, after the five year subsidy, there were still no market for EPS, DSNY and SMR would have to manage the costs and complications of having designated EPS as recyclable.” Ex. at 3.</p>	<p>After five years it would cost the City nothing to unwind the program even if it was not as successful as the parties indicated because the recycling would be privately financed. Ex. K (Dec. 24, 2014 Dart Letter) at 3.</p>
<p>Engrafting New Terms onto Local Law 142</p>	<p>“DSNY has concluded that the proposed program does not provide enough guarantees . . .” Ex. A at 2.</p>	<p>Local Law 142 says nothing about “guarantees”; it speaks only to “feasibility” and “effect.” Ex. C (N.Y. City Admin. Code § 16-329(b)).</p>
	<p>“ . . . nor could it be implemented in a timeline to warrant a determination or recyclability as of January 1, 2015.” Ex. A at 2.</p>	<p>By law, the proposed recycling could not be implemented until after a positive determination of recyclability and promulgation of enabling rules. Ex. C (N.Y. City Admin. Code § 16-329(b)).</p> <p>Sims, PRI, and Dart were ready to go for 2015. Shaw Aff. ¶¶ 11-12.</p>
	<p>“[I]t would be highly risky for DSNY to assume that . . . the program proposed by Dart would result in the establishment of a market that could be sustained over time.” Ex. A at 3.</p>	<p>Dart guaranteed a market for at least the first five years, and the Determination identifies no costs to unwind the program if necessary. Ex. K (Dec. 24, 2014 Dart Letter) at 3.</p> <p>Demand for recycled polystyrene exceeds the current supply. Reilly Aff. ¶ 10.</p>

Appendix B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of,	X
	:
RESTAURANT ACTION ALLIANCE NYC,	:
CECILIO ALBAYERO, JOSE CASTILLO,	:
MAXIMILIANO GONZALES, ANDRES	:
JAVIER-MORALES, ARISMENDY JEREZ,	:
TONY JUELA, RUPERTO MOROCHO, ASTRID	:
PORTILLO, LUCIANO RAMOS, SERGIO	:
SANCHEZ, ESMERALDA VALENCIA,	:
PLASTICS RECYCLING INC., DART	:
CONTAINER CORPORATION, PACTIV LLC,	:
GENPAK LLC, COMMODORE PLASTICS LLC,	:
and REYNOLDS CONSUMER PRODUCTS LLC,	:
	:
Petitioners,	:
	:
For Judgment Pursuant to CPLR Article 78	:
	:
– against –	:
	:
THE CITY OF NEW YORK; KATHRYN	:
GARCIA, in her official capacity as Commissioner	:
of the New York City Department of Sanitation; the	:
NEW YORK CITY DEPARTMENT OF	:
SANITATION, a charter-mandated agency; and	:
BILL DE BLASIO, in his official capacity as	:
Mayor of the City of New York,	:
	:
Respondents.	X

PETITIONERS’ FIRST REQUESTS FOR DOCUMENTS

PLEASE TAKE NOTICE that, pursuant to Article 31 of the Civil Practice Law and Rules, Petitioners Restaurant Action Alliance NYC, Cecilio Albayero, Jose Castillo, Maximiliano Gonzales, Andres Javier-Morales, Arismendy Jerez, Tony Juela, Ruperto Morocho, Astrid Portillo, Lucino Ramos, Sergio Sanchez, Esmeralda Valencia, Plastics Recycling, Inc.,

Dart Container Corporation, Pactiv LLC, Genpak LLC, Commodore Plastics LLC, and Reynolds Consumer Products LLC (collectively, “Petitioners”), through their undersigned counsel, hereby request that Respondents the City of New York, Sanitation Commissioner Kathryn Garcia, the New York City Department of Sanitation, and Mayor Bill de Blasio (collectively, “Respondents”) provide the following information and documents at the offices of Gibson, Dunn & Crutcher LLP, 200 Park Avenue, 47th Floor, New York, New York 10166, by no later than May 15, 2015.

DEFINITIONS

1. “Mayor’s Office” shall mean the office of New York City Mayor Bill de Blasio, including, without limitation, Mayor de Blasio and any officers, directors, employees, agents, consultants and attorneys thereof.
2. “Sanitation Department” shall mean the New York City Department of Sanitation, including, without limitation, Kathryn Garcia and any officers, directors, employees, agents, consultants and attorneys thereof, including without limitation Bridget Anderson, Vito Turso, Gregory Anderson, Ron Gonen, David Hirschler, Bob Orlin, and Ellen Cooper.
3. “City” shall mean the City of New York and all of its agencies, departments, functions, units, and other legal entities, both collectively and individually, including without limitation the Mayor’s Office and the Sanitation Department, and shall include all officers, directors, employees, agents, consultants and attorneys thereof.
4. “Dart” shall mean Dart Container Corporation, including, without limitation, any officers, directors, employees, agents, consultants and attorneys thereof.
5. “PRI” shall mean Plastic Recycling, Inc., including, without limitation, any officers, directors, employees, agents, consultants and attorneys thereof.

6. “Sims” shall mean Sims Municipal Recycling of New York, LLC, including, without limitation, any officers, directors, employees, agents, consultants and attorneys thereof.

7. “Sims Contract” shall mean the City of New York Department of Sanitation Contract with Sims Municipal Recycling of New York, LLC, dated September 17, 2008.

8. “Burrtec” shall mean Burrtec Waste Industries, Inc., including, without limitation, any officers, directors, employees, agents, consultants and attorneys thereof.

9. “NEPCO” shall mean NEPCO, Inc., including, without limitation, any officers, directors, employees, agents, consultants and attorneys thereof.

10. “Titus” shall mean Titus Services, Inc., including, without limitation, any officers, directors, employees, agents, consultants and attorneys thereof.

11. “Expanded Polystyrene” shall mean all blown polystyrene and expanded and extruded foams that are thermoplastic petrochemical materials utilizing a styrene monomer and processed by any number of techniques including, but not limited to, fusion of polymer spheres (expandable bead foam), injection molding, foam molding, and extrusion-blown molding (extruded foam polystyrene). For the avoidance of doubt, this definition shall also include any material considered, evaluated, or tested for recyclability under Local Law 142.

12. “Local Law 142” shall mean Local Law 142 of 2013, codified at N.Y. City Admin. Code § 16-329 (Exhibit B to the Mastro Affirmation).

13. “Determination” shall mean the Determination on the Recyclability of Expanded Polystyrene, dated January 1, 2015 (Exhibit A to the Mastro Affirmation).

14. “Petition” shall mean the verified Article 78 Petition in the above-captioned case, filed April 28, 2015.

15. “Mastro Affirmation” shall mean the Affirmation of Randy M. Mastro filed in support of the Petition on April 28, 2015.

16. “Document” is used in the broadest sense possible and shall include, without limitation, all originals and non-identical copies of: “books, papers and other things” pursuant to CPLR 2301; other printed or graphic matter of any kind or character; electronically stored data; and “records” pursuant to N.Y. Pub. Off. Law § 86(4), and shall include all communications.

17. “Communication” shall mean any transfer of information, written, oral, electronic, SMS, or otherwise, or any record or recording of any such transfer.

18. “Concerning” or “relating to” shall mean discussing, referring to, describing, evidencing, constituting, or in any way relating to the referenced matter set forth in each request.

19. “And” as well as “or” shall be both conjunctive and disjunctive, and each shall include the other whenever such dual construction would serve to bring within the scope of this request any documents that otherwise would not be brought within its scope.

20. The term “all” shall be construed as “any and all,” the term “each” shall be construed as “each and all,” and the term “any” shall be construed as “any and all.”

21. All references to the singular contained herein shall be construed to include the appropriate plural number, and all references to the plural shall be construed to include the singular as is necessary to make the request as inclusive as possible.

INSTRUCTIONS

1. You are requested to produce all responsive documents, wherever located, that are within your possession, custody, or control, or in the possession, custody, or control of your agents, employees, attorneys, accountants, or other persons acting or purporting to act on your behalf.

2. If you withhold any documents requested herein on the grounds of privilege, work product, or any other protection, include a written statement that:

- a) specifies the privilege or other protection asserted;
- b) identifies the facts supporting the applicability of the privilege or doctrine;
- c) states the general nature of the information which you refuse to provide;
- d) identifies the names, current addresses, and employment affiliations of all persons who are or were privy to the information or are otherwise familiar with the information or its contents; and
- e) specifies the date on which the information was made known to you.

3. If a portion of a document or information responsive to a request is withheld under a claim of privilege, any non-privileged portion must be provided, with the portion claimed to be privileged redacted. Do not leave any part of unanswered merely because you object to another part of the request.

4. All documents responsive to this request are to be produced in their entirety, without abbreviation or expurgation, including all attachments or other matters affixed thereto, as they are kept in the usual course of business with any identifying labels, file markings or similar identifying features, and shall be organized and labeled to correspond to the appropriate request herein. If a portion of a document is responsive, the entire document is to be produced.

5. This request shall be deemed continuing in nature and any information requested herein that is presently unavailable but which becomes available to you, or any of your attorneys, agents or representatives up to the conclusion of the proceedings herein must be provided in a supplementary response. If at any later date you obtain any additional information different from

that provided in your response, you should promptly notify counsel of the existence and content of such information and amend your response accordingly.

6. Unless otherwise specified herein, this request seeks information and documents from January 1, 2013 through the present.

DOCUMENT REQUESTS

1. All versions of the Determination and all documents cited or referred to in any version of the Determination.

2. All documents relied upon by Respondents in preparing the Determination.

3. All documents concerning any analyses, tests, experiments, reviews, estimates, surveys, or solicitations concerning recycling of Expanded Polystyrene, including all documents reflecting economic, scientific, or technical data collected by or provided to the City, including unredacted versions of all documents produced by the Sanitation Department, pursuant to Petitioners' New York State Freedom of Information Law request on March 5, 2015 (Exhibit II to the Mastro Affirmation).

4. All documents concerning the "economic analysis" referred to in Gregory Anderson's September 25, 2014 email to Michael Westerfield (Exhibit H to the Mastro Affirmation), including all drafts and the final version of said "economic analysis."

5. All documents reflecting communications between or among individuals within the Sanitation Department regarding recycling of Expanded Polystyrene.

6. All documents reflecting communications between or among individuals within the Mayor's Office regarding recycling of Expanded Polystyrene.

7. All documents reflecting communications with Dart, PRI, Sims, Burrtec, NEPCO, Titus, or the City of Los Angeles Sanitation Department regarding recycling of Expanded Polystyrene.

8. All documents reflecting communications between the Mayor's Office and the Sanitation Department regarding Expanded Polystyrene.

9. Documents sufficient to show the date of and participants in each communication between the Mayor's Office and the Sanitation Department regarding Expanded Polystyrene, Local Law 142, or any Petitioner.

10. For each "Billing Period" from January 1, 2013, to the present: each "Expense Invoice" and "Revenue Invoice" reflecting amounts received by, credited to, or paid to Sims or the City in connection with "MGP" "Recyclable Streams," and any additional documents necessary to show the "Average Composite Market Value" of MGP, the "Invoice Price" for MGP, and the "Invoice Amount" for MGP for each such Invoice (as each of these terms is defined in Attachment B to the Sims Contract).

Dated: New York, New York
April 28, 2015

GIBSON, DUNN & CRUTCHER LLP

By: Randy M. Mastro

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