STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY Index No.: 902673-20

POLY-PAK INDUSTRIES, INC., GREEN EARTH FOOD CORP., d/b/a GREEN EARTH GROCERY STORE, FRANCISCO MARTE, MIKE HASSEN and THE BODEGA AND SMALL BUSINESS ASSOCIATION,

Plaintiffs-Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

-against-

THE STATE OF NEW YORK, HON. ANDREW CUOMO, As Governor of the State of New York, THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, and BASIL SEGGOS, in his official Capacity of Commissioner of the New York State Department of Environmental Conservation,

Defendants-Respondents.

(Supreme Court, Albany County, Special Term)
(Hon. Gerald W. Connolly, Presiding)

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DECISION/ORDER/JUDGMENT

Connolly, J.:

Plaintiffs-Petitioners Poly-Pak Industries, Inc. ("Poly-Pak"), Green Earth Food Corp., d/b/a Green Earth Grocery Store ("Green Earth"), Francisco Marte, the Bodega and Small Business Association, f/k/a The Bodega Association USA, Inc. (the "Bodega Association") and Mike Hassen (herein collectively, "Petitioners") seek Article 78 and declaratory judgment relief in this challenge to S. 1508-C at Part H (now codified at New York Environmental Conservation Law ("ECL") §§27-2801 to 27-2809) (the "Bag Reduction Act") which, *inter alia*, prohibits the distribution by certain entities of "any plastic carryout bags" subject to certain enumerated exceptions, and certain regulations promulgated thereto. Defendants-Respondents State of New York, Governor Andrew Cuomo, The New York State Department of Environmental Conservation ("DEC") and DEC Commissioner Basil Seggos (hereinafter "Respondents") oppose the requested relief in its entirety.

Additionally, We ACT for Environmental Justice, Beyond Plastics, and Clean and Healthy New York seek amicus standing.

By stipulation of the parties as stated on the record at the commencement of oral argument on June 18, 2020, the parties (i) consider this matter to constitute a hybrid special proceeding/declaratory judgment plenary action, (ii) agree that the petitioners' amended petition constitutes both a petition and complaint, and (iii) have represented that, via the papers presently filed before the Court, petitioners are seeking summary judgment concerning their four declaratory judgment plenary causes of action and relief pursuant to their Article 78 special proceeding fifth cause of action and have proceeded under such common understanding.[1] The parties further stipulated via July 6, 2020 letter seeking a single decision and order addressing the Amended Verified Article 78 Petition and Opposition and Declaratory Judgment Petition and Opposition. It is noted as set forth above that there is only one Amended Petition. The parties further stipulated that their filings and oral arguments in this matter should be understood to include cross-motions for summary judgment with respect to the declaratory relief requested and that the matter is fully briefed and before the Court on a full application for relief under both Article 78 and the request for a declaratory judgment.

Amici

There is no statutory guideline or controlling case law that address a trial Court's acceptance of an application for amicus curiae status. This litigation clearly involves questions of important public interest, and based upon the quality of the submissions and the interests represented by the entities, the Court recognizes the value in granting *amici* status to the entities who have applied for such relief (*see Colmes v Fisher*, 151 Misc. 222, 223 (Sup. Ct. Erie County

[1]The Order to Show Cause sought a preliminary injunction enjoining respondents pending the determination of this proceeding from implementing and/or enforcing the Bag Reduction Act and Bag Regulations. Separate return dates for the preliminary injunction and the petition were each set via the Order to Show Cause. The parties recognized the matter as a hybrid action. Via a So Ordered Letter dated May 6, 2020, the petitioners agreed to convert their motion for a preliminary injunction to one for a permanent injunction. The parties have revised the briefing schedule for the papers throughout.

1934). Accordingly, the Court will grant the proposed motion for amicus status and consider the proposed submissions to the extent they are based on record evidence, relevant to the causes of action/requests for relief in the final amended petition and not merely duplicative of arguments already made by any party to this proceeding.

Requested Relief

Petitioners seek an order, *inter alia*, (i) declaring the Bag Reduction Act to be violative of Article VII, section 8 of the New York State Constitution, void for vagueness and inconsistent with and in conflict with existing New York law; (ii) declaring the regulations found at 6 NYCRR Part 351 promulgated by the New York State Department of Environmental Conservation ("DEC") related to the implementation of the Bag Reduction Act (the "Bag Regulations") to be unlawfully *ultra vires*; (iii) declaring the requirements imposed on reusable plastic bags by the Bag Regulations to be arbitrary and capricious; and (iv) permanently restraining the Defendants-Respondents (hereinafter "Respondents") from implementing or enforcing the Bag Reduction Act, the Bag Regulations or the requirements imposed on reusable plastic bags by the Bag Regulations.[2] Respondents oppose the relief requested by petitioners.

Parties

Petitioner Poly-Pak Industries, Inc. ("Poly-Pak") alleges that it is a family owned New York corporation that manufactures, *inter alia*, reusable plastic bags; however such bags are not 10 mils thick and thus prohibited by the Bag Regulations. Petitioner Green Earth Food Corporation ("Green Earth") alleges that it is a New York corporation operating a corner market - the Green Earth Grocery Store - in the Bronx which currently distributes carryout plastic shopping bags to its customers at the point of sale and as a "person required to collect tax" is

[2] The Respondents consented to take no enforcement action pursuant to the Bag Reduction Act and the Bag Regulations until June 15, 2020 and to provide notice prior to any such enforcement.

subject to the Bag Reduction Act and Bag Regulations. Petitioner Francisco Marte is the owner and operator of Green Earth and an officer of the Bodega Association. Petitioner Bodega Association is a New York corporation and trade association of local retailers and bodegas and asserts that as "person[s] required to collect tax," the bodegas that form the membership of such association will be subject to the Bag Reduction Act and Bag Regulations.

Petitioner Mike Hassen is the owner and operator of multiple supermarkets in the Northeastern United States, including six in New York State (five in the boroughs of New York City and one in Yonkers, New York) and as "person[s] required to collect tax", alleges that his stores will be subject to the Bag Reduction Act and Bag Regulations. Additionally, petitioners assert that Mr. Hassen's supermarkets are subject to the Bag Recycling Act, codified at ECL §§27-2701-27-2713, which requires, *inter alia,* that certain store operators establish an at-store recycling program with respect to "plastic carryout bags" (as such term is therein defined).[3]

We ACT for Environmental Justice, Beyond Plastics, and Clean and Healthy New York are public interest organizations concerned about the effect of plastic bags on the health of New York communities and the environment.

Respondent State of New York is a sovereign governmental entity. Respondent Andrew Cuomo is the duly elected and serving Governor of the State of New York. Respondent DEC is an agency of the State of New York authorized, by and through its commissioner, to *inter alia,*

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[3] It is noted that there are two ECL provisions denominated as ECL §27-2701 and §27-2703, however, the ECL provisions at issue herein fall under the Title 27 entitled "Plastic Bag Reduction, Reuse and Recycling". The Bag Recycling Act requires, *inter alia*, that the operator of a "store shall establish an at-store recycling program pursuant to the provisions of this title that provides an opportunity for a customer of the store to return to the store clean plastic carryout bags and film plastic" (ECL §27-2703). "Store" is defined" as a retail establishment that provides plastic carryout bags to its customers as a result of the sale of a product and (a) has over ten thousand square feet of retail space, or (b) such retail establishment is part of a chain engaged in the same general field of business which operates five or more units of over five thousand square feet of retail space in this state under common ownership and management" (ECL §27-2701(6)).

"carry out the environmental policy of the state". Respondent Basil Seggos is the DEC Commissioner.

Legal Background

In 2019 the Legislature enacted and the Governor signed a budget bill which included provisions, later codified in the ECL, referred to herein as the Bag Reduction Act. The Bag Reduction Act provides, *inter alia*, that "[n]o person required to collect tax[4] shall distribute any plastic carryout bags to its customers unless such bags are exempt bags as defined in subdivision one of section 27-2801 of this title" (*see* ECL §27-2803(1)).[5] Section 27-2801 of the Bag Reduction Act lists the specific bags that constitute "exempt bag[s]"[6]. The Bag Reduction Act also provides, *inter alia*, that a city or county may adopt a local law imposing a five cent fee on each paper carryout bag provided to customers. Up to forty percent of such fees may be used by such counties and cities to purchase and distribute "reusable bags, with priority given to low- and fixed-income communities" (*see* ECL §27-2805(7)). The Bag Reduction Act defines "[r]eusable bag" as "a bag: (a) made of cloth or other machine washable fabric that has handles;

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[4]"Person required to collect tax" is defined as "any vendor of tangible personal property subject to the tax imposed by subdivision (a) of section eleven hundred five of the tax law" (ECL §27-2801(5)).

[5]"Plastic carryout bag" is defined as "any plastic bag, other than an exempt bag, that is provided to a customer by a person required to collect tax to be used by the customer to carry tangible personal property, regardless of whether such person required to collect tax sells any tangible personal property or service to the customer, and regardless of whether any tangible personal property or service sold is exempt from tax under article twenty-eight of the tax law." (ECL §27-2801(2)).

[6]"Exempt Bag" is defined as "a bag: (a) used solely to contain or wrap uncooked meat, fish, or poultry; (b) bags used by a customer solely to package bulk items such as fruits, vegetables, grains, or candy; (c) bags used solely to contain food sliced or prepared to order; (d) bags used solely to contain a newspaper for delivery to a subscriber; e) bags sold in bulk to a consumer at the point of sale; (f) trash bags; (g) food storage bags; (h) garment bags; (i) bags prepackaged for sale to a customer; (j) plastic carryout bags provided by a restaurant, tavern or similar food service establishment, as defined in the state sanitary code, to carryout or deliver food; or (k) bags provided by a pharmacy of carry prescription drugs" (ECL §27-2801(2)).

or (b) a durable bag with handles that is specifically designed and manufactured for multiple reuse" (ECL §27-2801(4)), however the Bag Reduction Act does not include "reusable bag(s)" among the types of bags that are exempted from the Bag Reduction Act's prohibition.

DEC promulgated regulations with respect to the Bag Reduction Act that became effective on March 14, 2020 (*see* 6 NYCRR Pt. 351). The Bag Regulations prohibit the distribution of plastic carryout bags, define permissible "reusable" bags, and direct the recycling of plastic carryout bags and film plastic by certain stores (*see* 6 NYCRR §351-1.1(a)). 6 NYCRR §351-2.1(a) provides that "[a] person required to collect tax shall not: (a) distribute any plastic carryout bag to its customers unless the bag is an exempt bag;". The Bag Regulations define "exempt bag" to include *inter alia*, "a reusable bag" (6 NYCRR §351-1.2(f)) which is defined at 6 NYCRR §351-1.2(n) to include reusable plastic bags that are at least 10 mils thick.[7] The Bag

[7]An "exempt bag" is defined in the Bag Regulations at 6 NYCRR §351-1.2(f) as:
a bag that: (1) is either made of: (i) cloth or other machine washable fabric; or (ii) other non-film plastic washable material; and (2) has at least one strap or handle that does not stretch and is fastened to the bag in such a manner that it allows the bag to meet the strength and durability standards in paragraph 351-1.2(n)(3) and (4); and (3) has a minimum lifespan of 125 uses, with a use equal to the ability to carry a minimum of 22 pounds over a distance of at least 175 feet; and (4) has a minimum fabric weight of 80 grams per square meter (GSM) or equivalent for bags made of any non-film plastic of natural, synthetic, petroleum based, or non-petroleum-based origin, including woven or nonwoven polypropylene (PP), polyethylene-terephtha late (PET), cotton, jute, or canvas.

"Film-plastic" is defined in the Bag Regulations as "a flexible sheet or sheets of petroleum or non-petroleum based plastic resin or other material (not including a paper carryout bag), less than 10 mils in thickness, commonly used in and as packaging products, which include, but are not limited to, plastic carryout bags, newspaper bags, garment bags, shrink-wrap, and other plastic overwrap" (6 NYCRR §351-1.2(g)) and "film plastic bag" is defined as "any bag made of film plastic" (6 NYCRR §351-1.2(h)).

Regulations also provide that certain stores (as defined in the regulations)[8] must make "reusable bags" available for sale (6 NYCRR §351-2.2).

Prior to enactment of the Bag Reduction Act, in 2008, the Legislature enacted law, now codified at ECL Title 27, entitled Plastic Bag Reduction, Reuse and Recycling (ECL §§27-2701(5); 2703(1); 2705(5))(the "Bag Recycling Act") which required, *inter alia*, certain large retailers to establish in-store recycling programs through which, *inter alia*, used plastic carryout bags could be returned to the store for eventual recycling. Further, the Bag Recycling Act required such large retailers to make "reusable bags" available for purchase; and defined "reusable bags" to include "durable plastic bag[s] with handles that [are] specifically designed and manufactured for multiple reuse." (ECL §§27-2701(5); 2703(1); 2705(5)).

Petitioner's Contentions

Petitioners argue that the Bag Reduction Act and the Bag Regulations are in conflict with existing law (specifically the Bag Recycling Act), vague, unconstitutional, *ultra vires*, and/or arbitrary and capricious. As discussed above, the Bag Recycling Act requires, *inter alia*, certain retailers to establish in-store programs capable of supplying customers with "reusable bags" which include "durable plastic bag[s] with handles that [are] specifically designed and manufactured for multiple reuse". Petitioners argue that by forbidding what is required by the Bag Recycling Act, the Bag Reduction Act frustrates the purposes of those statutes, stands as an obstacle to the accomplishment of such provisions and places retailers in the untenable position of being caught between conflicting laws, unsure of which they should follow or violate.

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[8]"Store" as defined in the Bag Regulations refers to a "retail establishment that provided plastic carryout bags to its customers as a result of the sale of a product any time prior to March 1, 2020, and meets one or more of the following criteria: (1) has over 10,000 square feet of retail space; or (2) the retail establishment is part of a chain engaged in the same general field of business which operates five or more units of over 5,000 square feet of retail space in New York State under common ownership and management.

They further assert that the Bag Reduction Act is internally inconsistent as it "among other things, prohibits the use and distribution of certain plastic bags but permits the use and distribution of others, and, confusingly, seems to encourage and simultaneously to forbid the use and distribution of reusable plastic bags, while allowing the use and distribution of reusable fabric bags" (Amended Petition, ¶2). They argue the Bag Reduction Act should be declared void for vagueness as its express terms appear simultaneously to forbid and to permit the distribution of durable, reusable, handled plastic bags.

They also argue that the Bag Reduction Act unconstitutionally bestows a special benefit or business advantage on private corporations by "granting a boon to manufacturers of cloth, fabric, and paper bags, while denying similar treatment to makers of reusable plastic bags" (Amended Petition, ¶51).

Petitioners further assert that the Bag Regulations are *ultra vires* and arbitrary and capricious arguing that while the Bag Reduction Act does not authorize DEC to promulgate regulations for its implementation, DEC did so via 6 NYCRR Part 351 and such regulations "exceed and contradict the terms of the Bag [Reduction] Act by expanding the list of exceptions to the ban (i.e. expanding the list of permitted plastic bags) and by authorizing the use and distribution of reusable plastic bags that are at least 10 mils thick - a standard that (a) is more than 400% greater than California's analogous requirement, (b) upon information and belief was not supported by any testimony or agency fact finding, and (c) imposes a requirement that cannot currently be provided by a single American manufacturer of reusable bags." (Amended Petition, ¶3).

Respondents raise a number of objections in point of law, including, *inter alia*, that (i) petitioners have failed to plead injury-in-fact within the zone of interest of the Bag Reduction Act and regulations and lack standing to sue and lack standing to raise injuries allegedly suffered

by third parties, (ii) petitioners' expert affidavit cannot be considered in the article 78 portion of this hybrid proceeding, as its substance (the alleged health concerns related to reusable bags) was not presented to DEC before issuance of the Bag Regulations; (iii) petitioners' claim that the Bag Reduction Act conflicts with the Bag Recycling Act is without merit because statutes related to the same subject should be harmonized and read together and as the Bag Reduction Act specifies that the Bag Recycling Act is not preempted; (iv) petitioners' claim that the Bag Reduction Act is unconstitutionally vague is without merit as petitioners have failed to demonstrate their burden of proving unconstitutionality beyond a reasonable doubt and as the Bag Reduction Act has a predominant public purpose and presumption of validity; (v) petitioner's claim that the Bag Reduction Act violates the anti-gift clauses of the New York State Constitution fails to state a cause of action as the Bag Reduction Act does not authorize money or loans to any private entity; and (vi) petitioners' claim that the Bag Regulations are *ultra vires* and arbitrary is without merit as DEC has statutory authority to promulgate such regulation and its determination was rational.

The *amici* urge the Court to uphold the Bag Reduction Act and the Bag Regulations, with the exceptions of the regulatory provisions that allegedly create a loophole in the statutory prohibition on the distribution of "any plastic carryout bags," namely 6 NYCRR §351-1.2(f)(11), which adds an exemption for "reusable bags" and 6 NYCRR §351-1.2(n)(1)(ii), which defines "reusable bags" to include some plastic carryout bags. They argue along with respondents that the Bag Reduction Act does not conflict with the Bag Recycling Act or violate the New York Constitution and is not unlawful on its face. However, they do not agree with respondents' contention that the Bag Regulations are legal in their entirety. They assert that the Bag Regulations create a loophole that allows the distribution of thick plastic carryout bags in

defiance of the statutes express language that vendors are prohibited from distributing "any plastic carryout bags" other than those specifically enumerated.

Standing

Initially, the Court must address the respondents' challenge to the standing of Petitioners. "Standing is, of course, a threshold requirement for a plaintiff seeking to challenge governmental action. The two-part test for determining standing is a familiar one. First, a plaintiff must show 'injury in fact', meaning that plaintiff will actually be harmed by the challenged administrative action. As the term itself implies, the injury must be more than conjectural. Second, the injury a plaintiff asserts must fall within the zone of interests or concerns sought to be promoted or protected by the statutory provision under which the agency has acted." (*New York State Assn of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]). "A petitioner need only show that the administrative action will in fact have a harmful effect on the petitioner and that the interest asserted is arguably within the zone of interest to be protected by the statute." (*Dairylea Cooperative, Inc. v Walkley*, 38 NY2d 6 [1975]). "Moreover, a party must show that the injury suffered is personal to the party, i.e., distinct from that of the general public" (*Roberts v Health & Hosps, Corp.*, 87 AD3d 311, 319 [1st Dept 2011][internal quotations and citations omitted]). "As the concept of standing has evolved, the zone of interest test has developed into the primary test, focusing on whether the interest sought to be protected is within the concerns the Legislature sought to advance or protect by a statutory enactment" (*Lasalle Ambulance v New York State Dep't of Health*, 245 AD2d 724, 724-725 [3d Dept 1997]).

Respondents contend that no petitioner has pleaded an injury-in-fact. Respondents assert that none of the petitioners has alleged specific, non-conjectural harms and none have explained that their business has been hurt by the Bag Reduction Act, that they have attempted to comply or have a reasonable expectation of impending harm based on experiences had in trying to

comply with the challenged statute. Respondents assert that petitioners have not even tried to plead that they will suffer special damage, different in kind and degree from the community generally. Respondents assert that as all New York retailers are similarly situated - unable to distribute disposable film plastic bags, it is difficult to understand how they will be injured by the State's effort to reduce environmental harm.

As to the Bodega Association, Green Earth and Frank Marte, who owns Green Earth and serves as an officer of the Bodega Association, respondents contend that while such petitioners assert they will be injured by the alleged inconsistency between the Bag Reduction Act and the Bag Recycling Act, claiming that "some retailers" have been unable to obtain paper bags to distribute to customers, that some producers of paper bags have predicted a longterm shortgage and alleging a general inability to obtain any kind of product to give to the bodegas' customers, such assertions are vague and conclusory and do not establish injury to Green Earth.

Respondents argue that even if such petitioners had pleaded actual injuries from the Bag Reduction Act or the Bag Regulations, they have not met the zone of interests test. Respondents argue that the Legislature intended its passage of the Bag Reduction Act to address the overwhelming amount of plastic waste and to protect the environment so only injury-in-fact that is environmental in nature can satisfy the zone of interest test and help confer standing. Respondents assert that the retailers do not claim that anything in the Bag Reduction Act or the Bag Regulations suggest an intention to protect the corporate goodwill allegedly bestowed upon them by their customers. Respondents assert that none of their asserted injuries falls within the concerns that motivated the Legislature when it passed the Bag Reduction Act.

Further, respondents contend that the Bodega Association may complain only of harm flowing from a statute or regulation to which it is subject and the Bodega Association does not claim to be subject to the Bag Recycling Act and thus cannot raise any challenge premised on a

conflict between the Bag Reduction Act and Bag Recycling Act, or alleged favoritism of certain manufacturers. Accordingly, respondents allege the Bodega Association may not pursue the first or third causes of action. Respondents also argue that the Bodega Association's claim that it may be punished because of its own misinterpretation of the relationship between the Bag Reduction Act and the Bag Recycling Act cannot create standing as the respondents argue such statutes are not inconsistent.

In support of the Amended Petition, Mr. Marte submitted an affidavit averring, *inter alia*, that he is the owner and operator of Green Earth Food Corp, d/b/a Green Earth Grocery Store, a corner market in the Bronx. He is Secretary General of the Bodega Association, a trade association of local retailers and bodegas, which represents 5,000 stores in New York, including Green Earth. He avers Green Earth and most of the Bodega Association's other members currently distribute carryout plastic shopping bags to their customers at the point of sale, and are persons required to collect tax and therefore will be subject to the Bag Reduction Act and the Bag Regulations. He asserts that implementation and enforcement of the Bag Reduction Act and Bag Regulations as currently drafted will cause widespread confusion to consumers, Green Earth and the Bodega Association's other members in light of inconsistencies between the Bag Reduction Act and Bag Regulations and conflicts between the Bag Reduction Act and existing New York law.

Mr. Marte avers that available supplies of bags permitted under the Bag Reduction Act and Bag Regulations are in woefully short supply and it is proving to be impossible for retailers and small businesses to obtain them in sufficient numbers or sometimes to obtain them at all. He asserts that "[s]ome retailers have recently been unable to place orders for paper bags because suppliers are not accepting orders through 2020 due to the high demand in New York State. Producers of bags have advised it will be many months and maybe years before the supply of

paper bags can satisfy the demand created by the Bag [Reduction] Act and Bag Regulation and that other types of reusable bags are hard to obtain as they are made overseas and the supply of them is even slower and less efficient in light of coronavirus and trade related slowdowns and stoppages."

Mr. Marte avers that if required to comply with the Bag Reduction Act and Bag Regulations, Green Earth and other members of the Bodega Association would be irreparably harmed by the loss of sales and customer goodwill as a result of the retailers' inability to provide compliant bags to their customers and will be unable to meet the demand with allowed methods of carrying their purchases home. He further argues that if required to comply with the Bag Reduction Act and Bag Regulations, Green Earth and other members of the Bodega Association will be irreparably harmed by being forced to speculate what types of reusable bags they may distribute, risking inadvertently violating the Bag Reduction Act or the Bag Regulations and being punished with a civil penalty of $250 to $500 per violation.

Standing Discussion re: Green Earth, Mr. Marte & the Bodega Association

"To establish standing, an organizational plaintiff . . . must show that at least one of its members would have standing to sue, that it is representative of the organizational purposes it asserts and that the case would not require the participation of individual members." (*see Novello, supra* at 211 [internal citations omitted]).

Mr. Marte averred, *inter alia*, that Green Earth and most of the Bodega Association's other members currently distribute carryout plastic bags to their customers at the point of sale but there has been no allegation or representation that Green Earth or the Bodega Association's other stores are subject to the Bag Recycling Act or have established an at-store recycling program. Accordingly, as noted by respondents, such petitioners have no standing with respect

to the first cause of action requesting declaratory and permanent injunctive relief due to the inconsistency of the Bag Reduction Act and Bag Recycling Act.

Further, as neither Mr. Marte, Green Earth or the Bodega Association alleges that it is a bag manufacturer, they do not have standing with respect to the third cause of action alleging a violation of the New York State Constitution based on the alleged favoritism to certain manufacturers. Such interest is only marginally related to the purposes of the statute *(see generally, Transactive Corp. v New York State Dep't of Soc. Servs.*, 92 NY2d 579 [1998]).

Respondents further contend that no harm has been alleged as to Green Earth, and without injury to Green Earth, neither Marte nor the Bodega Association has standing. They argue that the claims of harm concerning "some retailers" being unable to obtain paper bags to distribute to customers, that some producers have been unable to obtain paper bags to distribute and that some producers have predicted a long-term shortage, are vague and conclusory. As such, they state that the assertions do not establish injury and there has been no demonstration of any specific occasion on which Mr. Marte was unable to obtain bags for his store, nor that he was told by paper bag producers that they had no inventory for him.

Such petitioners have asserted, however, that pursuant to ECL §27-2807, their failure to comply with the Bag Reduction Act and Bag Regulations may result in substantial civil monetary penalties per violation and, *inter alia*, have alleged that the Bag Reduction Act is vague and the Bag Regulations are *ultra vires*. Based upon the record, the Court finds that Green Earth, Mr. Marte and the Bodega Association have demonstrated cognizable harm providing a basis upon which to find an injury-in-fact with respect to petitioners' second, fourth and fifth causes of action.

As to the zone-of-interests test, while respondents argue that petitioners Green Earth and its owner, Mr. Marte, (and the Bodega Association) injuries do not fall within the zone of interests sought to be promoted or protected by the Bag Reduction Act, the Court disagrees.

Respondents assert that the Bag Reduction Act was instituted to address the overwhelming amount of plastic waste. In order to comply with the Bag Regulations and the Bag Reduction Act and effect the purpose which the Legislature sought to advance, those subject to such statute and accompanying regulations (and subject to penalty for failure to comply) must understand what is permissible thereto in order to effect the result sought by the Legislature. Such an understanding is within the concerns the Legislature sought to advance or protect by such statutory enactment. Accordingly, such petitioners have established standing with respect to their second, fourth and fifth causes of action.

Mike Hassen

Respondents argue that petitioner Hassen lacks standing, asserting that while he owns and operates six supermarkets in New York that he claims are subject to both the Bag Reduction Act and the Bag Recycling Act and that the "industry's supply is far outstripped by the demand for [paper bags]", he does not describe how he knows that demand exceeds supply, he does not aver that he has been unable to obtain paper bags or even that he has had to go outside the normal supply chain but asserts that he and other retailers are at risk of being unable to comply with the Bag Reduction Act, Bag Regulations and potential local laws. Respondents assert that Mr. Hassen fails to elaborate on his claim that the supply chain of all other reusable bags is foreign and backlogged and, that such claim, even if true, does not establish harm to Mr. Hassen's six stores. Respondents assert that the injuries are too speculative and conjectural to satisfy the injury-in-fact argument.

Respondents assert that Mr. Hassen is the only petitioner arguably subject to both the Bag Reduction Act and the Bag Recycling Act, and he alleges that he is concerned he will have to speculate as to what type of reusable bags his supermarkets may sell, risking enforcement pursuant to the two statutes or the regulations. Respondents argue that such petitioner's fears "are manufactured" (MOL, pg 12), asserting that the language of the two statutes, read together,

allow reusable bags to be made of fabric, cloth or other machine washable fabric or durable plastic and, to the extent there is any confusion, the DEC regulations clarify the meaning of terms like durability. Respondents argue that while the Bag Reduction Act's definition of reusable bag omits the word "plastic", a reusable plastic bag may still be offered for sale pursuant to the Bag Recycling Act because the Bag Reduction Act states "[n]othing in this section shall be deemed to exempt the provisions set forth in title 27 relating to at store recycling" (ECL §27-2803(3)). Respondents further argue that the challenged regulations make clear how the two statutes work together and that as the Bag Reduction Act and Bag Recycling Act relate to the same subject matter and are not in conflict, petitioner Hassen has failed to plead any injury flowing from the supposed conflict between the statutes.

In support of the petition, petitioner Hassen avers, *inter alia*, that he is the owner and operator of multiple supermarkets in the Northeastern United States, including six in the State of New York, that his supermarkets currently distribute carryout plastic shopping bags to their customers at the point of sale and that as his supermarkets are "persons required to collect tax", they will be subject to the Bag Reduction Act and Bag Regulations. Mr. Hassen further avers that his supermarkets are also subject to the Bag Recycling Act (as they have more than 10,000 square feet or retail space and are part of a commonly-owned and -operated business operating five or more units of over 5,000 square feet each in the State of New York). He avers that under Title 27, his supermarkets are required to supply customers with reusable bags, including durable, reusable plastic bags, however, under the Bag Reduction Act and Bag Regulations, his supermarkets are forbidden from supplying such bags to customers. He asserts that the Bag Reduction Act and Bag Regulations as currently drafted are unclear and confusing and impose arbitrarily and capriciously chosen requirements which leave retailers and owners like himself subject to confusion, uncertainty and legal risk.

Mr. Hassen further avers that the types of bags permitted under the Bag Reduction Act and Bag Regulations are difficult to obtain and that the industry's supply is "far outstripped by the demand for them, putting retailers such as myself at risk of being unable to comply with the Bag [Reduction] Act and Bag Regulation" (Hassen Aff., ¶7). He avers that other types of reusable bags that are permissible under the Bag Reduction Act and Bag Regulations are in short supply because they are made overseas and the already-inadequate pipeline of them has been reduced even further by coronavirus and trade related slowdowns and other delays and stoppages" (Hassen, aff., 8). He asserts that if required to comply with the Bag Reduction Act and Bag Regulations, his store will be irreparably harmed by the loss of sales and customer goodwill as a result of the inability to provide compliant bags to our customers. Further, he argues his supermarkets and he will be irreparably harmed by being forced to speculate as to what types of reusable bags may be distributed, risking inadvertently violating the Bag Reduction Act or the Bag Regulations and being punished with civil monetary penalties.

Standing Discussion re: Mr. Hassen

Mr. Hassen has alleged that his supermarkets are subject to both the Bag Reduction Act and Bag Recycling Act, which respondents do not dispute. Further, he has alleged, *inter alia*, that he may be punished with civil monetary penalties for inadvertent violation of the Bag Reduction Act or the Bag Regulations. The Court finds that Mr. Hassen has demonstrated cognizable harm providing a basis upon which to find an injury-in-fact with respect to petitioners' first, second, fourth and fifth causes of action as he is potentially subject to substantial civil penalties for his failure to comply with the Bag Reduction Act and Bag Regulations and has alleged a conflict between such Bag Reduction Act, Bag Regulations and the Bag Recycling Act.

As Mr. Hassen does not allege that he is a bag manufacturer, he has failed to demonstrate an injury-in-fact with respect to the third cause of action alleging a violation of the New York

State Constitution based on the alleged favoritism to certain manufacturers and accordingly, lacks standing. Such interest is only marginally related to the purposes of the statute *(see generally, Transactive Corp. v New York State Dep't of Soc. Servs.*, 92 NY2d 579 [1998]).

The Court finds that Mr. Hassen has standing with respect to the first, second, fourth and fifth causes of action. Mr. Hassen has alleged that he will be harmed and penalized for noncompliance with a potential civil penalty of $250 or $500 per violation as set forth in the Bag Reduction Act (*see* ECL §27-2807). Petitioners' assertions are that the (i) Bag Reduction Act (a) conflicts with existing law (the Bag Recycling Act) and (b) is unconstitutionally vague and, (ii) the Bag Regulations are *ultra vires* and arbitrary or capricious. Mr. Hassen has demonstrated he is or will be subject to the statutory and regulatory provisions at issue herein. As discussed above, in order to comply with such statutory and regulatory provisions and effect the purpose which the Legislature sought to advance, those subject to such statute and accompanying regulations (and subject to penalty for failure to comply) must understand what is permissible in order to effect the result sought by the Legislature. Such an understanding is within the concerns the Legislature sought to advance or protect by such statutory enactment.

To the extent that the respondents argue that Mr. Hassen lacks standing as his contention that the Bag Reduction Act and the Bag Recycling Act conflict is without merit, such argument is based upon a finding in favor on such substantive argument. Such assertion is not a proper basis to find a lack of standing.

Poly-Pak

Respondents also argue that Poly-Pak lacks standing, noting that Poly-Pak has admitted that it makes plastic products which are not "reusable" within the meaning of the challenged regulations. Respondents assert that Poly-Pak's representative avers that it "will be irreparably harmed by its inability to provide one of its core product offerings to ... an important market ... New York retailers". Respondents assert that, for standing to exist, the alleged injury must

derive from a statute or regulation to which petitioner is subject and accordingly, Poly-Pak may not raise any statutory challenge to the Bag Reduction Act or the Bag Regulations. Poly-Pak, respondents argue, is not at risk of enforcement. Respondents assert that the only injury Poly-Pak could conceivably incur is that the Legislature is unconstitutionally favoring other manufacturers of bags (the third cause of action) however, such petitioner has failed to plead injury-in-fact.

Respondents assert that Poly-Pak's representative, Mr. Trottere, does not establish actual harm as he offers no detail about reduced sales or the percentage of the company's business that would be impacted by the ban. He does not explain what percentage of Poly-Pak's overall sales are to New York retailers or what percentage of Poly-Pak's overall sales are from plastic film bags. Respondents assert that Mr. Trottere describes no loss in business as retailers prepared for the ban, no inquiries from concerned retailers, no evidence of any impact at all and, though he alleges the company's future is at risk, he describes no steps it has taken to comply with the new law and regulation. Respondents assert that Poly-Pak's vague, general and conclusory claim that the ban's impact may be "severe" and "potentially" threatening is insufficient to establish standing.

As to injury-in-fact, respondents contend that Poly-Pak does not claim that the profits of plastic bag manufacturers motivated or concerned the Legislature and that Poly-Pak has failed to identify injury-in-fact within the zone of interests of the Bag Reduction Act or the challenged regulations.

In support of the petition, petitioner's have submitted the affidavit of Ken Trottere, Vice President of Sales and Marketing at Poly-Pak. He avers, *inter alia*, that Poly-Pak manufactures reusable plastic bags that meet and surpass the strength and durability requirements adopted by the Bag Regulations, satisfy every ordinance currently on the books in the state of New York and

can comply with the majority of plastic bag laws and regulations across the country and around the world, however, are not 10 mils thick and thus prohibited pursuant to the Bag Regulations.

Mr. Trottere further avers that Poly-Pak sells its products to customers, including retailers, in New York and the impact the proposed Bag Reduction Act and Bag Regulations will have "on Poly-Pak and its employees would be severe, potentially to the point of imperiling Poly-Pak's continued viability and endangering the employment of Poly-Pak's many employees" (Trottere Aff., ¶7). He further avers that it is "impossible or, at best, extraordinarily costly for Poly-Pak to attempt to produce a product that satisfies" the requirements of the Bag Regulations and he opines that "[t]o the best of my knowledge, it is not possible to produce a 10-mil reusable plastic bag on Poly-Pak's equipment or on any manufacturers equipment that currently exists" and accordingly, such attempt would require such petitioner "to halt its operations: retool, reformat, or attempt to invent or acquire equipment that may not currently exist; reformulate or adjust the product components; and then attempt to restart production". (*Id.* at ¶8).

Standing Discussion re: Poly-Pak

While asserted injury may not be speculative and must be more than conjectural, "it need not be stated with specific quantification" (*NY Propane Gas Ass'n. v NY State Dep't. of State*, 17 AD3d 915, 916 [3d Dept 2005]) The averments of Mr. Trottere that the Bag Reduction Act and Bag Regulations limit petitioner Poly-Pak from engaging in a previously unrestricted activity demonstrates cognizable harm, providing a basis upon which to find a injury-in-fact with respect to the causes of action alleged (*see Id.*). Poly-Pak's claim of standing, however, fails as such injury does not fall within the zone-of-interests sought to be promoted or protected by the Bag Reduction Act or the Bag Regulations. The requirement that the injury suffered be within the zone of interests sought to be protected by the statute serves to filter out cases in which a person's interests are so marginally related to or inconsistent with the purposes implicit in the

statute that it cannot be reasonably assumed that the drafters intended to permit the suit (*see Soc'y of Plastics Indus. v County of Suffolk*, 77 NY2d 761 [1991]).

The legislative history of the Bag Reduction Act indicates that its purpose was to address "the overwhelming amount of plastic waste" (Simon Aff., Exh. E (March 31, 2019 Assembly debate at 41 [Assemblymember Helen Weinstein]; *see also id.*, Exh. F (March 31, 2019 Senate debate at 2281 [State Senate Sponsor Senator Todd Kaminsky]).

The statutory scheme of the Bag Reduction Act does not address economic costs that may be incurred with respect to compliance with such mandate and it is reasonable to assume that a general ban on the distribution of non-exempt plastic carryout bags would result in economic harm on certain manufacturers of such bags. While Poly-Pak's representative has averred that economic harm will flow as, *inter alia*, it would be required to retool, reformat, or attempt to invent or acquire equipment that may not currently exist, reformulate or adjust the product components and then attempt to restart production in order to produce a 10-mil reusable plastic bag as required by the Bag Regulations, it cannot be said that such economic injuries fall within the zone of interests sought to be promoted or protected by the Bag Reduction Act (*see Id* at 917-918; *see generally, Soc'y of Plastics Indus. v County of Suffolk*, 77 NY2d 761 [1991]). Accordingly, as Poly-Pak has failed to establish that its injury falls within the zone of interests of the Bag Reduction Act or its regulations, the first, second, third and fourth causes of action of such petitioner are dismissed for lack of standing.

As to Poly-Pak's constitutional claims, "a plaintiff has standing to maintain an action when that plaintiff has suffered an injury in fact and such injury falls within the zone of interests to be protected by the statute or constitutional provision involved" (*Saratoga County Chamber of Commerce Inc. v Pataki*, 275 AD2d 145 [3d Dept 2000]). Respondents assert that petitioner has

not plead and could not show that the Bag Reduction Act is a gift of money or aid to any private entity or undertaking but rather claims that a group of manufacturers who make fabric or paper bags is favored by the challenged legislation. Respondents argue that nothing suggests that the Legislature cannot ban a particular material, film plastic in this case, for a specific use, disposable bags, without running afoul of the Constitution's anti-gift clauses *(see Fox v Mohawk & Hudson Riv. Humane Socy.*, 165 NY 517 [1901]). Poly-Pak is a manufacturer who has alleged economic harm however it has failed to demonstrate that the constitutional provisions relied upon were intended for the protection of a manufacturer who alleges harm because it is not an entity receiving such funds. Further, Poly-Pak is not an individual or entity from whom money is being exacted for private purposes and it has failed to demonstrate that any alleged injury falls within the zone of interests to be protected by the constitutional provision involved (*compare Fox v Mohawk & Hudson Riv. Humane Socy.*, 165 NY 517 [1901]).

Legal Standards concerning petitioners' claims

Petitioners seek summary judgment relief with respect to their first, second, third and fourth plenary causes of action which seek declaratory judgment and permanent injunctive relief. and seek mandamus to review with respect to their fifth cause of action.

CPLR §3001 provides, in pertinent part, that "[t]he supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. If the court declines to render such a judgment it shall state its grounds."

On a motion for summary judgment, the movant must establish by admissible proof, the right to judgment as a matter of law (*see Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Gilbert Frank Corp. v. Federal Insurance Co.*, 70 NY2d 966 [1988]). If such right to judgment

is established, the burden shifts to the opponent of the motion to establish by admissable proof, the existence of genuine issues of fact (*see Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well established that on a motion for summary judgment, the court's function is issue finding, not issue determination (*see Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]), and all evidence must be viewed in the light most favorable to the opponent to the motion (*see Crosland v. New York City Transit Auth.*, 68 NY2d 165 [1986]). In order to defeat a motion for summary judgment, the opponent must present evidentiary facts sufficient to raise a triable issue, and averments merely stating conclusions are insufficient *(see Capelin Assoc. v. Globe Mfg. Corp.*, 34 NY2d 338, 343 [1974]; *Vitolo v. O'Connor*, 223 AD2d 762, 764 [3d Dept 1996]). A party opposing summary judgment must assemble, lay bare and reveal his evidentiary proof in admissible form to establish a triable issue of fact (*see Zuckerman*, 49 NY2d at 562; *Castro v. Liberty Bus Co.*, 79 AD2d 1014, 1014 [2nd Dept 1981]). Further, it is noted that CPLR §3212(b) authorizes the Court to grant summary judgment in favor of a non-moving party without the necessity of a cross-motion providing that "[i]f it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion".

"The standard for judicial review of an administrative regulation is whether the regulation has a rational basis and is not unreasonable, arbitrary or capricious. To meet this limiting standard, petitioners must show that the Regulations are so lacking in reason that they are essentially arbitrary" (*Matter of Acevedo v New York State Dept. of Motor Vehicles*, 29 NY3d 202 [2017]). "An administrative agency's exercise of rule-making powers is accorded a high degree of judicial deference, especially when the agency acts in the area of its particular expertise (*see Consolation Nursing Home*, 85 NY2d 326, 331).

Petitioners' First Cause of Action

Via its first cause of action, petitioners assert that the Bag Reduction Act prohibits retailers from distributing reusable plastic bags, while the Bag Recycling Act requires retailers to make such bags available to their customers (*see* ECL §§27-2801(1), 2801(2), 2803(1); ECL §§27-2701, 2703, 2705). Petitioners argue that the Bag Reduction Act places retailers between conflicting laws and that such inconsistent and conflicting statutes violate fundamental requirements of fairness, notice, due process and other constitutional and procedural safeguards and impose an irreparable harm on retailers affected by them. Accordingly, petitioners' argue, the Court should declare the implementation and enforcement of the Bag Reduction Act to be impermissible, unlawful and/or unconstitutional and should enjoin its implementation and enforcement pursuant to CPLR §§3001, 6311 and/or 6313, respectively.

Respondents argue that the Bag Reduction Act does not conflict with the Bag Recycling Act as, read together, the statutes allow both plastic and non-plastic reusable bags. Respondents assert that the Bag Reduction Act makes clear that it does not preempt the Bag Recycling Act and therefore, the statutes must be harmonized to allow both types of bags. Accordingly, respondents assert that operators of certain large stores and chain stores must make reusable bags made of fabric, cloth or other machine washable fabric or durable plastic available for sale (*see* ECL §§27-2701(5); 27-2801(4)) (*see* Respondents MOL, pgs. 22-23).

Respondents argue that while the Bag Reduction Act's definition of reusable bag omits the word "plastic", a reusable plastic bag may still be offered for sale pursuant to the Bag Recycling Act (*see* ECL §27-2701(5)). Respondents argue that the Bag Reduction Act specifies that "[n]othing in this section shall be deemed to exempt the provisions set forth in title 27 relating to at store recycling" (ECL §27-2803(3)), and therefore, petitioners cannot presume that

the legislature modified the earlier statute; rather, the two statutes must be harmonized (*see Consolidated Edison*, 71 NY2d 189, 195 [1997]).[9] Respondents argue that the Bag Reduction Act specified that the provisions of the Bag Recycling Act (title 27) remain in effect; and it did not repeal the earlier definition of reusable bags. Respondents also argue that the statutes at issue here relate to the same subject matter and are not in such conflict such that they cannot both be given effect, that is: reusable bags can include durable plastic bags.

"Legislative enactments enjoy a strong presumption of constitutionality [and] parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity beyond a reasonable doubt. Moreover, courts must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional" (*Overstock.com, Inc. v. New York State Dept. of Taxation & Fin .*, 20 NY3d 586, 624 [2013][internal citations and quotations omitted). When interpreting a statute, if it is clear and unambiguous on its face, the Court shall not resort to the rules of construction to broaden the scope and application of the same *(Doctors Council v. New York City Employees' Retirement System*, 71 NY2d 669, 674 [1988]). If the language of a statute is clear and unambiguous, the Court should construe it so as to give effect to the plain meaning of the words used (*Judge Rotenberg Educational Center v. Maul*, 91 NY2d 298, 303 [1998]; *Raritan Development Corp. v. Silva*, 91 NY2d 98, 107 [1997]).

The starting point in construing statutes is the statutory text, the clearest indicator of legislative intent. The Court first determines whether there is a "plain meaning". Words of ordinary import in a statute are to be given their usual and commonly understood meaning,

[9] It is noted however, that respondents have not submitted argument analyzing or interpreting the language of ECL §27-2803(3) to demonstrate a basis for their argued conclusion.

unless it is clear from the statutory language that a different meaning was intended (*Matter of Drew v. Schenectady County*, 88 NY2d 242, 246 [1996]). If the words employed by the legislature have a definite meaning, which involves no absurdity or contradiction, then there is no room for construction and courts have no right to add to or take away from that meaning (*Matter of Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577 [1998]; *Tompkins v. Hunter*, 149 NY 117, 122-123 [1896]; Statutes § 92, p 182).

The language of the Bag Reduction Act provides that "[n]o person required to collect tax shall distribute any plastic carryout bags[10] to its customer unless such bags are exempt bags as defined in subdivision one of section 27-2801 of this title". Further, Section 27-2801(1) expressly defines an "[e]xempt bag" as set forth in Footnote 5 herein (*see* ECL §27-2801(2)). Such comprehensive and specific list of exemptions from the Bag Reduction Act's ban on plastic bags does not include the also defined term "reusable bag", nor does it contain any linkage to the term "reusable bag" as defined in the Bag Recycling Act.

As noted above, the Bag Recycling Act provides, *inter alia*, that operators of stores like petitioner Hassen's must establish an at-store recycling program and the requirements of such program include, *inter alia*, that the operator of the store make "reusable bags available to customers within the store for purchase, ...". "Reusable bag" in the Bag Recycling Act is defined as "(a) a bag made of cloth or other machine washable fabric that has handles; or[11] (b) a

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[10]"[P]lastic carryout bag" is defined, in pertinent part, as "any plastic bag, other than an exempt bag, that is provided to a customer by a person required to collect tax to be used by the customer to carry tangible personal property, ..." (ECL §27-2801(2)).

[11]It is also noted that as the definition of "reusable bag" in the Bag Recycling Act includes the word "or" [emphasis added] compliance could be accomplished under both statutes by providing cloth or other machine washable fabric bags with handles.

durable plastic bag with handles that is specifically designed and manufactured for multiple reuse".

Respondents argue that despite the clear language of the Bag Reduction Act providing that only plastic carryout bags defined as "exempt bag(s)" (which exemptions do not include any type of reusable plastic bag) may be distributed by those required to collect tax, the Bag Reduction Act specified that the provisions of the Bag Recycling Act (which allow such bags to be available at certain stores for purchase) remain in effect by virtue of Section 27-2803(3) of the Bag Reduction Act's specification that "[n]othing in this section shall be deemed to exempt the provisions set forth in title 27 of this article relating to at store recycling".

Respondents argue that "[r]epeal or modification of legislation by implication is not favored in the law . . . Generally, a statute is not deemed impliedly modified by a later enactment unless the two are in such conflict that both cannot be given effect. If by any fair construction, a reasonable field of operation can be found for [both] statutes, that construction should be adopted. These principals apply with particular force to statutes relating to the same subject matter, which must be read together and applied harmoniously and consistently" (*Consolidated Edison Co. v. Department of Environmental Conservation*, 71 NY2d 186,195 [1987]).

Amici argue that the Bag Reduction Act and Bag Recycling Act can be reconciled without ambiguity as the Bag Reduction Act appears to make a distinction between distribution and purchase while the Bag Recycling Act requires larger stores to make reusable bags available for purchase. *Amici* argue that a larger store that sells any type of reusable bag but does not freely distribute any plastic bag - including any reusable plastic bag - satisfies both statutes. *Amici* also argue that even assuming the two provisions were irreconcilable, the later enacted Bag Reduction Act would repeal the conflicting provisions of the earlier enacted Bag Recycling

Act, and not the other way around, as petitioners argue as "[e]ven without an express provision in a statute that inconsistent provisions contained in earlier statutes are repealed, such inconsistent provisions would be repealed by necessary implication where the provisions in the earlier statutes cover the same field as the later statute and there is no room for reconciliation. (*Hastings v Byllesby & Co.*, 293 NY 413, 419 [1944]).

Petitioner Hassen's first cause of action does not entitle him to the relief requested, a declaration that the Bag Reduction's implementation and enforcement are impermissible, unlawful and/or unconstitutional as it conflicts with existing law and should be enjoined.

Initially, the Bag Reduction Act's clear language provides that only the items listed as exempt bags qualify as plastic carryout bags that may be distributed. ECL 27-§2803(1) provides that "[n]o person required to collect tax shall distribute any plastic carryout bags to its customers unless such bags are exempt bags as defined in subdivision one of section 27-2801 of this title" (ECL §27-2803(1)). ECL §27-2803(2) then provides that "[n]o person required to collect tax shall prevent a person from using a bag of any kind that they have brought for purposes of carrying goods".

ECL §27-2803(3) then provides that "[n]othing in this section shall be deemed to exempt the provisions set forth in title 27 of this article relating to at store recycling". While perhaps inartfully drafted, ECL §27-2803(3) does not utilize the words "affect" or "supercede" in such provision but rather utilizes the word "exempt", the common legal definition of which is "free or released from a duty or liability to which others are held" (Black's Law Dictionary [11th ed. 2019]) and "free of an obligation which is binding on others" (Ballantine's Law Dictionary [3d ed. 1969]). The plain meaning of the word "exempt" thus requires a finding that ECL §27-2803(3) does not exempt from its ambit the provisions of the Bag Recycling Act relating to at

store recycling. The plain language of ECL §27-2803 restricts the provisions of the Bag Recycling Act relating to at store recycling making them subject to and inferior to the later provisions. As the words employed by the legislature have a definite meaning, which involves no absurdity or contradiction, the Court has no room to add or take away from that meaning. Further, such language does not contravene legislative intent or lead to an unreasonable result.

While not necessary to consider herein as the Bag Reduction Act contains an express manifestation of intent by the Legislature to repeal contrary provisions within the at store recycling portion of the Bag Recycling Act[12], it is noted that repeal or modification of legislation by implication is not favored and if by any fair construction a reasonable field of operation can be found for both statutes it should be done unless the two statutes are in such conflict that both cannot be given effect. However, where the provisions in the earlier statute cover the same field as the later statute and there is no room for reconciliation, such inconsistent earlier provisions are repealed. In this case, even absent ECL §27-2803(3) (or, even where a finding was made that ECL §27-2803(3) is so unclear as to be irrelevant for purposes of the within analysis) it is clear from the express terms of the Bag Reduction Act that reusable plastic bags are not included as an exempt bag permitted to be distributed and the terms of the Bag Recycling Act permitting such distribution are directly in conflict with such subsequent Bag Reduction Act and, under the doctrine of implied preemption, contrary to the argument of petitioners seeking a declaration that the later Bag Reduction Act's implementation and enforcement unlawful and contrary to the argument of respondents that the two statutes should be harmonized, the Bag Recycling Act's provisions would be subject to and preempted by the Bag Reduction Act. Based upon the

[12] It is additionally noted that an analysis of the legislative history as set forth *supra* herein further supports such reading of the word "exempt".

foregoing, petitioner Hassen's first cause of action is without merit and he is not entitled to the declaratory relief he is seeking.[13]

Petitioners' Second Cause of Action

Via its second cause of action, Petitioners argue that the Bag Reduction Act is unconstitutionally vague and accordingly void as it is internally inconsistent, simultaneously appearing to forbid and permit the distribution of durable, reusable, handled plastic bags (*compare* ECL §27-2803(1) with ECL §§27-2801(1), (4) and 27-2805(7)). Petitioners argue that the Bag Reduction Act's vagueness deprives retailers and citizens of notice and due process protections and deprives State agencies and officials of clear standards for its enforcement. Petitioners argue that to survive a void-for-vagueness challenge, a law must clearly put the defendant on notice of the proscribed activity and must place a citizen in a position to reasonably determine exactly what activity is prohibited. Further, they argue that the law must give the officials and agencies tasked with enforcing it clear standards for its enforcement. Accordingly, petitioners assert that the Bag Reduction Act is unlawfully and/or unconstitutionally void for vagueness and the Court should declare its implementation and enforcement to be impermissible, unlawful, and/or unconstitutional, and enjoin its implementation and enforcement pursuant to CPLR §§3001, 6311, and/or 6313, respectively.

Respondents in opposition assert that petitioners have failed to demonstrate that the Bag Reduction Act is unconstitutionally vague and assert that petitioners cite no case law in support of their position. Respondents argue that petitioners' broad assertion of unconstitutional

[13] While *Amici* argue that the Court should consider the words "distribute" and "purchase" in an attempt to harmonize the Bag Recycling Act and the Bag Reduction Act, given the above discussion and considering the express language of ECL §27-2803(1), such argument need not be addressed.

vagueness fails to show how they were denied appropriate notice of the proscribed conduct required by the Bag Reduction Act.

"Turning then to the void-for-vagueness doctrine, we begin our analysis by a brief review of the reasons why it at times has been called the first essential of due process of law. As we have had occasion to reiterate in recent years, a prime purpose is to meet the constitutional requisite that a statute be informative on its face * * * to assure that citizens can conform their conduct to the dictates of the law. To this end, nothing less than adequate warning of what the law requires will do." (*People v New York Trap Rock Corp.,* 57 NY2d 371, 378 [1982]) [internal citations and quotations omitted]).

Petitioners have failed to meet their heavy burden of demonstrating any internal conflict in the Bag Reduction Act rendering it unconstitutionally vague. As discussed above, the Bag Reduction Act clearly precludes a "person required to collect tax", from distributing any plastic carryout bags to its customers unless such bags are exempt bags (as defined in ECL §27-2801). While the Bag Reduction Act also defines the term "reusable bag" as "a bag: (a) made of cloth or other machine washable fabric that has handles; or (b) a durable bag with handles that is specifically designed and manufactured for multiple reuse" (ECL §27-2801(4)), as discussed above, such term is not included in the list of exempt bags and such definition does not reference or authorize plastic (and is thus not in conflict with the general ban of ECL §27-2803(1)). Such term is however, used in ECL §27-2805(7), when discussing the ability of certain paper carryout bag reduction fee monies and penalties (and interest) to be utilized by municipalities, under certain circumstances, "for the purpose of purchasing and distributing reusable bags, with priority given to low- and fixed-income communities". As the purchase and distribution of any "reusable bags" places no requirement upon those persons required to collect tax who are banned

from distributing any non-exempt plastic carryout bags, petitioners have failed to demonstrate the existence of any internal inconsistency rendering the Bag Reduction Act unconstitutionally vague. Accordingly, petitioners are not entitled to the relief they are seeking with respect to the second cause of action.

Petitioner's Third Cause of Action

The Court has determined that Poly-Pak does not have standing and accordingly, no party has standing to bring the third cause of action, however, even assuming *arguendo* that Poly-Pak had standing, it failed to demonstrate that the Bag Reduction Act violates the anti-gift clauses of the New York State Constitution which prohibit the state and municipalities from giving or loaning money or credit to any private corporation (*see* NY Const. Art. VII §8 and article VIII, §1)[14].

Poly-Pak asserts that the Bag Reduction Act violates the anti-gift clauses by "granting a boon to manufacturers of cloth, fabric and paper bags, while denying similar treatment to makers of reusable plastic bags" (Amended Petition, ¶56) and that the Bag Reduction Act violates this

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[14] NY Constitution Art VII, §8(1) provides that
The money of the state shall not be given or loaned to or in aid of any private corporation or association, or private undertaking; nor shall the credit of the state be given or loaned to in aid of any individual, or public or private corporation or association or private undertaking ...

NY Constitution Art VIII, §1 provides as follows:
No county, city, town, village or school district shall give or loan any money or property to or in aid of any individual, or private corporation or association, or private undertaking, or become directly or indirectly the owner of stock in, or bonds of, any private corporation or association; nor shall any county, city, town, village or school district give or loan its credit to or in aid of any individual, or public or private corporation or association, or private undertaking, ... Subject to the limitations on indebtedness and taxation applying to any county, city, town or village nothing in this constitution contained shall prevent a county, city, or town from making such provision for the aid, care and support of the needy as may be authorized by law, ...

stricture by permitting local governments to impose a $.05 per bag tax on the sale of paper bags, which moneys are remitted to the state, which returns a portion of them to municipalities to be spent on the purchase of reusable bags from sources of the municipalities' choosing (*see* Amended Petition, ¶57). Poly-Pak argues that the Bag Reduction Act unconstitutionally exacts money from private citizens by compelling them to purchase items from only certain favored manufacturers and bestows state and local government money by the purchase of particular favored reusable bags and requests that the Court declare its implementation and enforcement to be impermissible, unlawful, and/or unconstitutional, and enjoin its implementation and enforcement.

Respondents contend that the Bag Reduction Act does not authorize money or loans to any private corporation or association, and with respect to the paper carryout bag reduction fee that a municipality may choose to enact, that the fee is not given to a private corporation but rather a portion is provided to a municipality for further use and for deposit in the environmental protection fund (*see* ECL §27-2805(7)). Respondents further argue that a petitioner's burden on the instant claim is heavy, particularly where it challenges public expenditures designed in the public interest (*see Bordeleau v State of New York*, 18 NY3d 305, 313 [2011].

Respondents argue that the Bag Reduction Act has a predominant public purpose, that being the reduction of the use of plastic bags that pollute the State, and that the provisions for the purchase and distribution of reusable bags by municipalities with portions of the paper carryout bag reduction fees garnered, with priority given to low-income communities are consistent with NY Const. art. VII, § 8(2) which provides, in pertinent part, that "...nothing in this constitution contained shall prevent the legislature from providing for the aid, care and support of the needy directly or through subdivisions of the state ...".

Legislative enactments "enjoy a strong presumption of constitutionality ... we give deference to public funding programs essential to addressing the problems of modern life, unless such programs are patently illegal" (*see Schultz v State of New York*, 84 NY2d 231, 241 [1994]). Furthermore, such an allegation of "unconstitutionality must be proven beyond a reasonable doubt" *(Bordeleau v State of New York*, 18 NY3d 305, 313 [2011]).

As asserted by the respondents, this case is not analogous to the cases cited by petitioners. Unlike in *Fox v Mohawk*, 165 NY 517 [1901], the Bag Reduction Act does not (1) exact money, (2) for distribution to a private corporation or association or private undertaking for (3) private discretionary purposes. Further, in *People v Ohrenstein,* 139 Misc2d 935 [1988] salaries were being provided to public employees to engage in private partisan purposes. The Bag Reduction Act authorizes local governments to charge a 5-cent fee on paper bags (*see* ECL §27-2805). Petitioners have not demonstrated, nor have they asserted, a payment of state or municipal funds to a private entity, and any "special benefit" created by the statute to the manufacturers of cloth, fabric and paper bags does not constitute such a payment, as the statute provides for purchase of bags for distribution.

Moreover, to the extent the Bag Reduction Act permits a municipality to collect a 5 cent paper carryout bag reduction fee and provides that a portion of such monies collected be used for the purchase of reusable bags, petitioners have not demonstrated any such monies, even to the extent that such purchase by the municipality could be considered a gift of such monies, constitutes more than an incidental private benefit which will not render such Bag Reduction Act unconstitutional.

In *Bordeleau*, taxpayers challenged, *inter alia*, the constitutionality of "appropriations to the State Department of Agriculture and Markets to fund agreements with not-for-profit

organizations for the promotion of agricultural products grown or produced in New York ..." (*Id.* at 317). The Court noted that it had previously held that "an incidental private benefit will not invalidate a project which has for its primary object a public purpose" (*Id.* at 318). The Court dismissed the taxpayers challenge, noting that the appropriations at issue fulfilled a predominantly public purpose and were not prohibited under New York Constitution Article VII, §8(1).

The Bag Reduction Act has the manifestly predominant public purpose of reducing the use of polluting plastic bags *(see Bordeleau v State of New York*, 18 NY3d 305, 313 [2011]), and petitioners have failed to raise any triable issue of fact regarding such purpose. The provisions authorizing the potential municipal imposition of a 5-cent paper carryout bag reduction fee, a portion of which may be used to purchase and distribute reusable bags, with priority given to low and fixed income communities, is plainly a portion of a larger comprehensive Act, the primary purpose of which is referenced above. Petitioners have failed to demonstrate that any benefit ultimately received by a reusable non-plastic bag manufacturer from a municipalities' purchase of reusable bags results in more than "an incidental private benefit" which should not invalidate a statute which has for its primary object a public purpose (*see Id*).

Based upon the record, respondents have demonstrated that the Bag Reduction Act does not violate the anti-gift clauses of the New York State Constitution and no triable issues of fact exist sufficient to preclude summary judgment dismissal of such third cause of action.

Petitioners' Fourth Cause of Action

Via its fourth cause of action, Petitioners argue that the Bag Regulations are *ultra vires* as they are inconsistent with and go beyond the Bag Reduction Act's provisions, purport to permit what the Bag Reduction Act forbids (the use and distribution of certain reusable plastic bags),

and impose requirements on such regulation-permitted plastic bags that are grossly excessive and unrelated to the statutory requirements articulated by the Legislature.

In the Amended Petition, petitioners allege that the regulations promulgated, identified generally as 6 NYCRR Part 351, exceed and contradict the terms of the Bag Reduction Act. Such Bag Regulations consist of numerous sections and provisions. Petitioners had alleged in the Amended Petition that the regulations exceeded and contradicted the terms of the Bag Reduction Act "by expanding the list of exceptions to the ban (*i.e.,* expanding the list of permitted plastic bags) and by authorizing the use and distribution of reusable plastic bags that are at least 10 mils thick ..." (Amended Petition, ¶3). At oral argument, Petitioners specified that they were challenging that portion of the Bag Regulations that authorized the use of plastic in reusable bags (*see* OA Transcript, pg. 26).

Petitioners assert that DEC cannot go beyond its administrative role and bypass the legislature to create policy based on what it determines the Legislature intended to say. Petitioners argue that as DEC has engaged in legislative policy-making without a proper statutory basis, its promulgation of the Bag Regulations constitutes an *ultra vires*, invalid action in excess of its jurisdiction and authority. Accordingly, they argue the Court should declare their implementation and enforcement to be impermissible, unlawful, and/or unconstitutional, and enjoin its implementation and enforcement pursuant to CPLR §§3001, 6311, and/or 6313, respectively.

Respondents argue that the Department's actions are not *ultra vires*. Respondents argue that the Bag Recycling Act expressly authorized the promulgation of regulations (*see* ECL §27-2711) and that the regulations set forth at 6 NYCRR Part 351 set forth requirements for both the Bag Recycling Act and the Bag Reduction Act; and further, that there is no requirement that a

statute specifically authorize the promulgation of regulations. Respondents argue that DEC properly acted pursuant to its general authority set forth in ECL §1-0101 and ECL §3-0301.

ECL §3-0301(1)(b) authorizes the Commissioner to protect and enhance the State's natural resources by, *inter alia*, "promulgating any rule or regulation, standard or criterion." Further, "[a] regulatory agency is clothed with those powers expressly conferred by its authorizing statute, as well as those required by necessary implication" (*Garcia v New York City Dept. of Health & Mental Hygiene*, 31 NY3d 601, 608-09 [2018]). Respondents argue that an agency can adopt regulations that "go beyond the text of [its enabling] legislation provided they are not inconsistent with the statutory language or its underlying purposes" (*Id.* at 609).

Respondents assert that the DEC did not write "on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance" (*see Boreali v Axelrod*, 71 NY2d 1 [1987]) but rather promulgated regulations intended to "fill up the details" (*Id.*). They assert that they sought to provide clarity and certainty to the regulated community via the Bag Regulations. Further, respondents argue that to the extent the regulations are the product of broad agency authority, broad deference should be given to the agency's judgment.

Amici argue that DEC's regulatory exemption for reusable bags and definition of such reusable bags, which together allow for the distribution of thick plastic bags, are invalid. *Amici* argue that the language of the Bag Reduction Act is clear and unambiguous: the Legislature banned the distribution of "any plastic carryout bags" with certain limited and specifically enumerated exemptions set forth by the Legislature. *Amici* argue that the Bag Regulations unlawfully add "reusable bag" to the Bag Reduction Act's list of exempt bags in violation of the Bag Reduction Act's language, structure and purpose.

Amici argue that the combination of DEC's reusable bag exemption (6 NYCRR §351-1.2(f)(11)) with portions of the DEC's definition of reusable bag (*Id.* §§351-1.2(n)(1)(ii), (4)) creates a major loophole exempting thick plastic bags from the Bag Reduction Act's broad statutory ban on "any plastic carryout bags" which impermissibly rewrites the statute and does not clarify but conflicts with such Act.

"[T]he separation of powers doctrine gives the Legislature considerable leeway in delegating its regulatory powers to an administrative agency to administer the law as enacted by the Legislature. As a creature of the Legislature, an agency is clothed with those powers expressly conferred by its authorizing statute, as well as those required by necessary implication. To that end, an agency is permitted to adopt regulations that go beyond the text of its enabling legislation, so long as those regulations are consistent with the statutory language and underlying purpose" (*Matter of Acevedo v New York State Dept. Of Motor Vehicles*, 29 NY3d 202, 219 [2017]; *see also, GE Capital Corp., v State Div. of Tax Appeals*, 2 NY3d 249 [2004]).

The Bag Regulations contradict the Bag Reduction Act to the extent that they create an additional exemption for certain "non-film plastic washable material" from the Bag Reduction Act's ban of any plastic carryout bags.[15] According to the Bag Reduction Act, a "reusable bag" is defined as one "made of cloth or other machine washable fabric that has handles; or ... a durable bag with handles that is specifically designed and manufactured for multiple reuse." (ECL §27-2801(4) and such term is only used in the Bag Reduction Act concerning a municipalities ability to use portions of the paper carryout bag reduction fee for purchase and distribution.

[15] The Bag Reduction Act provides for exemptions for such bags defined in subdivision one of ECL §27-2801.

6 NYCRR §351-2.1 provides that a person required to collect tax shall not distribute any plastic carryout bag to its customers unless the bag is an exempt bag and "exempt bag" is redefined in the Bag Regulations to include "a reusable bag, as that term is defined in this Part". In the Bag Regulations, "reusable bag" is defined as a bag that "(1) is either made of: (i) cloth or machine washable fabric; or (ii) other non-film plastic washable material; and ... (4) has a minimum fabric weight of 80 grams per square meter (GSM) or equivalent for bags made of any non-film plastic of natural, synthetic, petroleum-based, or non-petroleum based origin..." (6 NYCRR §351-1.2(n)(1), (4). The Bag Regulations provide that such reusable bags cannot be made of film plastic which the Bag Regulations define as "a flexible sheet or sheets or petroleum or non-petroleum based plastic resin or other material (not including a paper carryout bag), less than 10 mils in thickness...." (6 NYCRR §351-1.2(g)). Thus, the Bag Regulations expand the list of exempt plastic carryout bags as set forth in ECL §27-2801(1) to include "reusable bag[s]" which include, *inter alia*, bags made of certain plastic, in contravention of the plain dictate of the statute and accordingly, such portion of the Bag Regulations that do so are *ultra vires* (*see Acevedo, supra*). To the extent Respondents argue that they, by promulgating such Bag Regulations, are attempting to harmonize the Bag Recycling Act and the Bag Reduction Act as authorized by the alleged language exempting the Bag Recycling Act provisions from those of the Bag Reduction Act, the Court reiterates that the referenced language does not create such exemption (nor as stated above, did respondents attempt to demonstrate through any analysis of the language that it did).

That the portion of the Bag Regulations allowing for use of certain plastic reusable bags is in plain contradiction of the Bag Reduction Act is further borne out by the legislative history herein. Such legislative history indicates that "An Analysis of the Impact of Single-Use Plastic

Bags" was issued by the New York State Plastic Bag Task Force Report in January of 2018 (*see* Respondents' Exhibit 1). The Governor then introduced a budget bill (*see Amicus* Brief, page 9)[16] and the memorandum of support for the Governor's introduced budget bill provided that Section H sought to ban single-use plastic bags in order to significantly reduce waste and pollution and encourage consumers to shift toward the use of environmentally-friendly reusable bags (see Respondents' Exhibit 1). Part H of the 2019 initial budget bill which later (as significantly revised) became the Bag Reduction Act was drafted to amend the Bag Recycling Act, maintaining, *inter alia*, certain provisions of the at-store recycling program, and adding a new section 27-2708 which banned providing plastic carryout bags to customers "except as otherwise provided by the department pursuant to regulations." Proposed new section 27-2708 additionally provided a list of items to which the prohibition would not apply to (similar to the list of "exempt" items in the Bag Reduction Act) but also allowed an exemption for "any other bag exempted by the department in regulations." (FY 2020 New York State Executive Budget: Transportation, Economic Development, and Environmental Conservation Art. VII Legislation at Part H §27-2708 (2019), https://www.budget.ny.gov/pubs/archive/fy20/exec/artvii/ted-artvii.pdf; *see also*, Respondents' submissions - NYSCEF Documents 100-105).

Additionally, the proposed legislation amended "plastic carryout bag" as defined in the Bag Recycling Act to mean "any film plastic bag provided" (*Id.*) with "film plastic" continuing to be defined as it was in the Bag Recycling Act as "uncontaminated non-rigid film plastic packaging products composed of plastic resins, which include, but are not limited to, newspaper bags, dry cleaning bags and shrink-wrap" (ECL §2701(7)).

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[16] As stated at oral argument on July 7, 2020, the Court has taken judicial notice of the Governor's introduced budget bill and respondents have subsequently submitted what the State believes are all prints of such bill (*see* NYSCEF Documents 100-105).

The Bag Reduction Act as passed is significantly different from the originally introduced relevant section of the budget bill that would have amended the provisions of the Bag Recycling Act. The provisions of ECL Title 28 instituted far more limited exemptions to the general ban on the distribution of any plastic carryout bags by "persons required to collect tax". Further, ECL §27-2803(1) specifically states, "[n]o person required to collect tax shall distribute any plastic carryout bags to its customers unless such bags are exempt bags as defined in [emphasis added] subdivision one of section 27-2801 of this title."

These "... substantive changes made to the proposed legislation" (*Pines v State of New York*, 115 AD3d 8097 [2nd Dept 2014]) are, in the Court's opinion, a fundamental expression of the legislature's intent herein to limit exempt bags to those statutorily listed in the Bag Reduction Act. Thus, while it appears that the initial intention of the Governor's proposed legislation was to enact a ban prohibiting the distribution by persons required to collect tax (as such term is defined in ECL §27-2801(5)), of single-use plastic bags (as opposed to also banning reusable plastic bags), the enacted law as codified at ECL Title 28, as discussed above, enacts a far broader ban of plastic bags.

Further, to the extent respondents argue that the Court should engage in an analysis pursuant to *Boreali v Axelrod*, 71 NY2d 1 [1987], examining the four factors, in order to ascertain whether respondents rule-making amounted to legislative policy-making as opposed to administrative rule-making, in violation of the separation of powers doctrine, the Court need not engage in such analysis. An agency may adopt regulations that go beyond the statute itself as long as they are consistent with the statutory language or its underlying purposes (*see GE Capital Corp., supra* at 254). In this case, however, to the extent the Bag Regulations expand the list of exempt plastic carryout bags as set forth in ECL §27-2801(1) to include "reusable bag[s]"

which include, *inter alia*, bags made of certain plastic, such exemption is inconsistent with the statutory language and underlying purpose. It remains, of course, within the province of the Legislature to enact legislation to the extent it seeks to expand the list of "exempt bags" as defined in ECL §27-2801(1) or provide DEC such authority.

Accordingly, based upon the record, petitioners have demonstrated their entitlement to (i) a declaration that the relevant portions of the Bag Regulations which authorize an additional exemption to the plastic carryout bag distribution ban of ECL §27-2803(1) for reusable bags made of non-film plastic *(see* 6 NYCRR §351-1.2(f)(11) and (n)(1)(ii), (4)) are *ultra vires* and invalid as a matter of law and (ii) a permanent injunction enjoining respondents, their agents, officers and employees from implementing or enforcing such so much of the Bag Regulations which authorizes such additional exemption.

Petitioners' Fifth Cause of Action

Finally, via its fifth cause of action, Petitioners argue that the Bag Regulations are arbitrary and capricious as they purport to impose requirements on certain plastic bags that are grossly excessive, unrelated to the statutory requirements articulated by the Legislature, unsupported by any findings of fact, evidence or testimony, and have an economically and environmentally detrimental effect. Specifically, petitioners argue that DEC's requirement that reusable plastic bags made of polyethylene be at least 10 mils thick lacks any foundation in fact, is without sound basis, and was imposed despite and without substantively responding to public comments. Accordingly, petitioners argue that because the Bag Regulations requirements pertaining to polyethylene bags are arbitrary and capricious, the Court should declare its implementation and enforcement to be impermissible, unlawful, and/or unconstitutional, and enjoin its implementation and enforcement pursuant to CPLR §§7803, 7805 and 7806, respectively.

Given the Court's determination above the Court need not reach such cause of action. Petitioners' contentions are related to the Bag Regulations' imposition of requirements on certain plastic bags, particularly the requirement that reusable plastic bags made of polyethylene be at least 10 mils thick. Petitioners contend that such requirements are arbitrary and capricious. Such requirements however are related to the definition of "reusable bag" in the Bag Regulations which includes "other non-film plastic washable material". The significance of such term in the Bag Regulations is their allowance of an exemption for such bags from the Bag Reduction Act's distribution prohibition. As the Court has determined that such an exemption for reusable plastic bags is *ultra vires* and invalid, the Court need not determine whether the portions of the Bag Regulations relating to such are arbitrary or capricious. Accordingly the Court need not address petitioners contentions that DEC's actions are arbitrary and capricious for failure to consider the health implications of reusable bags in a pandemic that struck a year after passage of the statute, and after the regulations were adopted (Amended Petition, ¶¶38-39) nor Respondents' contentions concerning the non-admissibility of petitioners' expert affidavit concerning the health implications of reusable plastic bags as such affidavit was not before the agency prior to the adoption of the Bag Regulations.

To the extent Petitioners argue that the COVID-19 crisis provides grounds to invalidate the Bag Reduction Act, they have failed to provide legal authority entitling petitioners to such a determination. Based upon the record, such contention is without merit.

Otherwise, the Court has reviewed the parties' remaining arguments and finds them either unpersuasive or unnecessary to consider given the foregoing determination.

Therefore, it is hereby

ORDERED and ADJUDGED that respondents' are entitled to dismissal of the first and third causes of action as against petitioners Green Earth, Mr. Marte and the Bodega Association for lack of standing; and it is further

ORDERED and ADJUDGED that respondents' are entitled to dismissal of the third cause of action as against petitioner Hassen for lack of standing; and it is further

ORDERED and ADJUDGED that respondents' are entitled to dismissal of the Amended Petition (all causes of action/claims) as against petitioner Poly-Pak for lack of standing; and it is further

ORDERED and ADJUDGED that proposed *amici*, We ACT for Environmental Justice, Beyond Plastics, and Clean and Healthy New York, are granted amicus status and leave to file an amicus brief; and it is further

ORDERED and ADJUDGED that the Petitioners' motion for summary judgment with respect to their first, second, and third causes of action is denied as petitioners are not entitled to the declaratory or permanent injunctive relief they seek with respect to such causes of action; and it is further

ORDERED and ADJUDGED that Petitioners' motion for summary judgment with respect to its fifth cause of action is denied as academic in light of the within determination and accordingly, they are not entitled to the declaratory or permanent injunctive relief they seek with respect to such cause of action; and it is further

ORDERED and ADJUDGED that the Respondents' motion for summary judgment dismissal of the petitioners' first, second, third and fifth causes of action is granted for the reasons set forth herein; and it is further;

ORDERED and ADJUDGED that petitioners' motion for summary judgment with respect to its fourth cause of action seeking declaratory and related injunctive relief is granted solely to the extent set forth below; and it is further;

ORDERED, ADJUDGED and DECLARED that the relevant portions of the Bag Regulations which authorize an additional exemption to the plastic carryout bag distribution ban of ECL §27-2803(1) for reusable bags made of non-film plastic *(see* 6 NYCRR §351-1.2(f)(11) and (n)(1)(ii), (4)) are *ultra vires* and invalid as a matter of law; and it is further

ORDERED and ADJUDGED that respondents, and any of their agents, officers, and employees are enjoined and restrained from enforcing the relevant portions of the Bag Regulations which authorize an additional exemption to the plastic carryout bag distribution ban of ECL §27-2803(1) for reusable bags made of non-film plastic (*see* 6 NYCRR §351-1.2(f)(11) and (n)(1)(ii), (4)); and it is further

ORDERED that petitioners are granted the statutory costs of the action in the amount of $200.00 pursuant to CPLR §8101 and CPLR §8201(1).

This constitutes the Decision/Order/Judgment of the Court which is being electronically filed by the Court via NYSCEF for entry by the Albany County Clerk. Upon such entry, counsel for Petitioners shall promptly serve notice of entry on all other parties to this action (*see* Uniform Rules for Trial Courts 22 NYCRR § 202.5-b [h][1], [2]).

SO ORDERED, ADJUDGED and DECLARED.
ENTER.

Dated: August 20, 2020
Albany, New York

Gerald W. Connolly
Acting Supreme Court Justice

Papers Considered:

1. NYSCEF Documents 4-23; 26-29; 32-41; 43; 45; 51-57; 67; 69-70; 74-75; 77-79; 82; 84; 92-106.