RETURN DATE: MAY 28, 2019

FCR, LLC, Plaintiff, v. MATERIALS INNOVATION AND RECYCLING AUTHORITY, Defendant.	:	SUPERIOR COURT JUDICIAL DISTRICT OF HARTFORD APRIL 30, 2019

COMPLAINT

Plaintiff FCR, LLC ("FCR"), brings this action against defendant Materials Innovation and Recycling Authority ("MIRA") and alleges as follows:

PRELIMINARY STATEMENT

1. MIRA is a public instrumentality established by the State of Connecticut in 2014 as the successor to the Connecticut Resources Recovery Authority ("CRRA"). MIRA operates the Connecticut Solid Waste System ("CSWS"), a system that processes the single-stream recyclables of approximately 70 municipalities throughout the State. As part of that system, municipalities' single-stream recyclables are delivered to a MIRA-owned recycling facility located at 211 Murphy Road in Hartford, Connecticut (the "Recycling Facility"). The Recycling Facility sorts and screens incoming recyclables into different categories of recyclables, such as mixed paper, PET plastics, and aluminum cans. These sorted recyclables are then sold in bulk to specialized processing facilities throughout the United States and abroad, where they are turned into reusable raw materials.

2. In 2013, MIRA's predecessor, CRRA entered into an agreement with FCR to operate and maintain the Recycling Facility on a day-to-day basis (the "Agreement"). This Agreement remains in force today.

3. The Agreement contained detailed terms addressing the scope of services FCR would provide to MIRA at the Recycling Facility. These included precise definitions of the categories of recyclables FCR must accept and process. Under these provisions, MIRA agreed that FCR would not need to process loads of recyclables that were contaminated, meaning loads that consisted of more than five percent unrecoverable materials, or that originated from more than one municipality. Instead, MIRA agreed that it would reject these loads and that it would enforce the terms of its municipal service agreements with municipalities to ensure they delivered loads to the Recycling Facility that complied with the Agreement's terms.

4. These requirements, particularly the contamination limit, were integral to the parties' agreement. FCR's basic task in operating the Recycling Facility is to sort the incoming recycling stream into different categories of recyclables, which can then be sold as bulk sorted recyclables. The revenue earned from selling bulk recyclables is FCR's *only* form of compensation under the Agreement. The more contaminated the incoming recycling, the greater the processing costs FCR must incur to refine the stream into salable sorted recyclables. Excessively contaminated recycling also requires FCR to pay more to dispose of unrecoverable residue, reduces the volume of salable sorted recyclables FCR can recover from the incoming recycling stream, and creates excessive wear and tear on the processing machinery that FCR is required to maintain under the Agreement.

5. When FCR and MIRA entered the Agreement, they recognized that the scope of services FCR would provide may change over time. MIRA therefore reserved the right to

unilaterally modify FCR's obligations, including by expanding the categories or definitions of the recyclables FCR must accept and process. However, MIRA recognized that unilaterally changing the scope of required services could have an adverse effect on FCR. MIRA therefore agreed that if FCR demonstrated that a required change in the scope of services would result in increased costs for FCR, then MIRA would negotiate in good faith with FCR to determine the amount of additional compensation FCR was owed.

6. MIRA has failed to enforce the terms of its municipal service agreements with municipalities and has required FCR to accept and process recyclables that fall outside the parties' Agreement. MIRA consistently allows haulers to deliver loads of single-stream recyclables that originate from more than one municipality. It has also failed to monitor the composition of loads coming to the Recycling Facility, which has resulted in these loads becoming ever more contaminated. MIRA's failure to police the definitions of acceptable recyclables established by the Agreement and to reject loads from municipalities that do not meet the Agreement's terms has imposed substantial costs on FCR, as it tries to cope with a much more contaminated recycling stream than it ever agreed to process. Due to MIRA's failure to perform its obligations, FCR has been operating the Recycling Facility at a substantial loss. FCR has repeatedly raised these issues with MIRA, but it refuses to address them.

7. To document just how severe the problem has become, FCR recently retained the services of a nationally recognized waste/recycling consulting firm to audit the inbound recycling stream delivered to the Recycling Facility. This audit found that more than thirty percent of the incoming recycling stream consisted of unacceptable recyclables, more than six times the contamination threshold established by the Agreement.

8. By requiring FCR to accept and process a recycling stream that is more than six times as contaminated as what it agreed to process, MIRA has expanded the scope of services FCR must provide and changed the parties' agreed-upon definition for acceptable recyclables. FCR certified to MIRA in writing that this change in the scope of required services was having an adverse effect on FCR, which it substantiated with verifiable evidence. But MIRA has categorically refused to acknowledge its obligation to negotiate with FCR regarding additional compensation and refused to take steps to ensure a cleaner recycling stream going forward.

9. MIRA knows that the recycling material coming into the Recycling Facility far exceeds the contamination limits set by the Agreement. But MIRA is unwilling to hold municipalities to the terms of their municipal service agreements or to ask them to pay more in fees to cover the costs their contaminated recycling material is imposing on FCR. Simply put, MIRA is dumping the problem on FCR. But at the same time, MIRA is unwilling to pay FCR any additional compensation for shouldering the burden of addressing MIRA's own shortcomings.

10. MIRA simply cannot have it both ways. Either it must fulfill its part of the bargain by requiring municipalities to comply with their municipal service agreements and ensuring that the recycling stream coming to the Recycling Facility meets the terms of the parties' Agreement. Or it must compensate FCR for the additional expenses it is incurring as a direct result of MIRA's failure to perform its contractual obligations.

11. Because MIRA has refused to acknowledge its obligation to negotiate with FCR about the additional compensation FCR is owed for the additional services it now must provide and the grossly expanded category of recycling it must process, FCR has no choice but to bring the present action. FCR seeks damages for MIRA's breach of the parties' Agreement. FCR also

seeks a declaratory judgment that MIRA's actions are events of default, entitling FCR to terminate the Agreement without penalty.

PARTIES

12. Plaintiff FCR, LLC, is a Delaware limited liability company with its principal place of business in Arizona. It is authorized to do business in this State as a foreign limited liability company under the name ReCommunity Hartford, LLC.

13. Defendant MIRA is a public instrumentality established in 2014 as successor to CRRA. Conn. Gen. Stat. § 22a-260a. It is not a department, institution, or agency of the State. Conn. Gen. Stat. § 22a-261(a). Under State law, it has the power to sue or be sued and to enter into contracts or agreements. Conn. Gen. Stat. § 22a-265(3), (4). MIRA's headquarters is in Rocky Hill.

JURISDICTION AND VENUE

14. This action arises under Connecticut state law.

15. The Court has personal jurisdiction over MIRA because it is a political subdivision of the State of Connecticut. Conn. Gen. Stat. § 22a-261(a).

16. Venue is proper in this district because MIRA resides within the judicial district of Hartford. In addition, the parties agreed that disputes related to the Agreement would be settled by the Connecticut Superior Court, with proceedings taking place in Hartford.

STATEMENT OF FACTS

I. CRRA and the CSWS

17. In the 1970s, Connecticut established CRRA to develop a network of resource recovery and related facilities to move the State away from the use of landfills.

18. The network of facilities CRRA established is commonly known as the Connecticut Solid Waste System. The CSWS, as it exists today, is a three-part hub-and-spoke system. The system begins with municipalities, which collect trash and recyclables primarily through curbside collection. Under municipal service agreements with CRRA (and now MIRA), many of these municipalities deliver their solid waste to three CSWS transfer stations, located in Essex, Torrington, and Watertown. After processing, the transfer stations deliver the materials to the two hubs of the system: recycling materials go to the single-stream Recycling Facility and solid waste goes to the Resource Recovery Facility, both located in Hartford. Other municipalities deliver their recycling directly to the Recycling Facility and solid waste directly to the Resource Recovery Facility, bypassing the intermediate transfer stations.

19. Municipal solid waste (i.e., garbage) is sent to the Resource Recovery Facility, where it is converted into renewable energy. Single-stream recyclables are sent to the Recycling Facility, where they are sorted and screened into different categories of bulk recyclables, which are then sold for further processing to facilities elsewhere in the United States and abroad.

II. CRRA contracts with FCR to operate the Recycling Facility.

20. In 2013, CRRA entered into an Agreement with FCR under which FCR agreed to provide operation and maintenance services to CRRA at the Recycling Facility. The Agreement had an effective date of October 31, 2013. Its initial term ran until June 30, 2017. The Agreement gave CRRA the option to exercise four consecutive one-year renewal terms by providing written notice to FCR of its intent to exercise its option for a renewal term at least sixty days prior to the end of the initial term or the then-effective renewal term.

21. The Agreement contained detailed terms regarding the services FCR was required to provide. Among these provisions, the Agreement defined the specific types of "Acceptable

Recyclables" FCR must process in operating the Recycling Facility. CRRA expressly reserved the right to expand the definition of Acceptable Recyclables, subject to the provisions of the Agreement requiring CRRA to pay FCR additional compensation for this expansion of required services.

22. The Agreement required CRRA to reject all loads that included unacceptable levels of contamination, that were unprocessible, or that did not meet the terms and conditions of the Agreement.

23. Loads would be considered unacceptable if, among other things, they originated from more than one municipality.

24. Loads of single-stream recyclables would be considered contaminated if more than 5% of the load consisted of material that was not "Acceptable Paper Fiber Recyclables" or "Acceptable Commingled Container Recyclables." The Agreement defined the types of paper fiber and comingled containers that qualified as "Acceptable Paper Fiber Recyclables" and "Acceptable Commingled Container Recyclables."

25. This 5% maximum contamination level was central to the Agreement. FCR's basic task in operating the Recycling Facility is to screen and sort the incoming recycling material stream into categories of recyclables, such as mixed paper, PET plastics, or aluminum cans, that can be sold to specialized recycling facilities. The more contaminated the incoming recycling stream, the more unrecoverable residue material FCR must remove to yield recyclable materials that are clean enough to be sold, as envisioned by the Agreement. This increases FCR's processing costs, reduces the per-ton revenue FCR can ultimately obtain from the incoming recycling stream, and increases the costs FCR must incur to dispose of the residue. The entire structure of FCR's compensation under the Agreement was thus negotiated based on CRRA's

promise that FCR would not be required to process loads with greater than 5% contamination, because higher levels of contamination would make it impossible for FCR to cover its costs.

26. The single-municipality origin requirement was also integral to the parties' agreement. By ensuring that each load originated from only one municipality, FCR and CRRA could identify the specific municipalities that were delivering loads that did not meet the terms of the Agreement, such as loads that were excessively contaminated.

27. The Agreement gave CRRA sole responsibility to enforce all provisions of its municipal service agreements with municipalities. It also gave CRRA sole responsibility for all enforcement activities at the Recycling Facility.

28. As a result of these and other provisions, FCR simply has no control over the composition of the incoming recycling stream. Only CRRA (and now its successor MIRA) has the authority to affect the composition of recycling material coming into the Recycling Facility.

29. The Agreement also gave CRRA sole responsibility for maintaining all permits issued by the Connecticut Department of Energy and Environmental Protection ("DEEP"). These permits prohibit the Recycling Facility from accepting single-stream recycling loads that are more than 2% contaminated with non-recyclables. The Agreement provided that FCR would not be required to process any recyclables provided by CRRA if it would cause the Recycling Facility to exceed its legally permitted capacity.

30. The Parties recognized that the scope of services FCR may need to provide to CRRA at the Recycling Facility may change over time. Accordingly, CRRA reserved the right to change or expand FCR's services, at its sole discretion, including by expanding the scope of recyclables FCR must process. At the same time, CRRA agreed that if it required FCR to provide additional services, including processing expanded categories of recycling material, FCR would

be entitled to additional reasonable compensation. Specifically, if FCR certified in writing that it would incur increased costs as a result of CRRA's change in required services, then the parties were required to mutually and in good faith agree as to the amount of additional compensation that FCR would be entitled to from CRRA.

31. The Agreement defined several occurrences as Events of Default. Regarding CRRA, the Agreement specified that it would constitute an Event of Default if CRRA failed to fulfill any of its material obligations under the Agreement or if it breached any of its covenants or representations under the Agreement. The Agreement further specified that FCR would not have the right to seek damages or to terminate the Agreement based on CRRA's breach or an Event of Default until (a) FCR had given written notice to CRRA specifying the Event of Default and (b) CRRA had not cured the Event of Default within 30 days of notice or diligently initiated reasonable steps to correct the Event of Default within a longer period of time agreed in writing between CRRA and FCR.

32. On the occurrence of an uncured Event of Default, either party had the right to terminate the Agreement and/or to collect actual damages from the non-defaulting party.

III. MIRA succeeds CRRA in managing the Recycling Facility.

33. In 2014, Connecticut established MIRA as successor authority to CRRA. As CRRA's successor, MIRA assumed all rights and responsibilities of CRRA by operation of law, including its rights and responsibilities under its contract with FCR.

34. MIRA has twice exercised its option to extend the Agreement for one-year renewal terms. On March 25, 2019, MIRA notified FCR that it will exercise its option to extend the Agreement for a third renewal term, running from July 1, 2019, through June 30, 2020.

IV. MIRA expands the definition of recyclables FCR must process but refuses to negotiate with FCR regarding additional compensation.

35. MIRA has been permitting haulers to deliver loads of single-stream recyclables to the Recycling Facility that originate from more than one municipality.

36. Loads delivered to the Recycling Facility have frequently exceeded both the 2% contamination limit set by the Recycling Facility's DEEP permit and the 5% maximum contamination limit set by the Agreement.

37. FCR has repeatedly informed MIRA that a substantial number of loads arriving at the recycling facility originate from more than one municipality and that contamination levels among loads regularly exceed 5%.

38. The failure of municipalities, haulers, and MIRA to comply with the load requirements in the Agreement has had a substantial adverse effect on FCR. It has been forced to devote ever more resources to cleaning ever more contaminated loads in order to produce salable bulk recyclables. This also means that FCR obtains less in revenue from each ton of incoming single-stream recyclables, must pay more than contemplated in the Agreement to dispose of greater than expected residue, and faces greater maintenance obligations because of the wear and tear the excessively contaminated material has on the Recycling Facility's equipment.

39. As a result, FCR operates the Recycling Facility at a substantial loss. MIRA's failure to enforce the terms of the parties' agreement and to ensure that only acceptable loads are delivered to the facility results in more than $279,000 per month in additional costs, or more than $3,000,000 per year.

40. MIRA has failed to address the excess contamination in the incoming recycling stream. It has taken few, if any, steps to ensure that municipalities abide by the terms of their municipal service agreements and deliver loads that are less than 5% contaminated. MIRA has

also failed to take any steps at the Recycling Facility to identify and reject the substantial number of excessively contaminated loads being delivered to the Recycling Facility on a daily basis.

41. At the same time, MIRA has refused to negotiate with FCR regarding additional compensation to reimburse it for the substantial additional expenses it incurs because of MIRA's failure to take any steps to curtail the delivery of contaminated and unacceptable loads.

42. Instead, in public comments, MIRA leadership has recognized that it is paying FCR far below the market rate to process single-stream recyclables. By its own admission, and contrary to its obligations under the Agreement, MIRA plans to continue paying as little as it can for as long as it can, until the Agreement finally expires in 2021.

43. To document just how severe the problem has become, in early 2019 FCR retained the services of a nationally recognized waste/recycling consulting firm, MSW Consultants, to conduct an audit of the incoming recycling stream. Before this study was conducted, MIRA was invited to comment on MSW's proposed study design and protocols and raised no objections. MIRA then observed MSW's work on-site at the Recycling Facility and again raised no complaints regarding MSW's methodology or procedures.

44. MSW's findings showed exactly what FCR (and MIRA) expected: Contamination levels in incoming loads greatly exceed the threshold at which MIRA is *required* to reject loads. Approximately 31% of all recycling material being delivered to the Recycling Facility consists of Unacceptable Recyclables, as that term is defined in the Agreement.

45. MSW further noted that the Agreement's definitions of Acceptable Recyclables are in some respects outdated, and that some categories of recycling material deemed unacceptable under the Agreement can in fact be recovered using more modern sorting methods.

But even based on present-day industry guidelines, MSW still found that more than 24% of the materials being delivered to the Recycling Facility cannot be recovered.

46. Simply put, MIRA is knowingly requiring FCR to process a stream of recycling that is five to six times as contaminated as the *maximum* contamination level FCR agreed to process when it entered the Agreement. MIRA is demonstrably failing to fulfill its obligation to reject contaminated loads and to enforce the terms of its municipal service agreements with Connecticut municipalities. It is also failing to run the Recycling Facility in a manner that complies with its DEEP permit; instead, MIRA is knowingly requiring FCR to process loads that should not be processed under the permit.

47. On March 6, 2019, FCR certified in writing that MIRA's amendment of the contamination thresholds and origin requirements for loads was having an adverse effect on FCR. FCR therefore requested that MIRA participate in good-faith negotiation regarding additional compensation, as required by the Agreement. FCR supported this request with verifiable substantiation, including, among other things, MSW's study showing excessive contamination and the additional costs such contamination imposes on FCR.

48. On March 21, 2019, MIRA formally refused to even participate in negotiations regarding additional compensation. MIRA contended that because it has never *formally amended* the definitions of the types of recycling material that FCR must process under the Agreement, FCR is not entitled to any additional compensation. In essence, MIRA maintains that it can simply ignore the contamination levels it promised to enforce and make FCR bear all the costs of MIRA's failure to meet its contractual obligations.

49. On March 26, 2019, FCR informed MIRA that its failure to comply with its material obligations under the Agreement was an Event of Default. Specifically, MIRA's

ongoing failure to enforce the terms of the Agreement and its municipal service agreements (such as the contamination limits), to require FCR to process recycling material in violation of its DEEP permit, and its refusal to negotiate with FCR in good faith regarding compensation for the additional services MIRA is requiring FCR to provide are all breaches of MIRA's material obligations and Events of Default.

50. More than thirty days have passed since FCR notified MIRA of these Events of Default. Since that notification, MIRA has continued to refuse to accept responsibility for these Events of Default and failed to agree with FCR regarding a timeline under which MIRA will cure its Events of Default.

51. With no other choice left, FCR therefore brings the present action, seeking declaratory relief and damages.

COUNT ONE: BREACH OF CONTRACT

52. Paragraphs 1–51 are incorporated by reference.

53. A valid, enforceable contract exists between MIRA and FCR, namely the October 31, 2013 Agreement to provide operational and maintenance services to MIRA at the Recycling Facility.

54. FCR has fully performed its obligations under the Agreement.

55. MIRA has failed to perform its material obligations under the Agreement. Among other breaches, it has failed to reject loads that are excessively contaminated or originate from more than one municipality, refused to enforce the terms of its municipal service agreements with municipalities, and required FCR to process recycling material that is more contaminated than the Recycling Facility's permit allows.

56. Through these and other actions, MIRA has expanded or changed the scope of services FCR must provide under the Agreement.

57. FCR requested additional compensation from MIRA regarding the additional services it has been required to provide, but MIRA has refused to even participate in good-faith negotiations in violation of the Agreement.

58. FCR informed MIRA that its failure to fulfill its material obligations under the Agreement were Events of Default.

59. MIRA has failed to cure these Events of Default within 30 days, entitling FCR to terminate the Agreement and/or obtain actual damages.

60. FCR has suffered damages from MIRA's breaches of the Agreement in an amount to be determined at trial.

COUNT TWO: BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING

61. Paragraphs 1–60 are incorporated by reference.

62. A valid, enforceable contract exists between MIRA and FCR, namely the October 31, 2013 Agreement to provide operational and maintenance services to MIRA at the Recycling Facility.

63. The parties' obligations and duties under the Agreement are subject to the duty of good faith and fair dealing.

64. MIRA has impeded FCR's right to receive the benefits it reasonably expected to receive under the contract by acting in bad faith.

65. As set forth more fully above, these acts include failing to reject contaminated loads or loads that originate from more than one municipality, refusing to take other reasonable steps to reduce contamination among loads arriving at the Recycling Facility, allowing

municipalities to flout the terms of their municipal service agreements with MIRA, requiring FCR to process loads that are more contaminated than its DEEP permit authorizes, and refusing to compensate FCR for the costs incurred as a result of MIRA's failures to perform its contractual obligations.

66. As a result of these and other breaches of the duty of good faith and fair dealing, FCR has suffered damages in an amount to be determined at trial.

COUNT THREE: DECLARATORY JUDGEMENT

67. Paragraphs 1–66 are incorporated by reference.

68. A justiciable controversy exists between MIRA and FCR in which their interests are adverse.

69. There is an actual bona fide and substantial question regarding whether MIRA's actions constitute one or more Events of Default under the Agreement.

70. All persons who have an interest in the subject matter of this complaint are parties to this action.

71. Determination of this controversy is capable of resulting in practical relief to FCR. Specifically, a determination that MIRA is in default would entitle FCR to terminate the Agreement without the risk of MIRA claiming that FCR's termination of the Agreement is itself an Event of Default.

72. Accordingly, this Court has the power to declare the parties' rights and legal relations under General Statutes § 52-29.

RELIEF SOUGHT

For the above reasons, FCR respectfully requests the following relief:

(1) A declaration that MIRA's actions are an Event of Default, entitling FCR to terminate the Agreement without penalty;

(2) Monetary damages, in an amount to be determined at trial;

(3) Pre- and post-judgment interest, fees, and costs;

(4) Such other relief as the Court deems just and proper.

PLAINTIFF,
FCR, LLC

By: */s/ Timothy A. Diemand*

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RETURN DATE:MAY 28, 2019

FCR, LLC,	:	
	:	SUPERIOR COURT
Plaintiff,	:	JUDICIAL DISTRICT OF HARTFORD
	:	
v.	:	
	:	
MATERIALS INNOVATION AND RECYCLING AUTHORITY,	:	
	:	APRIL 30, 2019
Defendant.	:	
	:	

STATEMENT OF AMOUNT IN DEMAND

The amount in demand in this action is not less than Fifteen Thousand Dollars ($15,000), exclusive of interest and costs.

PLAINTIFF,
FCR, LLC

By: */s/ Timothy A. Diemand*

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