CAUSE NO. 2022CI06061

TEXAS DISPOSAL SYSTEMS LANDFILL, INC., Plaintiff,	§	IN THE DISTRICT COURT OF
v.	§	BEXAR COUNTY, TEXAS
CITY OF SAN ANTONIO, TEXAS, Defendant.	§	288th JUDICIAL DISTRICT

PLAINTIFF TEXAS DISPOSAL SYSTEMS LANDFILL, INC.'S OPPOSITION TO DEFENDANT'S APPLICATION FOR INJUNCTION

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff Texas Disposal Systems Landfill, Inc. ("TDSL") files this Opposition to the Application for Injunctive Relief ("Application") of Defendant City of San Antonio ("City"). The City's requested relief should be denied for multiple reasons, including:

- The City has materially breached the agreements between the parties by failing to pay legitimate invoices; its Application seeks to avoid the consequences of these breaches.
- The City fails to acknowledge that material changes in circumstances beyond the reasonable expectations of both parties has resulted in multi-million-dollar losses to TDSL every year, necessitating either adjustment of rates or termination of any obligation by TDSL to accept the City's waste at the below-cost contract rate.
- The City misinterprets the contractual provision regarding priority, which only requires that TDSL use *reasonable* efforts; the agreement does not require TDSL to incur a multi-million-dollar loss.
- The City cannot show irreparable harm; whether it will be able to continue access to Starcrest is entirely within its own power, and even if its access to the Starcrest Transfer Station is terminated pending the litigation, the City has multiple options for disposal without any real threat to public health and safety, and its alleged damages are readily subject to calculation, providing an adequate remedy at law.

FACTUAL SUMMARY

The City omits key material facts from its Original Counterclaim and Application. This Opposition will summarize those facts important for the Court's consideration of the

Application. TDSL disagrees with many other assertions in the City's Counterclaim, but in the interest of time and length, here TDSL will focus primarily on those issues on which the City seeks temporary injunctive relief.

1. The two components of TDSL's services: the Landfill and the Transfer Station.

Under the contracts between the parties, as amended and supplemented (together, the "Agreement"[1]), TDSL's services to the City comprise essentially two elements. One element is disposal of the City's waste at TDSL's landfill in Creedmoor, which is just off Interstate 35 in southern Travis County. TDSL charges the City a per-ton rate for landfill disposal; that rate is not at issue in this lawsuit, neither as a portion of the City's rate to deliver its waste to Starcrest or to direct haul its waste to the TDSL landfill. The TDSL landfill is one of three landfills currently used by the City for disposal of municipal solid waste.

The second element of TDSL's service is operation of the Starcrest Transfer Station ("Starcrest"), located north of the San Antonio International Airport. This includes receiving the City's garbage route trucks, transferring the waste to large trailers that hold as much as several truckloads, and trucking the waste to the TDSL landfill. This arrangement offers the City efficiencies in routing its trucks because the other two landfills used by the City are on the opposite side of the metro area, so routes in the northern and western parts of the city can be completed more quickly and efficiently if the route trucks empty their loads at Starcrest rather than travelling cross-city to the other landfills. The Agreement also gives the City the option of hauling waste directly to the TDSL landfill, instead of or in addition to hauling to Starcrest.

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[1] The City erroneously claims that the totality of the parties' Agreement consists of the original contract, the First Amendment, and the Second Amendment. Application at 7: *see also* Application Ex. A (Newman Declaration) ¶ 11. The City fails to disclose to the Court that the parties' overall Agreement includes a Special Addendum dated March 22, 2001. A true and correct copy of the Special Addendum is attached hereto as TDSL Ex. 1. In this Response, TDSL refers to the *entirety* of the parties' agreements – including the Special Addendum that the City disregards – as the "Agreement."

Under the Agreement, the City must either deliver a total of 100,000 tons of regularly collected municipal waste per year to TDSL (to Starcrest and/or the landfill) or pay TDSL for the shortfall; this is known as a "put-or-pay" provision. For example, if the City only delivered 80,000 tons in a particular year, it would be required to pay TDSL an additional amount equal to what it would have paid had the other 20,000 tons been delivered. The put-or-pay provision and its assurance of cash flows to cover its cost of operations was essential to TDSL's entry into the Agreement.

2. The cost of operating Starcrest and hauling waste has increased dramatically over the decades – far beyond the parties' reasonable expectations.

At the time TDSL responded to the City's request for proposal in 1995 for this contract, the parties reasonably believed that annual increases in operating costs would be consistent with the Consumer Price Index (CPI) for All Urban Wage Earners and Clerical Workers, All Items, for the Southern Region of the United States (the "CPI Escalator"). Consistent with this, the Agreement provided for annual adjustments, based on the CPI Escalator, in the rate TDSL charged the City for Starcrest services.

Neither party anticipated that costs associated with TDSL's operation of Starcrest would increase in a manner far outpacing the CPI Escalator. The non-occurrence of the CPI Escalator's inadequacy as a proxy was a basic, shared assumption of the parties at the time of the Agreement. Its gross inadequacy was an event outside the control of the parties and was not anticipated by the parties. For example, the CPI Escalator as applied to TDSL's rate rose 74% from 1995 through September 2022. This failed to account for drastic increases of cost in items essential to TDSL's services, such as the 806% increase in diesel fuel between 1998 and September 2022, the 200% increase in cost of transfer trucks between 1996 and September 2022, and the 158% increase in the cost of transfer trailers from 1996 to September 2022.

Overall, TDSL's Starcrest total expense – including transfer station operations and hauling waste to the TDSL landfill – increased 233% just between 1999 and September 2022, far more than the 74% increase in the rate it charges the City based on the inadequate CPI Escalator. This has resulted in a loss to TDSL of approximately $200,000 each and every month, or about $2.4 million per year.

The City has also experienced unanticipated and dramatic increases in its waste collection and disposal costs. But unlike TDSL, the City has no limit to the amount of increase in rates charged to customers. Between 1995 and September 2022, the City's rates to residents in San Antonio have increased an estimated ***215%,*** and between 1998 and 2022 the City's budgeted costs for solid waste management have increased ***267%***. While the City is able to recoup its increased costs, it vigorously opposes TDSL's efforts to do the same. TDSL has attempted to negotiate with the City for the better part of a decade, with the City never once agreeing to any proposal or offering any meaningful counter-proposal. As a last resort, TDSL initiated litigation.

3. The City changes its practices and policies on bulky waste after the Agreement, depriving TDSL of expected customers and profitable revenue and increasing costs to TDSL but refusing to pay for the expanded services that are not eligible for the contract rate.

In the Second Amendment to the Agreement, TDSL agreed to accept at Starcrest the City's "regularly collected Municipal Solid Waste … as had been processed by the City through the Transfer Station from 1991 to 1996."[2] But after the Agreement was entered, the City changed its practices materially and began delivering waste to Starcrest that was not "regularly collected" during the relevant time period – and thus was not eligible for the lower contract rates.

For example, the City materially changed its practices regarding bulky waste. As defined by City ordinance "bulky waste" consists of "irregularly sized items that do not readily fit into

[2] Second Amendment to Agreement (included in Ex. B to City's Application) at 3-4.

refuse containers," such as appliances, mattresses and box springs.[3] The City, at the time of the Agreement, collected bulky waste twice yearly using trucks with compacting ability, so that bulky waste was delivered to TDSL at Starcrest in a compacted state. At other times, residents and other private haulers could bring bulky items directly to Starcrest and would be charged rates set by TDSL that were higher than those it charged to the City, in recognition of the fact that non-City-hauled bulky waste would typically be non-compacted and thus would be significantly more expensive for TDSL to process through Starcrest and haul to its landfill and dispose of there.

But after the Agreement, the City unilaterally changed its bulky waste practices, establishing four separate bulky waste drop-off sites that residents can use at any time, at no charge. The City then hauled this bulky waste to Starcrest in large roll-off containers without compacting it, increasing TDSL's costs with no offsetting increased revenue to TDSL. Further, residents no longer brought their bulky waste to Starcrest (either themselves or through private haulers), so the City's change of policy deprived TDSL of the additional revenue it would otherwise have received and increased TDSL's cost of operations.

Because this waste was not "regularly collected" at the time of the Agreement, it was never eligible for the contract rate, nor was it eligible to be counted in satisfaction of the City's put-or-pay commitment. The City's bulky waste drop-off center material is not "collected" by anyone, let alone "regularly collected" by the City. Also, the full-time operation of the City's free bulky waste drop-off centers cannot be construed as the types of "citizen clean-up events" that took place from 1991 to 1996.

[3] San Antonio Code of Ordinances § 14-1 (relevant excerpt attached as Ex. 2).

4. The City's put-or-pay failure.

The City is obligated to deliver 100,000 tons of regularly collected municipal solid waste to TDSL each fiscal year, or pay TDSL for the shortfall – a put-or-pay provision. The City has failed to meet this requirement, in at least two ways.

First, as discussed immediately above, the uncompacted bulky waste from citizen drop-off centers is not "regularly collected" waste as the Agreement defines that term, and thus the tonnage of such waste does not qualify to be included in the City's put-or-pay requirement. From 2015 through 2019, the City failed to meet the requirement due to its bulky waste practices.

Second, as explained in more depth below, the City also did not meet the put-or-pay requirement in the 2021-2022 fiscal year. TDSL has sent invoices to the City for the shortfalls, but the City did not pay and is now in default.

5. TDSL's uncompensated repairs to Starcrest.

The Agreement provides specifically that TDSL "shall not bear the cost for any modifications to the permit or facility requested of TDSL by the City."[4] In approximately 2017, the City demanded that TDSL modify (repair) portions of the Starcrest facility, including the unloading area. TDSL complied, completing the repairs, but the City has refused to reimburse TDSL for the work.[5]

6. The City's erroneous interpretation of the "priority" provision.

Due to the substantial losses incurred by TDSL at Starcrest, it has been forced to take steps to reduce costs. Sometimes City vehicles wait at Starcrest more than 30 minutes to unload

[4] Ex. 1 (Special Addendum) paragraph 3(ii)(c). This is the document that the City fails to include in its definition of "Agreement" and fails to provide to the Court.

[5] The City mentions this invoice in passing but fails to disclose that the Agreement requires the City to pay TDSL and that the City has not done so, despite several demands from TDSL.

waste. The Agreement states that TDSL "shall use reasonable care" to service City trucks at Starcrest so that the trucks are not "required to wait more than 30 minutes," with some specific allowances for periods of heavy demand. The City has interpreted this provision to mean that TDSL is in breach if City trucks are required to wait at Starcrest more than 30 minutes to unload, virtually regardless of circumstances. However, the Agreement provides "reasonable care" will be used; it does not impose an absolute 30-minute requirement.

ARGUMENT AND AUTHORITIES

I. Because the City is in material breach of the Agreement due to non-payment of past-due invoices, TDSL is excused from any obligation to accept City waste at the inadequate rates set forth in the Agreement.

TDSL has given notice that the City is in default under the Agreement by not paying past-due invoices. The City, in its Application, acknowledges that it does not intend to pay those invoices. TDSL has stated that it will continue to accept City waste at Starcrest, but due to the City's default, TDSL will charge the City the prevailing "gate rate" charged all other haulers, including the public. TDSL has further informed the City that absent agreement to a new per-ton rate, TDSL will bill the City at the gate rate on a seven-day basis with seven days to pay, and that if the City fails to pay, TDSL will no longer accept the City's waste until past-due payments of the applicable gate rate are made. As an alternative, TDSL has also offered the City a per-ton fee of $64.89 per ton (a discounted rate unavailable to the public and which, unlike the contract rate, is sufficient to account for TDSL's increased costs) to continue to access Starcrest, but the City has stated they will not pay it.

The main relief sought by the City in the Application is a Court order commanding TDSL to continue accepting City waste at the Agreement's inadequate rate, despite the City's defaults. The City is not entitled to this relief because it is in breach of the Agreement, which relieves TDSL from any obligation to accept City waste at the Agreement's inadequate rates. Further,

the City essentially asks this Court to rule on the ultimate merits of the case, which is improper at the preliminary injunction stage. Also, the City does not lack an adequate remedy at law if it ultimately prevails, because the difference between the rate now being charged by TDSL (or the proposed revised per-ton rate) and the Agreement rate is easily calculated and can be awarded as money damages.

A. A material breach by one party to a contract relieves the counter-party from the obligation to perform under the contract.

When one party materially breaches a contract, the counter-party is discharged from performing the remainder of the contract. *Bartush-Schnitzius Foods Co. v. Cimco Refrigeration, Inc.*, 518 S.W.3d 432, 436 (Tex. 2017). This is "a fundamental principle of contract law." *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 196 (Tex. 2004) (citing *Hernandez v. Gulf Grp. Lloyds*, 875 S.W.2d 691, 692 (Tex. 1994)).[6]

It is also a defense to a claim for breach of contract that the claimant repudiated the contract prior to the alleged breach. *See, e.g.*, *Scientific Mach & Welding, Inc. v. FlashParking, Inc.*, 641 S.W.3d 454, 462 (Tex. App.—Austin 2021, pet. denied) ("[R]epudiation [is] an affirmative defense[] . . . that [the other party] unequivocally refused to perform the contract."). "Repudiation or anticipatory breach is an unconditional refusal to perform the contract in the future, which can be expressed either before performance is due or after partial performance." *N.Y. Party Shuttle, LLC v. Bilello*, 414 S.W.3d 206, 216 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).

[6] A repudiation or material breach can also support the counter-party's claim for breach of contract. *Compare Long Trusts v. Griffin*, 222 S.W.3d 412, 415 (Tex. 2006), *with Blackstone Med., Inc.*, 470 S.W.3d at 646 ("The contention that a party to a contract is excused from performance because of a prior material breach by the other contracting party is an affirmative defense that must be affirmatively pleaded.").

B. The City has materially breached the Agreement by failing to pay past-due invoices.

The City has failed to pay past-due invoices, despite multiple requests from TDSL. These failures constitute material breaches; thus TDSL has no obligation to accept City waste at the inadequate Agreement rates unless and until the invoices are paid.

1. Modifications to Starcrest.

The City directed TDSL to conduct modifications, in the form of repairs, to Starcrest. TDSL complied. The Agreement provides – unambiguously – that TDSL "shall not bear the cost for any modifications to the permit or facility requested of TDSL by the City."[7] Though this City fails to explain its rationale for not paying this invoice – and in fact fails to provide the Court with the contract amendment which this provision appears – the City does include a copy of one version of the invoice as part of Exhibit C to its Application. The non-payment of this invoice constitutes a material breach that excuses TDSL from any obligation to accept the City's waste at the inadequate Agreement rate.

2. Miscellaneous invoices from other City departments.

On occasion City departments other than Solid Waste Management have delivered waste to Starcrest but have failed to pay invoices for TDSL's services. The City has failed to explain or even mention these unpaid invoices in its Application, but it did attach copies to the Application as part of Exhibit F. Since the City filed its Application, it has paid some – but not all – of these outstanding invoices. This failure to pay constitutes a default by the City.

[7] Ex. 1 (Special Addendum) paragraph 3(ii)(c). This is the document that the City fails to include in its definition of "Agreement" and fails to provide to the Court.

3. Failure to make put-or-pay payment for fiscal year 2021-2022.

The City was obligated to deliver 100,000 tons of regularly collected municipal solid waste to TDSL in the 2021-2022 fiscal year. It did not do so, falling short by more than 35,000 tons. Under the Agreement, the City is required to pay TDSL for this shortfall. TDSL sent the City an invoice for $1,151,774.56 on September 30, 2022,[8] but the City still has not paid and is now in default.

The City appears to maintain that it can deduct, from its put-or-pay requirement, tonnage that it unilaterally chose to send to other area landfills because the drivers or their managers did not wish to wait at Starcrest. Although the Agreement provides for deductions from put-or-pay under certain specific conditions and if the City follows a specific procedure, the City failed to comply with its obligations to be eligible for tonnage reductions.

For the City to claim an offset of its put-or-pay requirement, (1) it must designate an Onsite Program Manager; (2) a City vehicle must be "required to wait longer than 30 minutes" due to either TDSL not providing the City "first right of service" or TDSL being unable to provide "normal services … using reasonable care"; (3) the Program Manager must determine whether the vehicles are to be diverted; and (4) the City must provide notice of any diversion "on a daily basis."[9] The City failed to comply with any of these four requirements from the Agreement, and thus cannot deduct any allegedly diverted loads from the put-or-pay requirement.[10] Further, the City has failed to demonstrate that TDSL has not used "reasonable care."

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[8] Copy attached as Exhibit 3.

[9] Second Amendment to Agreement (included in Ex. B to the City's Application) at 6, 18.

[10] The City has now begun to provide TDSL with "diversion reports." TDSL does not concede that these reports are accurate or that they comply with the Agreement's requirements, but it does demonstrate that the City failed to comply with the Agreement at all times before beginning to send the reports.

4. Failure to pay past due invoices for waste materials not subject to the Agreement rate.

TDSL has accepted uncompacted bulky waste from the City that falls outside the scope of the Agreement. TDSL has invoiced the City for this bulky waste, but the City has refused to pay.[11]

The Agreement specifies that TDSL will accept at the Agreement rate the "regularly collected municipal solid waste … as has been customary for the City, as has been processed by the City through the Transfer Station from 1991 through 1996."[12] At the time of the Agreement, the City and TDSL agreed to twice-yearly citizen drop-offs, and the City occasionally collected in compacting vehicles curbside bulky waste from residents. At other times, citizens would bring bulky waste directly to Starcrest under TDSL operation at the prevailing gate rate, not the City's lower Agreement rate.

After the Agreement was entered, the City materially changed its practices, providing free bulky waste drop-off locations open year around to residential and certain commercial establishment customers. This deprived TDSL of the higher rate that would otherwise be paid by citizens, small businesses, or the private haulers hired by them, and eliminated a large and profitable waste stream that would become available to TDSL at Starcrest once the City transitioned to cart-based residential automated curbside collection.

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[11] The City alleges that TDSL sent invoices for this waste and the City paid them. This is not accurate. Initially, TDSL included all City-delivered tonnage in invoices sent at the contract rate. However, when TDSL realized that this waste stream was not the type of "regularly collected" waste that would be eligible for the contract rate, it sent a revised invoice for the appropriate amount. (A copy is included in Ex. C to the City's Application.) The City has not paid the revised and proper invoice rate. TDSL's acceptance of waste delivered to Starcrest does not preclude TDSL from subsequently invoicing the City at the posted gate rate, which is higher than the Agreement rate for regularly collected waste.

[12] Second Amendment to Agreement (included in Ex. B to the City's Application) at 3-4.

TDSL has on multiple occasions informed the City that the delivery of such waste (1) is significantly more expensive to process and transfer, (2) results in less tonnage of waste in the transfer trailer loads, thus increasing the per ton cost of transporting the City's waste to the TDSL landfill, and (3) is not within the scope of the Agreement rates, because it is not "regularly collected municipal solid waste … as has been customary for the City, as has been processed by the City through the Transfer Station from 1991 through 1996." The City has tacitly acknowledged this by immediately ceasing the delivery of such waste after the City received the TDSL demand letter on August 2, 2021 but has failed to pay invoices submitted on multiple occasions for the disposal of such waste in previous years, representing the difference between the Agreement rate (for which this waste was not eligible) and the Starcrest gate rate (which was the proper rate applicable to such waste). Further, this waste does not qualify for credit toward the City's put-or-pay requirement, because it is not regularly collected waste; the City has further failed to pay the amounts owed for this put-or-pay shortfall. These failures constitute default by the City. Copies of the invoices submitted to the City by TDSL are included in Exhibit C to the City's Application.

Additionally, the City's practices regarding bulky waste described herein have deprived TDSL profitable tipping fee revenue by providing free bulky waste collection centers both close by and elsewhere within the City, and have hindered, prevented, or interfered with TDSL's ability to perform its duties under the contract for the contracted-for rate. "[A] party cannot 'hinder, prevent, or interfere with [another's] ability to perform [its] duties under [the] agreement.'" *SP Terrace, L.P. v. Meritage Homes of Texas, LLC*, 334 S.W.3d 275, 285 (Tex. App. – Houston [1st Dist.] 2010, no pet.) (brackets in original, quoting *Bank One, Tex., N.A. v. Stewart,* 967 S.W.2d 419, 435 (Tex. App. – Houston [14th Dist.] 1998, pet. denied)).

II. TDSL is not obligated to accept City waste at the inadequate Agreement rates because such performance has become impracticable, and because of the Agreement's specific language requiring the City to consider in good faith requests by TDSL for rate adjustments.

As set forth above, TDSL's costs in operating Starcrest and disposing of the City's waste have dramatically increased due to events that neither TDSL nor the City anticipated or reasonably could have anticipated in 1995 with TDSL submitted its bid. The non-occurrence of those events was a basic assumption underlying the parties' agreement to use the CPI Escalator, and the occurrence of subsequent events has rendered TDSL's performance under the Agreement's rates impracticable, thus excusing performance.

"Where ... a party's performance is made impracticable ... by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged ...." *Centex Corp. v. Dalton,* 840 S.W.2d 952, 954 (Tex. 1992) (ellipses in original, quoting RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981)). "Performance may be impracticable because extreme and unreasonable difficulty, expense, injury, or loss to one of the parties will be involved." *Chevron Phillips Chem. Co. LP v. Kingwood Crossroads, L.P.*, 346 S.W.3d 37, 60 (Tex. App. – Houston [14th Dist.] 2011, pet denied) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 261 cmt. d).

The City has failed to show that continued performance by TDSL is not impracticable due to the occurrence of events the non-occurrence of which was a basic assumption underlying the Agreement. TDSL has a valid claim to be excused from any obligation to accept the City's waste under the inadequate CPI Escalator.

Further, the Agreement specifically allows TDSL to propose changes in the payment rate and allows the City access to certain financial documents if such a proposal is made by TDSL.[13]

[13] *See* Section 4 of the Original Contract, included in Ex. B to the City's Application.

This provision must be read to impose some obligation on the City. A fundamental principle of contract interpretation is that all provisions of a contract should be harmonized and given effect such that no provision will be rendered meaningless. Even absent this provision, TDSL would always have the right to request an adjustment in payment rates. By specifically mentioning this right in the contract, some commensurate obligation must be imposed on the City, or else the provision allowing TDSL to propose payment rate changes would be rendered meaningless. The City has continued to ignore the TDSL request for a rate increase and/or for an alternate source of profitable revenue for years, thus relieving TDSL from accepting waste under the inadequate Agreement rate.

III. The City has not demonstrated, and cannot demonstrate, that TDSL has failed to use reasonable efforts in accommodating City waste at Starcrest.

The City clearly misinterprets what it calls the "priority" provisions of the Agreement. It complains that its trucks have had to wait more than 30 minutes to unload at Starcrest and appears to maintain that this constitutes a *per se* violation of the Agreement.

However, any obligation by TDSL regarding priority service to the City is expressly qualified. TDSL is only to use "reasonable care" for any priority to the City. Whether a party has used reasonable care is typically a *fact* question. *See, e.g.*, *Farrar v. Sabine Mgmt. Corp.,* 362 S.W.3d 694, 703 (Tex. App. – Houston [1st Dist.] 2011, no pet.) (fact issue as to whether party "failed to exercise reasonable care"); *Cohen v. Landry's, Inc.*, 442 S.W.3d 818, 829 (Tex. App. – Houston [14th Dist.] 2016, pet. denied) (fact issue as to whether party "exercised reasonable care").[14]

[14] *See also Hena v. Vandegrift*, Civil Action No. 18-762, 2020 WL 1158640, at * (W.D. Penn. Mar. 10, 2020) ("[T]he rule that a party cannot recover damages from a defaulting defendant which could have been avoided by the exercise of reasonable care and effort is applicable to all types of contracts. The question presented is one of fact." (quoting *Aircraft Guar. Corp. v. Strato-Lift, Inc.*, 991 F. Supp. 735, 739 (E.D. Penn. 1998))); C*oppola v. Long Island Univ.*, 734 N.Y.S.2d 580, 581 (N.Y. 2d App. Div. 2001)

The City has not produced any evidence or argument regarding whether TDSL has failed to use reasonable care in servicing City route trucks, particularly in light of the fact of TDSL's multi-million-dollar loss per year. TDSL has been forced to take steps to mitigate this loss (caused directly by the City's actions and the unforeseen and unforeseeable increase in cost of Starcrest operation and hauling of City waste), which have included Starcrest staff reductions. These have been reasonable measures by TDSL, which continues to service City trucks with reasonable care in light of the circumstances. Past years of TDSL delivering to the City a level of service at Starcrest that significantly exceeded its contractual requirements has apparently given the City staff a sense of entitlement such that they feel any reduction in services is a violation of the Agreement. One example of this is the City's expectation that a worn-out scale not required by the Agreement should be replaced for the City's convenience.

Further, the City alone determines the number of its route trucks that arrive at Starcrest in any given hour. TDSL cannot be held to meet the City's peak demand for services when its demand has varied dramatically from hour to hour. A reasonable staffing of Starcrest should not be expected to meet such an erratic range of tons of waste per hour when the 100,000 ton per year put-or-pay requirement can be met if the City delivers 40 tons of regularly collected waste per hour – a pace that the current staffing at Starcrest can service in 30 minutes or less per truck.

IV. The City has not demonstrated entitlement to injunctive relief.

An applicant for preliminary injunctive relief must plead and prove three elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable,

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("We agree with the Supreme Court that there is a question of fact as to whether the third-party defendant exercised reasonable care in its operations under the contract."); *Levine v. De Wolff & Co.*, 78 N.J.L. 306, 309 ("[I]t was a question entirely of fact whether the storing of these goods in defendant's stable, upon a wagon for two days and nights, under a contract with defendant as a warehouseman, to use such reasonable care in storing them as men in that line of business usually take of goods committed to their care[] . . . .").

imminent, and irreparable injury in the interim. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). In addition, a court will "balance the equities between the parties as well as the resulting conveniences and hardships." *Universal Health Servs., Inc. v. Thompson*, 24 S.W.3d 570, 578 (Tex. App. – Austin 2000, no pet.).

The City is unable to prove any of the elements required to obtain the injunctive relief it seeks, and the balance of the equities weighs heavily in favor of TDSL.

A. The City does not have a proper declaratory judgment claim.

TDSL is the plaintiff in this case and seeks declaratory judgment. The City, in its newly filed counterclaim, purports to seek declaratory judgment on the same issues already raised by TDSL. This tactic violates what is sometimes called the "mirror-image" rule: "a party generally may not invoke the Declaratory Judgments Act to settle disputes that are already pending before the court." *McGehee v. Endeavor Acquisitions, LLC*, 603 S.W.3d 515, 529 (Tex. App. – El Paso 202) (citing *BHP Petro. Co. v. Millard*, 800 S.W.2d 838, 841 (Tex. 1990)). The City thus does not meet the first required element to obtain a temporary injunction.

B. Even if the City had pleaded a proper declaratory judgment claim, it cannot show a probable right to the relief it seeks.

To show a probable right to relief, a party must establish that its claims will probably succeed on the merits. *See, e.g.*, *Abbott v. Anti-Defamation League*, 610 S.W.3d 911, 917 (Tex. 2020). Even if the City had a valid declaratory judgment claim that mirrors TDSL's requested relief, TDSL – not the City – is likely to succeed on the merits. If anything, the claims should be tried on their merits, not form the basis of a temporary injunction.

1. TDSL has agreed to continue accepting City waste – even if past invoices are not paid while the litigation is pending – as long as the City pays the prevailing gate rate (or a proposed revised per-ton rate).

The City's first request for a temporary injunction is based on its declaratory judgment claim that seeks a declaration that TDSL "be enjoined from preventing the City from accessing Starcrest and dumping solid waste at Starcrest until the conclusion of this litigation." Application at 22 ¶ 52(i). But TDSL will continue to accept the City's waste – even if the past-due invoices for services delivered before January 16, 2023 are not paid – as long as the City pays TDSL's prevailing gate rate, or if the City accepts TDSL's proposed revised per-ton rate, which is sufficient to account for TDSL's increased costs (and may be more economical for the City than the public gate rate). Whether the City can continue to bring waste to Starcrest *is completely within the City's control*. There is no probability of immanent and irreparable harm in the interim.

2. TDSL cannot be required to continue accepting the City's waste at the inadequate Agreement rate, due to the City's breaches and due to demonstrated impracticability.

The City's second request for a temporary injunction is based on its declaratory judgment claim seeking a declaration that TDSL be enjoined from charging the City a disposal rate in 2023 beyond the inadequate Agreement rate. Application at 22 ¶ 52(ii). The City is not likely to succeed on this request, for multiple reasons.

First, the City's prior breaches by failure to pay past-due invoices, detailed above, relieve TDSL of any obligation to accept the City's waste at the Agreement rate.

Second, to show a likelihood of success on this issue, the City would have to overcome TDSL's claim of impracticability (again, discussed at length above), which it has not done and cannot do.

Third, the City has declined to consider in good faith TDSL's multiple requests over many years for reasonable rate adjustments, an obligation that the Agreement imposes on the City, once more set forth above.

Considered separately or together, these facts show that the City is not likely to succeed on the merits of its claim that TDSL must continue to accept the City's waste at the Agreement rate and continue to sustain losses in the hundreds of thousands of dollars every month, and in the millions of dollars every year.

3. TDSL will continue to weigh City loads and cannot be prohibited from charging the City prevailing gate rates, due to the City's contract breaches.

The City's third request for a temporary injunction asks the Court to (1) order TDSL to weigh City trash trucks, and (2) prohibit TDSL from charging anything other than the inadequate Agreement amount. Agreement at 22 ¶ 52(iii).

The first issue is moot, because TDSL will continue weighing City trucks and identifying those weights on the load tickets, even if TDSL bills the City on a volume rather than weight basis. It is important to note that TDSL has offered the City a revised per-ton charge of $64.89, which is lower, and thus less costly for the City per load, than the gate rate of $40.00 per cubic yard, but the City has refused to agree to that proposed revised volume discount rate, which is unavailable as a gate rate.

The second issue is duplicative of the City's earlier request for a mandatory injunction ordering TDSL to bill the City only at the Agreement rate, which is not likely to succeed on the merits for the reasons set forth above.

4. The City improperly seeks greater "priority" than it is granted in the Agreement.

The City's final request for temporary injunctive relief asks that TDSL be ordered "to provide priority of service to the City waste haulers in accordance with the Agreement." Application at 22 ¶ 52(iv).

But it is the City, not TDSL, who seeks to depart from the Agreement on this issue. The City prays for a declaratory judgment that "City haulers dumping at Starcrest must be serviced within thirty (30) minutes except in situations of heavy demand whereby more than fifteen (15) or more city-owned haulers attempt to dump at Starcrest within approximately the same time period." Application at 16-17 ¶ 36(v). The City ignores the actual language of the Agreement, which does *not* impose such a mandatory requirement on TDSL or define "the same time period," but instead is based on "reasonable care."

The Agreement provides that "TDSL shall use *reasonable care* to ensure that no vehicle of the City or its designated haulers will be required to wait more than 30 minutes."[15] The provision referenced by the City regarding "large number of vehicles" is a "safe harbor" – that is, if the processing of a large number of City trucks requires the drivers to wait more than 30 minutes, Texas Disposal is *deemed* to have used reasonable care. But the Agreement does not provide that this is the *only* instance of "reasonable care." Indeed, the Agreement elsewhere provides, without elaboration, that "TDSL shall use reasonable efforts to accommodate City collection crews" (Second Amendment, paragraph 18(D)).

The "reasonable efforts" provision does not require TDSL to provide a level of service to the City that results in TDSL losing hundreds of thousands of dollars every month. TDSL has maintained staffing that allow delivery of 40 tons per hour by the City, which amounts to the

[15] Second Amendment Paragraph 18.C.2 (emphasis added).

City's committed 100,000 tons per year. "Reasonable care" does not require Texas Disposal to incur substantial losses by providing excessive numbers of full-time staff to service the City's highly irregular peak waste volume demand within 30 minutes wait time.

Because the City seeks relief beyond that to which it is entitled, it is not likely to succeed on the merits on this request for injunctive and declaratory relief.

C. The City will not suffer irreparable injury in the absence of an injunction; TDSL will continue to accept City waste, and there will be no disruption of City services during the pendency of the litigation, as long as the City pays its 2023 haul ticket invoices under the revised rates and remains timely with payment.

The City contends – wrongly – that "[w]ithout intervention from this Court, the City will lose access to dumping at the Starcrest property," which it claims will endanger public health and prevent the City from meeting the Agreement's requirement that the City deliver 100,000 tons of waste to TDSL each year. Application at 20-21.

But TDSL will not exclude the City from using Starcrest during the pendency of this litigation if the City pays its revised rate 2023 haul ticket invoices and keeps current with TDSL's billing. The City can easily avoid the alleged irreparable harm it says it fears and continue serving the citizens of San Antonio simply by paying TDSL either $40.00 per cubic yard or $64.89 per ton.

Further, the City has two other San Antonio landfills available for disposal, as well as the TDSL landfill in southern Travis County, which is available 24 hours every weekday and Saturday until the earlier of 7:00 p.m. or dusk. And alleged interference with the City's 10-hour collection schedule falls far short of irreparable harm. The bottom line is that even if the City chooses to refuse to pay its past-due revised rate invoices and loses access to Starcrest, it has multiple other options for waste disposal and the public health will not be endangered one bit.

D. Injunctions commanding specific contract performance are improper, and the City has an adequate remedy at law if it believes TDSL has or will breach the Agreement.

The City in essence asks the Court to command TDSL to specifically perform under the Agreement – actually, under the City's *interpretation* of the Agreement, with which TDSL disagrees, and at a service delivery standard that exceeds the requirements in the Agreement – for a period of months or years, under supervision of the Court, until this litigation ends. The City asks for relief that is improper and unavailable.

"A court should not decree future contractual performance by requiring a party to perform a continuous series of acts, extending through a long period of time, over which the court exercises its supervision." *Cytogenix, Inc. v. Waldroff*, 213 S.W.3d 479, 487 (Tex. App. – Houston [1st Dist.] 2006, pet. denied) (Bland, J.). "Contractual rights are not enforced by writs of injunction absent exceptional circumstances, since an inadequate remedy at law and irreparable injury are rarely shown when a suit for damages for breach of contract is available." *Chevron U.S.A. Inc. v. Stoker*, 666 S.W.2d 379, 382 (Tex. App. – Eastland 1984, writ dism'd). When a party to a contract alleges a present or future breach by the counter-party – as the City does here (and as TDSL has done) – the appropriate remedy is an action for damages, which provides an adequate remedy at law. *Cytogenix*, *supra.*

The City wants to avoid the consequences of its default – paying a reasonable rate rather than the inadequate Agreement rate – so it asks this Court to force TDSL to bear substantial losses during the pendency of the litigation, rather than the City paying a higher rate. But the City has available to it an action for damages to recover any alleged overpayment should the factfinder ultimately rule in its favor. Therefore, the City has an adequate remedy at law and will not suffer irreparable harm if it can continue to use Starcrest by paying TDSL's quoted rate.

Since TDSL has been invoicing the City at the gate rate rather than the contract rate, the City has been editing the TDSL invoices to calculate the amount that would be owed under the contract rate and paying that lesser amount. This amply demonstrates that the City has an adequate remedy at law should it ultimately prevail – the City could recover damages from TDSL in the amount of the difference between the rate on TDSL's invoices and the lower rate the City believes it should be paying. This amount is calculable, and in fact the City is currently calculating it. A damage award would make the City entirely whole, providing an adequate remedy at law.

E. The balance of the equities favors TDSL; granting the City's requested injunction will cause TDSL to continue to incur multi-million-dollar losses, whereas denying the injunction will allow TDSL to continue servicing the City's waste disposal needs, with the ultimate resolution of the dispute at trial on the merits.

The City knows that TDSL is incurring substantial losses servicing the City at Starcrest. TDSL has informed the City of this for years, but the City has consistently turned a deaf ear. Further, the City itself has raised its own waste collection rates to its residential customers 215% over the years, while TDSL has only been allowed to raise its rates to the City 74%. The City knows well how costs of running a solid waste services operation have skyrocketed.

Forcing TDSL to continue to incur these enormous losses – particularly with all the factors set forth herein, such as the City's breaches and material changes in its practices and policy – would work a substantial hardship on TDSL. In contrast, denial of injunctive relief would not disrupt the City's waste collection and disposal operations at all; it would merely be required to pay amounts due to TDSL and pay an ongoing rate that would cover TDSL's greatly increased expenses and stop the massive losses TDSL has been experiencing (and the City would retain an adequate remedy at law – an action for money damages – if the City ultimately prevails in its interpretation of the Agreement).

The City also has two other area landfills to which it can haul waste directly, and it can also haul waste directly to the TDSL landfill, where it will be charged only the landfill disposal rates that are set forth in the Agreement and which TDSL does not contest. TDSL's landfill is available to the City 24 hours a day five days a week (every weekday), and until the earlier of 7:00 p.m. or dusk on Saturday, giving the City yet another option for waste disposal.

Ultimately, trial on the merits will determine the proper interpretation of the Agreement and the parties' relationship; until then, equities do not favor requiring TDSL to incur continued substantial losses.

F. The City's request for relief goes far beyond the proper scope of an injunction; it asks to be insulated from any future breach it may commit.

The City seeks an injunction commanding TDSL – under Court order and under the possible penalty of contempt – to continue servicing the City under the City's contested interpretation of the Agreement through the conclusion of this litigation. ***With no exceptions.***

So, under its requested injunction, the City could steadfastly refuse to pay TDSL *anything* and TDSL must continue to offer services to the City if it does not wish to be held in contempt. City personnel could take actions that damage TDSL equipment and TDSL would have no recourse but to continue accepting the City's waste. The Court should not grant the City a virtual blank check to mistreat TDSL in any way it chooses.

V. If injunctive relief is granted, the City must be required to file a meaningful bond.

Texas Rule of Civil Procedure 684 provides:

> In the order granting any temporary restraining order or temporary injunction, the court shall fix the amount of security to be given by the applicant. Before the issuance of the temporary restraining order or temporary injunction the applicant shall execute and file with the clerk a bond to the adverse party, with two or more good and sufficient sureties, to be approved by the clerk, in the sum fixed by the judge, conditioned that the applicant will abide the decision which may be made in the cause, and that he will pay all sums of money and costs that may be

> adjudged against him if the restraining order or temporary injunction shall be dissolved in whole or in part.

It has long been established that municipalities are not exempt from the posting of bond to obtain temporary injunction under Texas law. *Cf. Athens Tele. Co. v. City of Athens*, 163 S.W. 371, 372 (Tex. Civ. App.—Dallas 1914, writ ref'd) (noting that Texas law "exempts the state . . . but not municipalities" from the requirement that an injunction's issuance be accompanied by "the giving of a bond in such amount as may be fixed in the order granting the writ").

Because TDSL is experiencing losses of approximately $2.4 million a year, a suitable bond would be in that amount, to be re-evaluated if the case is still pending a year from now.

CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, Texas Disposal Systems Landfill, Inc. prays that the Court deny the Application for Injunctive Relief of the City of San Antonio, and further grant TDSL all other relief to which it may show itself justly entitled.

Respectfully submitted,

GRAVES DOUGHERTY HEARON & MOODY, P.C.
401 Congress Ave., Suite 2700
Austin, Texas 78701
(512) 480-5762 direct phone
(512) 536-9907 direct fax

/s/ James A. Hemphill
James A. Hemphill
State Bar No. 00787674
jhemphill@gdhm.com
Christopher C. Cyrus
Texas State Bar No. 24097110
ccyrus@gdhm.com
ATTORNEYS FOR PLAINTIFF TEXAS DISPOSAL SYSTEMS LANDFILL, INC.

CERTIFICATE OF SERVICE

I certify that on this 13th day of February, 2023, a true and correct copy of the foregoing was served by electronic service on the following:

Bonnie L. Kirkland
Melanie L. Fry
DYKEMA GOSSETT PLLC
112 East Pecan Street, Suite 1800
San Antonio, Texas 78205
bkirkland@dykema.com
mfry@dykema.com

/s/ James A. Hemphill
James A. Hemphill

Special Addendum
To Contract Documents
Between the City of San Antonio
And
Texas Disposal Systems Landfill, Inc.
For Conveyance of TNRCC Permit for Starcrest Transfer Station

General Description of this Special Addendum: Conveyance by the City of San Antonio (City / Owner) to Texas Disposal Systems Landfill, Inc., (TDSL / Operator), collectively referred to as the "parties", of the Texas Natural Resource Conservation Commission (TNRCC) Municipal Solid Waste (MSW) Permit No. MSW-1443 (the Permit), which conveyance shall be for a fixed period of time cited herein under conditions as described below.

Background and Authority. This supplemental authorization is made consistent with an Agreement made between the City and TDSL under authority of Ordinance No 85263, passed December 5, 1996, which Ordinance enabled an agreement known as the 2nd Amendment to Agreement which authorized privatization of the City's Starcrest Transfer Station (Station), which 2nd Amendment, also known as the Starcrest Transfer Station Privatization Agreement ("Privatization Agreement"), became effective as a contract on January 7, 1998.

This Special Addendum is immediately enabled by Ordinance No. 93272, passed on January 18, 2001, by which Ordinance the City Council consented to and made further modifications to the Privatization Agreement.

According to the "Addendum Sections" below, numbers 1 through 10, the parties acknowledge and agree as follows:

1. The City Manager of the City of San Antonio, as recited in the enabling Ordinance, shall execute all documents and perform all actions as may be necessary to convey the Permit to TDSL. A draft copy of the permit transfer application is attached hereto as Exhibit 1.

2. The parties conferred with TNRCC prior to submitting the permit transfer application and have been apprised by respective legal counsels of responsibilities, liabilities, and obligations that reside with permit ownership and facility ownership. As between the City as the owner and TDSL as the operator, the parties agree that as of the date the Transfer Station Permit is issued to TDSL and signed by the TNRCC (the "Effective Date") TDSL will assume all responsibilities and liabilities for activities involving the Station in consideration of the permit transfer as follows:
   (i) TDSL shall be solely responsible for compliance with the Permit, including, without limitation, all of the terms, provisions, conditions, limitations and other restrictions embodied in the permit and with all applicable regulations of the TNRCC for municipal solid waste facilities, including maintaining financial assurance acceptable to the TNRCC.
   (ii) TDSL shall be solely responsible for responding to enforcement actions, payment of all penalties and fines, and compliance with corrective action orders that may be issued concerning the operation and management of the Station.
   (iii) TDSL shall be solely responsible for the cost and implementation of investigations, assessments and corrective action requirements related to spills, releases or discharges that occur after the Effective Date and which result in environmental contamination or threaten environmental contamination at the Station. TDSL's responsibility shall extend to any off-site impacts that may result as a consequence of on-site activities.

(iv) Except for wastes transported to the Station by the City, TDSL shall be solely responsible for all wastes managed through the Station that become the subject of any state or federal Superfund investigation.

3. Conveyance of the Permit to TDSL will shift liabilities as described in Section 2 of this Addendum and will therefore necessitate clarification of each party's duties and responsibilities under the Privatization Agreement. The City and TDSL agree that as of the Effective Date, specific provisions of the Privatization Agreement are superseded by this Addendum as follows:

(i) Section 6 - DISPOSAL RATES

a. Paragraph F: TDSL and the City shall establish appropriate methodology for compliance with service requests for City contractors and designated City haulers, entitled to City priority services from TDSL, and creation of such methodology shall be expedited by means of informal letters of agreement or memorandums of understanding between the City and TDSL rather than by means of a Technical Operations Manual.

b. Paragraph I: TDSL is not required to notify the City of the receipt and nature of unacceptable waste.

(ii) Section 18 - TRANSFER STATION

a. Paragraph A: The Transfer Station shall be operated by TDSL in accordance with TDSL's TNRCC permit, as modified or amended.

b. Paragraph E: TDSL shall be responsible for ensuring compliance at the facility at all times. The City's on-site Program Manager shall instead become the City's on-site "Contracts Servicing Representative" and is not responsible for compliance oversight of the TDSL operations.

c. Paragraph K: TDSL shall not bear the cost for any modifications to the permit or facility requested of TDSL by the City, which request may be made subsequent to the Permit conveyance to TDSL and which request may exceed requirements of the parties' Privatization Agreement.

d. Paragraph M: TDSL shall apply for and acquire all future permits, permit modifications, business operational licenses and permits at the cost of TDSL. The City does not own the permit and is not required to assist TDSL in processing or executing permit revisions, except for licenses, permits or authorization issued by the City. The City will cooperate with TDSL in permitting activities to the extent approval is required by the property owner which said approval, if not in conflict with the City's municipal governmental obligations as determined under the City Charter, shall not be unreasonably withheld or delayed. The Charter is found at the City's website. All proposed permit revisions are subject to Sections 4 and 5 of this Addendum.

e. Paragraph P: TDSL shall be responsible for obtaining other required permits, including a state stormwater permit, business operational licenses, and governmental approvals, and permit modifications or amendments for any improvements to or operation of the Transfer Station on its own behalf and on behalf of the City only to the limited extent that the City is the Owner of the facility. The City does not own the permit and is not required to assist TDSL in processing or executing permit revisions, except for licenses, permits or authorization issued by the City. The City will cooperate with TDSL in permitting activities to the extent approval is required by the property owner which said approval, if not in conflict with the City's municipal governmental obligations as determined under the City's Charter, shall not be unreasonably withheld or delayed. The City's Charter is found at the City's website. All proposed permit revisions are subject to Sections 4 and 5 of this Addendum.

f. Paragraph Q: In accordance with Section 5 of this Addendum, TDSL shall not reduce the capacity of the Transfer Station to receive or process solid waste materials during the term of the Privatization Agreement.

g. Paragraph X: TDSL shall be solely responsible to develop a technical operations manual for the Transfer Station, and shall provide a current and updated copy of the manual to the City. If no updates are made during the year, TDSL will insert a short written statement to that effect to accompany each annual lease payment on those dates when the lease fee is due and payable to the City. The parties acknowledge the lease payment schedule has been modified according to certain amendments effected by Ordinance No. 93272 noted below.

(iii) Section 19 - DISPUTE RESOLUTIONS

a. Paragraphs A-D are supplemented with an understanding that TDSL holds the permit for the Station and is solely responsible for all compliance issues concerning the facility operations. Citizen complaints that are reported to the City shall be handled as described in this section. The City retains any and all governmental powers to protect the public health, safety and welfare, as may be the City's governmental duty, for protection of the public health, safety, and welfare, including but not limited to abatement of common law and statutory nuisance and exercise of authority under the Texas Solid Waste Disposal Act. The City continues to require TDSL to abide by all state, federal, and local laws, rules and regulations applicable to the Transfer Station operation.

4. Each party shall bear its respective administrative, legal, and other costs that may be incurred through transfer of the permit.

5. TDSL shall provide 60 days advanced notice to the City prior to application for any proposed modification or amendment of the Permit. An exception to 60 days advanced notice may be had if TDSL must make a permit alteration submission in response to a compliance or enforcement action by TNRCC affording less than 60 days for response. In that case, TDSL must notify the City of the TNRCC directive or "compliance concern" for permit alteration immediately upon receipt of the NOV or letter or notice of concern in which TNRCC identifies permit alteration as a remedy. To maintain the value of the Permit, TDSL may not modify or amend the Permit to limit the nature or type of waste, limit the volume of waste, reduce the operational hours of the facility, suspend or revoke the permit, or otherwise diminish the waste management authorization under the Permit, without the prior written approval of the City. Consideration for the Permit conveyance is TDSL's promise the company will not apply to enlarge the Permit's industrial waste stream to include Class 1 Industrial Waste and TDSL agrees not to seek any such authorization without the permission of the City. TDSL will not service hazardous waste at the Station, except for materials authorized under state and federal law for disposal at a Type I municipal solid waste landfill as described in 30 TAC Section 330.41(a) and (b), nor will TDSL store hazardous waste at the facility, not even on a temporary basis.

6. TDSL shall inform the City of each NOV or enforcement action. By January 31 of each year, TDSL shall provide a summary of the prior year's environmental performance, including how many times the facility was inspected by TNRCC, the number of NOV's issued, whether enforcement actions were commenced, and the results of any enforcement actions

7. Upon termination of the lease term provided in the Privatization Agreement, whether by exhaustion of the lease term, contract termination, or any other legal or equitable means by which

TDSL shall no longer have or exercise control or occupation of the premises, subject of the Starcrest Privatization Agreement (2nd Amendment), TDSL shall, upon instruction from the City, either re-convey the permit to the City pursuant to the protocols directed by TNRCC regulations, revoke the Permit under TNRCC protocols that will effect destruction of the permit, suspend the permit for a specified period of time, or convey the Permit to another party, all at the City's discretion. Six months prior to termination or expiration of the parties' contractual relationship concerning the Starcrest Transfer Station for whatever reason, TDSL shall notify the City of its intent to relinquish the permit and shall request the City to issue an instruction for disposition of the permit. Following receipt of TDSL's notice, it shall be the City's responsibility to issue instruction to TDSL no later than 60 days prior to termination of the parties' contractual relationship. If the City does not provide instructions to TDSL within the required timeframe, then TDSL shall submit a request for revocation of the permit to TNRCC prior to the termination of the parties' contract.

8. In consideration for permit transfer, TDSL promises it shall not diminish the level, quality, and expeditiousness of service being provided to the City, which level, quality, and expeditiousness was achieved prior to the conveyance of the permit. And in further consideration and in affirmation of the terms and intentions of the Privatization Agreement, TDSL promises to expedite ability for Third Parties to enter into reasonable contractual and insurance requirements to use the transfer station facilities to enable the City to realize royalties anticipated under the Privatization Agreement.

9. Upon and by operation of termination of the parties' contractual relationship concerning the Station, termination of the lease term, or end to TDSL's occupation or control of the Station, TDSL shall be divested of all right, title, and interest in the Permit, subject to any and all liabilities that may have attached during TDSL's ownership.

10. The changes to the Privatization Agreement in Section 18S and Section 18T as adopted in Ordinance 93272 are hereby specifically incorporated by reference into the Privatization Agreement.

Executed this 22 day of March, 2001.

CITY OF SAN ANTONIO

by _____
for City Manager

TEXAS DISPOSAL SYSTEMS
LANDFILL, INC.

by: _____
printed name: Bob Gregory
Title: Chairman and CEO

Approved as to form: _____
for City Attorney

§ 14-1. Definitions.

Latest version.

As used in this chapter, the following terms shall have the meanings shown:

Biodegradable shall mean a substance capable of breaking down into its small constituent parts when the degradation is the result of naturally-occurring micro-organisms such as bacteria, fungi, and algae.

Brush shall include tree branches, woody vines, shrubs, and other herbaceous and woody plants less than six (6) feet in length, excluding posts, boards, lumber or their fragments. Stumps, roots, or shrubs with root balls, loose or containerized leaves and grass clippings are unacceptable for brush collection. Brush does not include any material generated at a location other than the residence from which it is collected.

Bulky waste shall include only municipal solid wastes in the forms of irregularly sized items that do not readily fit into refuse containers, which include but are not limited to, large appliances (e.g. refrigerators, water heaters, washers, and dryers), toilets and furniture, also small and medium-sized appliances, and other domestic wastes and discards which are commonly regarded by the regulated community as large non-putrescible municipal solid waste items. Bulky waste does not include household hazardous waste, hazardous or special wastes, construction and demolition waste, vehicle parts, commercial tires, brush, electronics, or products containing glass which may break during collection. Bulky waste does not include waste generated at a location other than the residence from which it is collected.

Bulky waste collection center shall mean a citizen collection station that allows drop off of bulky waste such as furniture, appliances, toys, water heaters, etc. The facility may consist of one or more storage containers to collect material that will then be transported to the landfill or recycle facility for disposal. Site operational procedures and types of MSW accepted are detailed in this chapter.

Business customer shall mean a person that produces business waste that the city has agreed to collect.

TEXAS DISPOSAL SYSTEMS

TEXAS DISPOSAL SYSTEMS, INC. TEXAS DISPOSAL SYSTEMS LANDFILL, INC.

P.O. Box 17126
Austin, TX 78760-7126
512.421.1300
www.texasdisposal.com

February 8, 2023

Mr. David Newman, Director, Solid Waste Management Department
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283

Re: Notice of Default – Put or Pay

Dear Mr. Newman,

On November 23, 2022, Texas Disposal Systems Landfill, Inc. (TDSL) sent the City of San Antonio (City) an invoice for $1,151,774.56, reflecting the amount due for the City's failure to meet its 100,000-ton minimum requirement at the Starcrest Transfer Station for the fiscal year ending September 30, 2022. The City has made no payment toward this amount, placing it in further default under the contract.

Because the City failed to cure the defaults set forth in TDSL's November 22, 2022 letter, and has since defaulted on the November 23 put-or-pay invoice, the City lost access to the Starcrest Transfer Station under the terms of the contract, and TDSL began charging the City the public gate rate beginning January 16, 2023, to be paid on a weekly basis. In response, the City stated its intent to short-pay those invoices. While TDSL has received no payments toward its weekly invoices, TDSL will treat any payment other than the full amount of the invoice as a partial payment only. TDSL's acceptance of a partial payment will in no way constitute an accord and satisfaction or an acceptance in full of the invoiced amount.

TDSL reiterates its position that if the City remains in default, TDSL will continue to invoice the City weekly at the posted gate rate until such time as the City cures its defaults, or loses access to Starcrest due to non-payment of TDSL's weekly invoices following the expiration of the parties' Rule 11 Agreement.

Regards,

Bob Gregory
President & CEO
Texas Disposal Systems Landfill, Inc.

cc: Andrew Segovia, San Antonio City Attorney, Andy.Segovia@sanantonio.gov
Gary Newton, TDSL General Counsel
Jim Hemphill, Graves, Dougherty, Hearon & Moody
Larry Laine, TDSL Director of Facilities

Texas Disposal Systems Landfill, Inc.
PO Box 17126
Austin, Tx 78760

Date
9/30/2022

CITY OF SAN ANTONIO
PO BOX 839976
SAN ANTONIO, TX 78283

	NET TONS	TIPPING FEE	AMOUNT
Put or Pay shortage charges for City's tonnage shipped into the Starcrest Transfer Station Fiscal year ending 9/30/2022			
Volume guarantee	100,000.00		
Actual tonnage shipped	65,495.07		
Put or pay shortage	34,504.93	$ 33.38	$ 1,151,774.56
Total	**34,504.93**		**$ 1,151,774.56**

Texas Disposal Systems Landfill, Inc.
PO Box 674090
Dallas, Texas 75267-4090

Invoice

Invoice Number
7051937

Account Number
5-400

Billing Date
1/23/2023

Amount Due
$239,491.97

City of San Antonio
Attn: Accounts Payable
PO BOX 839976
San Antonio TX 78283-3976

Remit #7007190
PO#4500437027

Date	Description	Qty	Rate	Amount
1/23/2023	Tonnage through 1/15/23	2,607.01	$36.23	$94,451.97
	Yardage 1/1/23 through 1/22/23	3,626.00	$40.00	$145,040.00
				$239,491.97

Charges for 1/1/23 through 1/22/23 due January 30, 2023

Sent 1/23/23 via email and certified mail

Texas Disposal Systems Landfill, Inc.
PO Box 674090
Dallas, Texas 75267-4090

Invoice

Invoice Number
7071524

Account Number
5-400

Billing Date
1/30/2023

Amount Due
$420,411.97

City of San Antonio
Attn: Accounts Payable
PO BOX 839976
San Antonio TX 78283-3976

Remit #7007190

PO#4500437027

Date	Description	Qty	Rate	Amount
1/30/2023	Cubic Yards 1/23/23 through 1/29/23	4,523.00	$40.00	$180,920.00
	INV 7051937 Past Due 1/1/23 through 1/22/23			$239,491.97
		Total Due		$420,411.97

Sent 1/30/23 via email and certified mail

Texas Disposal Systems Landfill, Inc.
PO Box 674090
Dallas, Texas 75267-4090

Invoice

Invoice Number
7079745

Account Number
5-400

Billing Date
2/6/2023

Amount Due
$611,411.97

City of San Antonio
Attn: Accounts Payable
PO BOX 839976
San Antonio TX 78283-3976

Remit #7007190

PO#4500437027

Date	Description	Qty	Rate	Amount
2/6/2023	Cubic Yards 1/30/23 through 2/5/23	4,775.00	$40.00	$191,000.00
	INV 7051937 Past Due 1/1/23 through 1/22/23			$239,491.97
	INV 7071524 Past Due 1/23/23 through 1/29/23			$180,920.00
		Total Due		$611,411.97

Sent 2/6/23 via email and certified mail