

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

WANDERING DAGO, INC.,

Plaintiff,

vs.

**1:13-cv-1053
(MAD/DJS)**

**ROANN M. DESTITO; JOSEPH J. RABITO;
WILLIAM F. BRUSO, JR.; AARON
WALTERS; and JOHN DOES 1-5,**

Defendants.

APPEARANCES:

BOIES, SCHILLER & FLEXNER, LLP

30 South Pearl Street
Albany, New York 12207
Attorneys for Plaintiff

**ISEMAN, CUNNINGHAM, RIESTER &
HYDE, LLP**

9 Thurlow Terrace
Albany, New York 12203
Attorneys for Plaintiff

**OFFICE OF THE NEW YORK
STATE ATTORNEY GENERAL**

The Capitol
Albany, New York 12224
Attorneys for Defendants

OF COUNSEL:

**GEORGE F. CARPINELLO, ESQ.
JOHN F. DEW, ESQ.**

MICHAEL Y. HAWRYLCHAK, ESQ.

**COLLEEN D. GALLIGAN, AAG
LOUIS JIM, AAG**

Mae A. D'Agostino, U.S. District Judge:

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

On August 27, 2013, Plaintiff commenced this civil rights action seeking damages, and injunctive and declaratory relief arising from the denial by the New York State Office of

General Services ("OGS"), RoAnn M. Destito, Joseph J. Rabito, William F. Brusio, Jr., and Aaron Walters of Plaintiff's application to participate as a food vendor in the 2013 Empire State Plaza Summer Outdoor Lunch Program, and the subsequent termination of Plaintiff's status as a vendor at the Saratoga Race Course by the New York State Racing Association ("NYRA"), Christopher K. Kay, and Stephen Travers. *See* Dkt. No. 1. Plaintiff alleges that Defendants took these actions under pressure from, or at the direction of, various New York State officials. *See id.*

In a January 15, 2014 Memorandum-Decision and Order, the Court granted in part and denied in part Defendants' motions to dismiss. *See* Dkt. No. 54. Specifically, the Court dismissed without prejudice Plaintiff's federal and state Equal Protection claims against the NYRA Defendants. Further, the Court dismissed with prejudice Plaintiff's claims against OGS, as well as Plaintiff's claims for damages against the State Defendants in their official capacities. *See id.*

On May 24, 2015, Plaintiff filed a motion to amend the complaint, in which it sought to add the following: (1) four additional defendants; (2) allegations pertinent to the Equal Protection causes of action which were dismissed without prejudice; (3) facts to identify the type of forum conceivably relevant to the First Amendment causes of action; (4) "factual context" in support of the original claims; and (5) allegations concerning the denial of Plaintiff's application for the 2014 Empire State Plaza Summer Outdoor Lunch Program. *See* Dkt. No. 73-1. In a July 28, 2014 Memorandum-Decision and Order, Magistrate Judge Treece¹ granted in part and denied in part Plaintiff's motion to amend. Specifically, Magistrate

¹ The Court notes that, upon Magistrate Judge Treece's retirement in September of 2015, (continued...)

Judge Treece permitted Plaintiff to add additional facts to provide some context on the "characteristics and the nature of the fora in which its speech took place," and "to more accurately reflect the manner in which the First Amendment claims have developed in the course of the litigation." *Id.* at 31. Moreover, Plaintiff was permitted to add facts to the complaint regarding the denial of their application for the 2014 Empire State Plaza Summer Outdoor Lunch Program. *See id.* at 32.

In a stipulation dated January 13, 2015, Plaintiff and the NYRA Defendants indicated that they had entered into a settlement agreement and, therefore, stipulated to the dismissal of all claims brought against the NYRA Defendants pursuant to Rule 41 of the Federal Rules of Civil Procedure. *See* Dkt. No. 140. Thereafter, in a letter dated January 15, 2015, Plaintiff informed the remaining Defendants that it "has elected to drop its claims for damages" but "continues to pursue its claims for declaratory and injunctive relief as well as attorneys' fees and costs." Dkt. No. 143-1 at 1.

On July 31, 2015, the parties cross moved for summary judgment on the remaining claims, which are currently pending before the Court. *See* Dkt. Nos. 155 & 156.

II. BACKGROUND

A. The parties

Plaintiff Wandering Dago, Inc. ("Plaintiff" or "Wandering Dago") is a New York Corporation. *See* Dkt. No. 156-2 at ¶ 1. Wandering Dago is owned and operated by Andrea Loguidice and Brandon Snooks, with Ms. Loguidice serving as the corporation's president.

¹(...continued)
this case was reassigned to Magistrate Judge Daniel J. Stewart.

See id. at ¶ 2. Through Wandering Dago, Inc., Ms. Loguidice and Mr. Snooks operate a food truck using the "Wandering Dago" brand from which they serve a variety of foods cooked and prepared on-site in the truck's mobile kitchen. *See id.* at ¶ 3; *see also* Dkt. No. 86 at ¶ 5.

Wandering Dago serves food for a variety of types of functions, including catering events, fairs and festivals, and street-side lunch service. *See id.* at ¶ 3. Ms. Loguidice and Mr. Snooks work as the business' co-chefs, with Mr. Snooks also serving as the driver. *See* Dkt. No. 86 at ¶ 5.

Defendant RoAnn M. Desito is the Commissioner of OGS. *See* Dkt. No. 156-2 at ¶ 4. Defendant Joseph J. Rabito is the Deputy Commissioner of OGS. *See id.* at ¶ 5. Defendant William F. Brusco, Jr. is an Associate Attorney working for OGS and Defendant Aaron Walters is employed as a promotions and public affairs agent for OGS. *See id.* at ¶¶ 6-7.

B. The Empire State Plaza

The Empire State Plaza is a facility owned by the State of New York and operated by the Office of General Services. *See* Dkt. No. 156-2 at ¶ 8. The Empire State Plaza includes multiple state buildings, including the Corning Tower, four agency buildings, the Swan Street Building, the Legislative Office Building, the Robert Abrams Justice Building, the Egg Center for Performing Arts, the Cultural Education Center (which contains the State Museum and the State Library), and the New York State Capitol Building, all of which are connected by an underground Concourse. *See* Dkt. No. 157-1 at ¶ 9. The Plaza level of the Empire State Plaza (the "Plaza") is an outdoor space bounded on the North by State Street, on the South by

Madison Avenue, on the West by Swan Street, and on the East by a multi-story bulkhead wall.

See Dkt. No. 156-2 at ¶ 10.

The Plaza is the site of a Farmer's Market on certain weekdays during the summer. *See id.* at ¶ 11. Moreover, several special events are held annually on the Plaza. *See id.* at ¶ 12; Dkt. No. 157-1 at ¶ 12. Some examples include the African American Family Day, Hispanic Heritage Month, the Food Festival, and the Fourth of July Festival. *See id.* Further, the Plaza is occasionally used by various private groups as a site for political rallies, marches, and protests. *See* Dkt. No. 156-2 at ¶ 13; Dkt. No. 157-1 at ¶ 13. According to Defendants, although "OGS may issue demonstration permits for individuals or organizations that apply to use the Plaza for political rallies, marches, and protests, the issuance of a demonstration permit does not equate to OGS sponsorship of the event." Dkt. No. 157-1 at ¶ 13 (citing Rabito Dep. at 86). The potential offensiveness of a political event is not a basis for the denial of an application for a political event permit, and signs and speeches are not reviewed in advance. *See* Dkt. No. 156-2 at ¶ 14.

Although OGS issues permits to individuals or organizations that apply for a permit to demonstrate on OGS-controlled property, such demonstrations sometimes occur without the individual or group first obtaining a permit. *See id.* at ¶ 15; Dkt. No. 157-1 at ¶ 15. According to Defendants, the purpose of the permit "is to provide OGS with notice of the likely size and location of the demonstration so that OGS can provide adequate services and operational management. . . ." Dkt. No. 157-1 at ¶ 15. Moreover, both permitted and unpermitted demonstrations also occur on the Concourse beneath the Plaza. *See* Dkt. No. 156-2 at ¶ 16. Unpermitted demonstrations are allowed to continue unless they create a health or safety issue,

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