

CAUSE NO. 2022-CI-06061

TEXAS DISPOSAL SYSTEMS
LANDFILL, INC.,

Plaintiff,

VS.

CITY OF SAN ANTONIO, TEXAS,

Defendant.

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IN THE DISTRICT COURT

288TH JUDICIAL DISTRICT

BEXAR COUNTY, TEXAS

**DEFENDANT/COUNTER-PLAINTIFF’S APPLICATION FOR TEMPORARY
RESTRAINING ORDER**

COMES NOW, Defendant/Counter-Plaintiff City of San Antonio (“City” or “Defendant/Counter-Plaintiff”) and hereby files this, Application for Temporary Restraining Order (the “TRO”) and would respectfully show unto this Honorable Court the following:

INTRODUCTION

1. Texas Disposal Systems Landfill, Inc. (“TDSL”) is threatening to disrupt the City’s solid waste operations, which could cause ripples impacting the City and its customers (residents of the City)—impacting public health and safety, as nothing more than an aggressive attempt to force the City to renegotiate a contract that the City has no obligation to renegotiate.

2. The City entered into a contract with TDSL in 1998 whereby TDSL would be allowed to operate the City-owned transfer station located in North San Antonio. The City would have priority, in terms of service and capacity, to dispose of waste at the transfer station and did so at a set contractual rate. After more than twenty years of both sides performing under the agreement between the parties, in 2021, TDSL began to baselessly accuse the City of breaches of contract and began to make demands from the City inconsistent with and beyond the obligations provided in the agreement between the parties. When the City refused to capitulate, TDSL made

operational changes that impacted TDSL's ability to meet its obligations under the agreement (including service requirements) and, ultimately, the City's ability to perform its obligations.

3. In November of 2022, TDSL notified the City that, if the City did not meet TDSL's demands to modify the contract and pay the alleged damages demanded (totaling more than \$12 million) by January of 2023, TDSL would no longer allow the City to access the transfer station unless it paid a rate higher than that required by the contract.

4. If the City were denied access to the transfer station, the detrimental impact to the City's waste collection operations and the public would be immediate and significant. Operations, personnel, equipment and the public would all be negatively impacted within hours. Trash collection routes, in terms of timing and geography, were designed for both efficiency and safety, including minimizing interactions with the public. If the City were to lose access to the transfer station and have to divert trucks to disposal sites much greater distance from the drivers' routes, the operations of waste collection and the public's health and safety would be at risk. Access to the transfer station is critical to the City and loss of that access would cause immediate and irreparable harm.

5. Therefore, the City asks this Court to grant its application for Temporary Injunction against TDS.

FACTUAL BACKGROUND

Solid Waste Management Department

6. As one of the city-services provided to residents, the City provides regular waste collection services to over 368,000 customers, including collection of recycling and organic

materials.¹ Such services are managed by the City's Solid Waste Management Department ("SWMD").²

7. SWMD provides weekly curbside collection of residential garbage, recycling, and organics materials³. SWMD also provides curbside brush and bulky item collection two times per year.⁴ SWMD operates four bulky waste drop-off sites, three household hazardous waste drop-off sites, and two brush drop-off sites.⁵ Additionally, SWMD offers special collections such as dead animal collection from city streets, bagged leaf collection, and special out-of-cycle collections.⁶ SWMD also collects the downtown litter baskets and cleans up over 9,000 illegal dumping locations and over 250 miles of litter across the City.⁷ In total, the City collects more than 600,000 tons of waste each year via its various activities and services.⁸

8. Weekly curbside collections makes up approximately 480,000 tons of that total.⁹ After being collected by SWMD, depending on the material at issue, the material is transported to either a contracted recycling company, a contracted organics composting company, or a disposal site. SWMD currently has three contracts for disposal, including the agreement with TDS, which provide access to three disposal sites within the City.¹⁰ For curbside collection, collection workers are scheduled to work a 10-hour day and must complete his or her entire route each day before logging out.¹¹ Garbage routes are designed to be completed in two truckloads.¹² The collection

¹ See Exhibit A, Affidavit of David Newman.

² See *id.*

³ See *id.*

⁴ See *id.*

⁵ See *id.*

⁶ See Exhibit A.

⁷ See *id.*

⁸ See *id.*

⁹ See *id.*

¹⁰ See *id.*

¹¹ See Exhibit A.

¹² See *id.*

drivers will collect the waste from the customers on their assigned routes until the truck is full.¹³ Once full, the drivers travel to a designated dump site (geographically determined) to empty the load and then return to the route.¹⁴ The drivers then complete the collection of their route and, once the collection is finished, empty the second load at the disposal site to complete their day.¹⁵ Any delays in traffic or at the dump site greatly affect the drivers' ability to finish on time and provide the necessary service for the citizens of San Antonio.¹⁶

9. Given the myriad of services provided, the provision of proper and efficient waste collection services is logistically complicated and requires the detailed coordination of employees, equipment, and operations.¹⁷ To provide its services, SWMD employs more than 800 individuals operating out of twelve (12) locations.¹⁸ For curbside collections alone, the City operates over 160 trucks daily.¹⁹ Additionally, there are approximately another 130 SWMD vehicles operated daily collecting other materials, including bulky waste/brush, litter, and dead animals.²⁰ Given the coordination necessary to ensure timely service on a daily basis, any unforeseen complication can have a ripple effect significantly affecting operations.²¹

The Agreement

10. With the City-owned landfill coming to the end of its permitted life and with new changes in landfill regulations in the 1990's, the City permanently closed all of its City-owned

¹³ *See id.*

¹⁴ *See id.*

¹⁵ *See id.*

¹⁶ *See Exhibit A.*

¹⁷ *See id.*

¹⁸ *See id.*

¹⁹ *See id.*

²⁰ *See id.*

²¹ *See Exhibit A.*

landfills.²² In 1993, after engaging in the bid procurement process, the City entered into three separate contracts with Waste Management, Inc., Browning Ferris (now Republic Services), and TDS related to the disposal of the City's regularly collected solid waste.²³

11. The City originally entered into a contract with TDS for landfill disposal in 1993 ("the Original Contract").²⁴ The City agreed to provide TDS a certain amount of tonnage of waste (100,000 tons) per year at an agreed upon price for disposal at TDS's landfill in Buda, Texas.²⁵ TDS agreed to accept the City's waste (up to 350,000 tons per year) at the contractually determined rate.²⁶ The Original Agreement set the initial disposal rate for the first three years, then established how any increase to such rate after the third year would be determined.²⁷ The Original Contract was set to expire in 1998 (with the option for five additional one-year extensions).²⁸

12. The Original Agreement also contemplated that the City and TDS would enter into negotiations concerning TDS's potential use and operation of the City's Starcrest Transfer Station ("Starcrest").²⁹ A transfer station is a site where recyclables and waste are collected from multiple sources, sorted, and bundled in preparation for processing or transport to a landfill.³⁰ At Starcrest, the City would have its collection trucks (those nearby to the facility geographically) dump their collected loads at the facility.³¹ These loads would be dumped into larger tractor trailer trucks that would then transport the load to a landfill or another facility as appropriate (*i.e.*, for recyclables).³²

²² *See id.*

²³ *See id.*

²⁴ *See* Exhibit B, the Original Agreement.

²⁵ *See id.*

²⁶ *See id.*

²⁷ *See id.*

²⁸ *See id.*

²⁹ *See id.*

³⁰ *See* Exhibit A.

³¹ *See id.*

³² *See id.*

By gathering multiple smaller loads into one larger load for transport, the City could transport the waste or other materials to their ultimate destination more efficiently and cost effectively by making fewer trips.³³ Third parties such as residents or commercial trash haulers could also dump waste at the facility for a fee (providing a revenue source for the City).³⁴ The City had owned and operated Starcrest since July 1982.³⁵ At the time, the City was using city-operated trucks loaded at Starcrest to haul waste to TDS's disposal site in Buda to satisfy the contractual requirements of the Original Agreement.³⁶

13. The Original Contract was amended in 1995 to extend the contract duration to September 30, 2025 ("the First Amendment").³⁷ Under the First Amendment, the City was obligated to provide 50,000 tons of waste per year to TDS at TDS's Buda landfill.³⁸ TDS was obligated to accept up to 500,000 tons of the City's municipal waste annually at the contractually established rate.³⁹ The First Amendment again set out the disposal rates for the first two years of the Amendment, then provided the method by which future increases to the disposal rate would be established.⁴⁰ Additionally, the First Amendment noted that the parties would enter into negotiations regarding TDS's potential operation of Starcrest.⁴¹

14. In 1998, the City and TDS finalized negotiations related to Starcrest and executed a second amendment to the Original Contract ("the Second Amendment").⁴² Pursuant to the Second Amendment, TDS would lease and operate Starcrest and accept the City's solid waste at

³³ *See id.*

³⁴ *See id.*

³⁵ *See id.*

³⁶ *See id.*

³⁷ *See* Exhibit C.

³⁸ *See id.*

³⁹ *See id.*

⁴⁰ *See id.*

⁴¹ *See id.*

⁴² *See* Exhibit D.

the site for an agreed upon rate. TDS was obligated to accept up to 500,000 tons of the City's waste annually at the contractual rate.⁴³ As it had before, the City continued to have any annual tonnage obligation to provide to TDS as well.⁴⁴ As in the Original Agreement and First Amendment, the Second Amendment established the disposal rate to be paid by the City for dumping waste at Starcrest for the first two years of the agreement then set out the mechanism for determining any rate increases thereafter.⁴⁵

15. In operating Starcrest, TDS had to accept the City's solid waste brought to the facility; however, so long as TDS gave city-haulers priority of service as set out in the Agreement, TDS could also accept waste at Starcrest from TDS's own trucks as well as from third parties, such as private citizens, at whatever rate TDS chose.⁴⁶ Thus, TDS had a separate stream of revenue from the site. TDS could also operate a retail landscape materials operation at this site for additional revenue.⁴⁷

16. The Second Amendment was set to expire on January 15, 2023, unless TDS chose to extend the contract to expire in 2025 to coincide with the expiration of the First Amendment.⁴⁸

17. A few years later, the parties executed a Memorandum of Agreement and Special Addendum (related to the transfer of the Permit for the transfer station).⁴⁹ Together, these documents governed the relationship between TDS and the City and are collectively referred to as the Agreement. At a high level, under the Agreement, the City has an obligation to deliver 100,000 tons of solid waste to TDS for disposal annually (either via delivery to the landfill in Buda or

⁴³ *See id.*

⁴⁴ *See id.*

⁴⁵ *Compare* Exhibits B and C *with* Exhibit D.

⁴⁶ *See* Exhibit D.

⁴⁷ *See id.*

⁴⁸ *See id.*

⁴⁹ *See* Exhibit E, Memorandum of Agreement; *see* Exhibit F, Special Addendum.

dumping at Starcrest currently operated by TDS).⁵⁰ For its part, in addition to other requirements, TDS has an obligation to accept up to 500,000 tons of solid waste from the City at the contractually set rate.⁵¹ The Agreement sets out the various obligations of the parties including the annual disposal rate the City pays per ton of waste and how future increases of the disposal rate would be determined.⁵²

TDS seeks to unilaterally modify the Agreement and breaches the Agreement

18. For more than twenty years, TDS and the City performed their obligations under the Agreement.⁵³

19. On August 2, 2021, TDS sent the City a letter invoking the mediation clause of the Agreement as a prerequisite to litigation.⁵⁴ In the letter, TDS claimed that that the annual increases on the disposal rate were insufficient given a reduction in revenue and increase in costs (including costs driven by the City's allegedly improper dumping of bulky waste at Starcrest).⁵⁵ TDS included two invoices both dated with the same date as the letter. One invoice was for alleged loss revenue and tonnage shortages associated with bulky waste delivered to Starcrest by the City from January of 2013 through 2021.⁵⁶ The second invoice was for alleged costs to make a repair at the facility in October of 2017.⁵⁷

20. TDS had accepted bulky waste at Starcrest without complaint since 2013 and the contract has no prohibition on the dumping of bulky waste at Starcrest.⁵⁸ Moreover, TDS had been

⁵⁰ See generally, Exhibits B–F.

⁵¹ See Exhibit D.

⁵² See *id.*

⁵³ See Exhibit A.

⁵⁴ See Exhibit G, TDS's 08/02/2021 correspondence invoking mediation.

⁵⁵ See *id.*

⁵⁶ See *id.*

⁵⁷ See *id.*

⁵⁸ See Exhibit A. To the contrary, while “bulky waste” is not a term used in the Agreement, the type of items that are generally considered bulky such as appliances, etc., were specifically included in the

billing and invoicing the City separately for any bulky waste dumped at the site when TDS deemed necessary, which the City had paid as received.⁵⁹ Regardless, to avoid further issue until the dispute could be resolved, the City immediately ceased delivering bulky waste to Starcrest as of August 3, 2021, and has not delivered bulky waste to the site since that date; thereby curing any alleged default caused by the delivery of bulky waste to Starcrest.⁶⁰ However, the City disagreed that it owed TDS any payment for either invoice.⁶¹

21. On November 19, 2021, the City informally met with TDS to try to resolve the issues raised in TDS's August letter.⁶² In the meeting, TDS requested an increase in the disposal fee beyond that required by the Agreement and sought to change how future increases would be calculated.⁶³ The City did not agree to the changes given the changes were inconsistent with, and not required by, the Agreement.⁶⁴ Three days later, without justification, TDS announced that it would no longer accept dead animals at Starcrest on the belief that the City was collecting commercially collected dead animals (*i.e.*, animals from veterinary offices and not off the street) and dumping them at Starcrest.⁶⁵ After the City spoke with TDS to assure TDS that it was not dumping commercially collected dead animals, TDS agreed to resume accepting dead animals on

definition of allowable waste to be dumped at Starcrest by the City. *See* Exhibit D (defining the type of waste that could be dumped by the City to include "the same type of waste, including small amounts of brush, white goods, and materials from citizen cleanup events, as has been customary for the City, as has been process by the City through the Transfer Station from 1991 through 1996 and other solid waste appropriate for the Transfer Station."). White goods include large appliances like refrigerators and dishwashers.

⁵⁹ *See id.*

⁶⁰ *See id.* The Agreement requires that notice of alleged default must be provided to the defaulting party and time allowed to that party to cure the alleged default. To the extent TDS claims that the City's dumping of bulky waste at Starcrest was inconsistent with the Agreement, the City cured any alleged default the day it received notice.

⁶¹ *See* Exhibit A.

⁶² *See id.*

⁶³ *See id.*

⁶⁴ *See id.*

⁶⁵ *See id.*

November 24th.⁶⁶ However, two weeks later, in violation of the Agreement, TDS announced that dead animals could no longer be dumped on Saturdays.⁶⁷ Additionally, TDS also announced that Starcrest would close earlier each weekday and would not be available after hours or on the weekends as it had been before.⁶⁸

22. On March 9, 2022, the City and TDS unsuccessfully mediated the contract dispute.⁶⁹ The next day, after the mediation failed, the City began to experience significant delays in service at Starcrest.⁷⁰ TDS reduced personnel at Starcrest and added additional steps for dumping.⁷¹ Where it had previously rarely taken the City more than thirty minutes for a truck to dump a load at Starcrest, the City trucks now began to experience regular delays of more than an hour (with some incidents of trucks waiting almost two hours) causing huge delays in servicing the City's routes and increasing operational issues.⁷² The day after the mediation, TDS also stated that it would accept no dead animals on any day at Starcrest and has refused to accept collected dead animals since that date.⁷³

23. On March 31, 2022, TDS filed its lawsuit against the City alleging claims of breach of contract and quantum meruit as well as seeking declaratory judgment. The City denied all such claims as baseless.

24. On May 16, 2022, the City sent its first Notice to Cure to TDS advising TDS to cure the service delay issues and to accept dead animals at Starcrest in accordance with the

⁶⁶ *See id.*

⁶⁷ *See* Exhibit A. The City regularly collects approximately 25,000 dead animals off of city streets and alleys annually.

⁶⁸ *See id.*

⁶⁹ *See id.*

⁷⁰ *See id.*

⁷¹ *See id.*

⁷² *See id.*

⁷³ *See id.*

Agreement.⁷⁴ While there were minor improvements in the services times after receiving the Notice, long delays remained such that the City had to begin diverting trucks to other landfills for dumping in an attempt to prevent the excessive delays from impacting operations.⁷⁵ Additionally, TDS continued to refuse to accept dead animals.⁷⁶ Thereafter, the parties agreed to a second mediation.

25. In September of 2022, pending mediation, the City sent a second Notice to Cure regarding TDS's failure to provide priority to City trucks as required by the Agreement and failure to maintain equipment at Starcrest.⁷⁷ The City's drivers were reporting that TDS was not complying with the proper ratio of servicing the City haulers before other haulers required by the Agreement.⁷⁸ Also, a scale at the facility was reportedly broken.⁷⁹ Both issues were (on top of the ongoing service issues) contributing to continued delays in the service of the City's trucks.⁸⁰ As a direct result of TDS's conduct and failure to abide by the Agreement, the City did not meet the tonnage requirements under the Agreement for 2022 for the first time in the decades-long duration of the Agreement.⁸¹

26. On November 22, 2022, TDS sent its response to the City's default notices and disputed the City's assertions.⁸² The letter also served as TDS's Notice to Cure to the City for alleged defaults by the City related to the Agreement.⁸³ The Notice included both old and new

⁷⁴ See Exhibit H, the City's 5/17/2022 Notice of Default to TDS.

⁷⁵ See Exhibit A.

⁷⁶ See *id.*

⁷⁷ See Exhibit I, The City's 9/16/2022 Notice of Default to TDS.

⁷⁸ See *id.*

⁷⁹ See *id.*

⁸⁰ See Exhibit A.

⁸¹ See *id.*

⁸² See Exhibit J, TDS's 11/22/2022 correspondence regarding "default."

⁸³ See *id.*

assertions of default (including the tonnage shortage for 2022).⁸⁴ The Notice gave the City until January 15, 2023 to cure the alleged defaults (including payment of over \$12,000,000 in alleged amounts owed).⁸⁵ Per the Notice, if the City did not capitulate to TDS's unlawful and baseless demands, TDS would deny the City access to Starcrest or, alternatively, would allow the City access so long as the City pays the standard gate rates charged to third-party customers (*i.e.*, not the reduced contractual rate in the Agreement).⁸⁶ If the City refuses to pay the gate rate, TDS will prevent the City from using the Starcrest facility.⁸⁷ Further complicating the threat, the public gate rate uses a different measurement for disposal loads than the contractual measurement such that it would be impossible for the City to reconcile what amount should be paid for each load under the Agreement as opposed to what TDS will attempt to charge (the public rate).⁸⁸

27. At the end of the Notice, despite all of TDS's assertions that the Agreement is an unfair financial burden and other claims included in its Petition, the letter also exercised TDS's option to extend the Agreement for an additional two years to 2025.⁸⁹ By separate letter, TDS also sent its annual notice of proposed rate increase to the City.⁹⁰ In the letter, TDS recognized what rate would be proper under the Agreement but then asserted that the rate would more appropriately

⁸⁴ *See id.*

⁸⁵ *See id.*

⁸⁶ *See id.*

⁸⁷ *See id.*

⁸⁸ *See Exhibit A.* TDS public gate rate is calculated and charged by cubic yard whereas the Agreement's disposal rate contemplates payment for tonnage. When charging by the cubic yard, TDS does not need to weigh the load being disposed—TDS charges based on the estimated volume of the truck bringing the waste. Without the weight, the City is unable to calculate the proper amount to be paid for each load under the contract, which is a rate per ton. It should be noted that SWMD's collection trucks are fully enclosed making an accurate visual estimate of volume inside this enclosed truck impossible.

⁸⁹ *See Exhibit J.*

⁹⁰ *See Exhibit K,* TDS's 11/22/2022 correspondence regarding 2023 rates.

be twice the Agreement rate.⁹¹ The City responded that the appropriate rate, and thus what the City will pay, is the rate set by the Agreement.⁹²

28. On January 12, 2023, the City filed its Original Counterclaim and Application for Injunctive Relief seeking a declaration of the City's rights and TDS's obligations under the Agreement. The City further sought temporary injunctive relief to maintain the status quo of the parties' relationship pending the outcome of this litigation.

29. The Parties agreed pursuant to Texas Rule of Civil Procedure 11 to maintain the status quo until the earlier of ruling on the City's application for injunction or Wednesday, February 22, 2023.⁹³

30. On or about January 16, TDS began to charge the City the public gate rate for disposing at Starcrest.⁹⁴ The first invoice was sent the following week.⁹⁵ Invoices have followed on a weekly basis.⁹⁶ The City has paid the invoices in accordance with the contractually set disposal rate and not the incorrect public gate rate demanded by TDS.⁹⁷ Thereafter, TDS sent a letter stating that it considered the City to still be in breach and stating that the City would be denied access to the facility after the expiration of the R. 11 if such breaches were not "cured."⁹⁸

31. Accordingly, the City set a hearing on the City's application for injunctive relief for Wednesday, February 15, 2023 at 9:00 a.m. However, there were no courts available to accommodate the Parties for hearing on that day and the matter was reset for Tuesday, February 21, 2023. Out of an abundance of caution, the City now files this Application for Temporary

⁹¹ *See id.*

⁹² *See* Exhibit A.

⁹³ *See* Exhibit N, Rule 11 Agreement.

⁹⁴ *See* Exhibit A.

⁹⁵ *See* Exhibit L, January Invoice from TDS.

⁹⁶ *See* Exhibit A.

⁹⁷ *See id.*

⁹⁸ *See* Exhibit M, TDS 2/8/2023 Correspondence.

Restraining Order in the event the City’s application for temporary injunction cannot be heard before the expiration of the R. 11 agreement between the parties.

ARGUMENTS & AUTHORITIES

Legal Standard

32. A trial court has broad discretion to grant or deny an application for temporary injunction.⁹⁹ An order granting injunctive relief should be reversed only where the trial court abuses its discretion.¹⁰⁰ As the Texas Supreme Court has held, the purpose of a temporary injunction is preservation of the status quo.¹⁰¹ *The status quo is the position the parties were in before the dispute arose.*¹⁰² Further, obtaining a temporary injunction requires pleading and proving (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) irreparable injury that is both probable and imminent if the relief is not granted.¹⁰³ To warrant issuance of a temporary injunction, the applicant need only show a probable right and probable injury.¹⁰⁴

Application for Temporary Restraining Order

33. The City hereby applies to this Court for a Temporary Restraining Order (“TRO”) Defendant/Counter-Plaintiff incorporates and re-alleges all previous paragraphs by reference as if fully set forth herein.

34. The City’s Application for a TRO is authorized by TEX. CIV. PRAC. & REM. CODE § 65.011(1)-(5) because: (a) The City is seeking temporary injunctive relief enjoining acts

⁹⁹ *Danbill Partners, L.P. v. Sandoval*, 621 S.W.3d 738, 744 (Tex. App.—El Paso 2020, no pet.)(citing *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002)).

¹⁰⁰ *Id.*, (citing *Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex. 1993)).

¹⁰¹ *Butnaru*, 84 S.W.3d at 204.

¹⁰² *Pilf Invs. v. Arlitt*, 940 S.W.2d 255, 258 (Tex. App.—San Antonio 1997)(citing *Story v. Story*, 142 Tex. 212, 176 S.W.2d 925, 927 (1944)).

¹⁰³ *Butnaru*, 84 S.W.3d at 204.

¹⁰⁴ *Pilf Invs.*, 940 S.W.2d at 258.

prejudicial to the City; (b) TDS has performed or is about to perform or is procuring or is allowing the performance of an act relating to the subject of this litigation and in violation of the City's rights, and such violations (unless enjoined) would tend to render any judgment in this litigation ineffectual; (c) the City is entitled to a writ of injunction under the principles of equity and the laws of Texas; and (d) irreparable injury to the City and its property exists and is threatened.

35. As demonstrated herein and the City's previously filed Original Counterclaim, which is incorporated by reference herein, the City has a likelihood of success on the merits of their claim for declaratory relief against TDS. The facts described above present an actual controversy within this Court's jurisdiction. A real and substantial controversy exists between the parties regarding the parties' obligations in their business relationship. A valid and enforceable contract exists between the City and TDS. The Agreement contains the following relevant provisions:¹⁰⁵

Section 6(F) of the Agreement (Second Amendment – "disposal rates"

TDSL agrees to accept up to 500,000 tons per year of City solid waste hauled by any City vehicle or designated haulers...during the term of this Agreement at the rates as adjusted in the matter set forth in this Agreement...TDSL agrees to accept the City's regularly collected Municipal Solid Waste, which includes waste from all City department, City contractors, and designated City haulers at the City's contracted price...The City's need to process additional volumes and types of waste materials appropriate for the transfer station shall be reasonably accommodated over time by good faith modifications to the Transfer Station by TDSL.

Section of the Agreement (Second Amendment)

B. TDSL shall operate the Transfer Station at a minimum of Monday through Friday of each week from 7:00 a.m. to 5:00 p.m....

C. Priority to City for Service: Pursuant to Ordinance No. 85263, passed December 5, 1996, which provide in part that this Second Amendment is intended to the City, "First priority for the City's use and access to the Transfer Station facilities, thereby affording the City a first right of service and limiting working or services available to third parties at any time the City may so choose or need the station's capacity."

¹⁰⁵ See Exhibits B, C, and D.

It is understood that the purpose of the foregoing requirements is to protect the City's right to first priority for daily capacity to the Transfer Station.

(1) At any time, City shall have the first right of service at the Transfer Station, but especially, on Monday, Tuesday, Thursday, and Friday....

(2) In case of simultaneous demand from the City and its designated haulers, and TDS or other haulers, the City and its designated haulers, and TDS and other haulers will wait in separate lines for the same services. When the City and its designated haulers and TDS and other haulers are waiting for the same services, the City, and its designated haulers, will be allowed service four vehicles to every one by TDS or other haulers. 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. For purposes of this Agreement, TDSL shall be deemed to have used reasonable care even though trucks belonging to the City or its designated haulers have to wait more than 30 minutes, if the wait is due to large numbers (15 or more vehicles) of collection trucks owned by the City or its designated haulers arriving at the Transfer Station within approximately the same time period.

(3) In the event that a City vehicle is required to wait longer than 30 minutes as a result of (i) TDSL not providing the City first right to service at the Transfer Station or (ii) TDSL being unable to provide normal services to the Transfer Station using reasonable care, the City's on-site Program Manager will determine, at his/her sole discretion whether City vehicles are to be diverted to another landfill. If City vehicles are diverted due to the failure of TDSL to use reasonable care, TDSL will:

- a. Pay the City the added cost to transport and dispose of waste [at a designated alternative site]...
- b. Take immediate steps to put the Transfer Station back in service...
- c. Credit towards the City's requirement to deliver 100,000 tons annually all tons diverted from the Transfer Station to another disposal facility...

D. The City and its designated haulers shall have first right of access to any and all capacity at the Transfer Station for full process and disposal services at the contract price. TDS will have second priority. Third parties will have last priority....

G. TDSL shall provide for disposal of dead animals collected on City streets and alleys and brought to the transfer station by the City or its designated haulers between the hours of 7:00 AM and 6:00 PM, Monday through Friday and 7:00 AM to Noon on Saturday...

N. TDSL..shall have the right to collect solid waste and process such waste through the Trnasfer Station. TDSL shall also have the right to accept solid waste from other

haulers, to the extent that the acceptance of such volume does not interfere with the City's priority and the orderly acceptance of City collection vehicles...

T. City shall pay TDSL a disposal rate per ton for all municipal solid waste delivered to TDSL at the Transfer Station pursuant to this Second Amendment ("Disposal Rate at Transfer Station") of \$19.13 for the period of March 1, 1997 to September 30, 1997, and \$20.62 for the period of October 1, 1997 to September 30, 1998....Beginning on October 1, 1998, and continuing on the same date each year thereafter, the Disposal Rate at the Transfer Station shall be adjusted by the Consumer Price Index as defined in Section 6B of the First Amendment....

Section 6(B) of the Agreement (First Amendment (as referenced in Second Amendment) — "Disposal Rate Increases"

CPI, as used herein, means the "Consumer Price Index" determined by the United States labor's Bureau of Labor Statistics Consumer Price Index. All Urban Wage Earners and Clerical Workers, All Items, for the Southern Region of the United States, or the successor of such index, or if no successor index is designated, then other index as may be agreed by the parties hereto. The base index shall be September, 1995.

36. Pursuant to Chapter 37 of the TEX. CIV. PRAC. & REM. CODE, in its Original Counterclaim, the City seeks a declaration of the rights, status, and other legal relations between the parties, including but not limited to, pursuant to the Agreement, the following declarations:

- i. Under the Agreement, TDS has no right to refuse the City access to Starcrest or prevent the City from dumping solid waste at Starcrest; therefore, TDS must continue to allow the City's access to Starcrest for dumping of solid waste;
- ii. Under the Agreement, the disposal rate for solid waste dumped by the City at Starcrest for the year 2023 is \$36.23 per ton, therefore, the City is not obligated to pay more than \$36.23 per ton for all solid waste dumped under the Agreement and TDS cannot refuse service to the City for failure to pay a rate beyond the contract rate;
- iii. Under the Agreement, for the duration of the contract through 2025, the disposal rate will increase or decrease as follows:
 - (a) 2024: The 2023 rate plus or minus any change in the CPI index as defined in Section 6B of the First Amendment;
 - (b) 2025: The 2024 rate plus or minus any change in the CPI index as defined in Section 6B of the First Amendment; and

iv. Under the Agreement, TDS has no basis, factual or legal, to refuse to accept the City's dead animal waste and must accept all waste for the duration of the Agreement; and

v. Under the Agreement, the 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.

37. Given the City is seeking declarations consistent with the agreement between the parties, the City has a likelihood of success on the merits of its claim for declaratory relief against TDS.

38. Further, as a result of TDS' actions, as described herein, the City is threatened with immediate and irreparable harm to which it has no adequate remedy at law. If not enjoined, TDS will cause the City imminent and irreparable harm by:

- a. preventing the City from accessing Starcrest and dumping solid waste at Starcrest;
- b. charging the City a disposal rate beyond \$36.23 per ton for solid municipal waste dumped by the City at Starcrest;
- c. failing to provide priority of service to the City waste haulers in accordance with the Agreement; and
- d. failing to weigh all the City trash haulers and bill the City per ton for all waste dumped at Starcrest as required by the Agreement.

39. As detailed by the Director of the Solid Waste Department David Newman in his affidavit submitted in support of the City's application, the consequences to the City if TDS is not enjoined as requested would be significant and unquantifiable.

40. First, charging the City the public gate rate is inconsistent with the contract.¹⁰⁶ Additionally, if TDS ever stops weighing the City loads, it will make it impossible for the City to track tonnage for purposes of the minimum requirement and impossible to pay in accordance with the Agreement given the differences in how the public gate rate and contract disposal rate are calculated.¹⁰⁷

41. Second, even more critically, denying the City access to Starcrest would impact SWMD's ability to complete daily collections in a timely and efficient manner, which will have a ripple effect throughout the Department's operations (including increased costs for equipment and personnel).¹⁰⁸ The City contracted for three disposal sites, and contracted for priority of service at Starcrest, because it is critical that the City have sufficient disposal access to meet its daily operational needs and failure to have such access, even for one day (or as little as a couple of hours), impacts the City's ability to provide the services depended on by its residents and, ultimately, public health if it cannot meet those needs.¹⁰⁹ Waste services is an essential City-service. If TDS is not enjoined from denying access to Starcrest, the City, and the public's health and safety, will be exposed to probable and imminent harm as the City's services will be immediately impacted.¹¹⁰

42. It is because of this that the City included specific language in the contract protecting its right to access Starcrest:

Purpose and Severability

Operation of the Transfer Station is an essential City service directly impacting public health. Therefore it is paramount to the public interest in both relationships, that it be understood and agreed between the parties that the subject matter of this

¹⁰⁶ See Exhibit A.

¹⁰⁷ See *id.*

¹⁰⁸ See *id.*

¹⁰⁹ See *id.*

¹¹⁰ See Exhibit A.

Second Amendment is in all ways severable from and independent of the subject matter of the Original Agreement and first Amendment in the event of a default under either the Original Agreement and its First Amendment or this Second Amendment with the exception of certain provisions as set forth in this Second Amendment.

Disposal Rate (Paragraph 6(F))

TDSL agrees to accept up to 500,000 tons per year of City solid waste hauled by any City vehicle or designated haulers...during the term of this Agreement at the rates and adjusted in the matter set forth in this Agreement...TDSL agrees to accept the City's regularly collected Municipal Solid Waste, which includes waste from all City department, City contractors, and designated City haulers at the City's contracted price...The City's need to process additional volumes and types of waste materials appropriate for the transfer station shall be reasonably accommodated over time by good faith modifications to the Transfer Station by TDSL.

Transfer Station (Section 18)

B. TDSL shall operate the Transfer Station at a minimum of Monday through Friday of each week from 7:00 a.m. to 5:00 p.m....

C. Priority to City for Service: Pursuant to Ordinance No. 85263, passed December 5, 1996, which provided in part that this Second Amendment is intended to the City, "First priority for the City's use and access to the Transfer Station facilities, thereby affording the City a first right of service and limiting working or services available to third parties at any time the City may so choose or need the station's capacity." It is understood that the purpose of the foregoing requirements is to protect the City's right to first priority for daily capacity to the Transfer Station.

(1) At any time, City shall have the first right of service at the Transfer Station, but especially, on Monday, Tuesday, Thursday, and Friday....

D. City and its designated haulers shall have first right of access to any and all capacity at the Transfer Station for full process and disposal services at the contract prices....

N...TDSL shall also have the right to accept solid waste from other haulers, to the extent that the acceptance of such volume does not interfere with the City's priority and the orderly acceptance of City collection vehicles.

Dispute Resolutions (Section 19)

C. Extraordinary Contractual Remedies Available to City

(1) In recognition of the fact that the City requires daily access to the Transfer Station because the operation of the Station is an essential City service potentially impact public health, the City shall have certain extraordinary remedies under the

circumstances outlined in this paragraph. These extraordinary remedies are in addition to, and not to the exclusion of, any and all remedies the City may have at law and in equity to enforce the terms of this contract or to protect the public health, safety and welfare...¹¹¹

43. The harm that would be caused by not having access to Starcrest would be unquantifiable.¹¹² The City designed its trash routes to utilize specific disposal sites (one of the three used in the City) based on proximity.¹¹³ The three facilities are not geographically close but instead are located in different parts of the City.¹¹⁴ Diversions of routes that previously went to Starcrest to the other facilities would result in much longer trips for the trucks—the mileage on the trucks, fuels costs, and labor costs.¹¹⁵ Additionally, the City’s routes are designed to be completed and off route before heavy traffic periods begin.¹¹⁶ With these longer route times, drivers will then be subject to increased traffic and engaging with more cars on the roads increasing the risk of accidents.¹¹⁷

44. There would be detrimental impacts on the City’s personnel as well, including working significantly longer shifts.¹¹⁸ The workload would be unsustainable and create a significant risk of losing staffing in the near future if the problems continue. Given it can take up to a year to hire someone and for them to become proficient in operating these types of trucks, any loss in staffing would have an immediate and negative impact on the City’s operations.¹¹⁹

45. The risk is not to equipment and personnel alone. The longer trips made necessary by the diversion of trucks to farther sites would create other issues as well due to the timing. The

¹¹¹ See Exhibit D.

¹¹² See Exhibit A.

¹¹³ See *id.*

¹¹⁴ See *id.*

¹¹⁵ See *id.*

¹¹⁶ See Exhibit A.

¹¹⁷ See *id.*

¹¹⁸ See *id.*

¹¹⁹ See *id.*

routes were set up so that collections were done between 7:00 a.m. and 3:30 p.m., so that the majority were picked up while people were gone for the day.¹²⁰ With the delays that diverting to the farther disposal sites would cause, there will be far greater interaction between the collection trucks and our customers and the public as trucks try to complete their routes in neighborhoods where children are returning from school and others are returning from work.¹²¹ There will be more cars parked on the street preventing access to the carts potentially preventing the collection of waste and other issues.¹²² The risk of an accident to both the operators and the customers, including the risk of both personal injury and property damage, will go up significantly with these increased interactions.¹²³

46. Finally, these long diversions would have a detrimental impact on the City's equipment. If the City trucks are not able to reach the other disposal sites before they close, the truck will have to hold the trash for the night.¹²⁴ The trucks are then considered fire hazards and must be isolated from other vehicles.¹²⁵ Additionally, over time, the corrosive nature of the trash will cause damage to the trucks if this is a frequent occurrence.¹²⁶

47. As shown, it is critical to the City's solid waste operations to retain access to Starcrest. If TDS is not enjoined from denying the City access to Starcrest, the City is threatened with immediate and irreparable harm to which it has no adequate remedy at law as detailed above; therefore, the City requests that, after notice and a hearing thereon, the Court issue the City the temporary injunctive relief requested. Specifically, the City requests:

¹²⁰ *See id.*

¹²¹ *See* Exhibit A.

¹²² *See id.*

¹²³ *See id.*

¹²⁴ *See id.*

¹²⁵ *See* Exhibit A.

¹²⁶ *See id.*

- i. TDS be enjoined from preventing the City from accessing Starcrest and dumping solid waste at Starcrest until the conclusion of this litigation;
- ii. TDS be enjoined from charging the City a disposal rate beyond \$36.23 per ton for solid municipal waste dumped by the City at Starcrest in 2023;
- iii. TDS be required to weigh all the City trash haulers and bill the City per ton for all waste dumped at Starcrest as required by the Agreement and that TDS further be prohibited from modifying its method of charging for solid waste dumped by the City at Starcrest in a manner inconsistent with the Agreement; and
- iv. TDS be required to provide priority of service to the City waste haulers in accordance with the Agreement.

48. Defendant/Counter-Plaintiff further requests that the Court set the City's previously-filed Request for Temporary Injunctive Relief for a hearing and, after the hearing, issue a temporary injunction against TDS as requested above.

49. Defendant/Counter-Plaintiff further requests that the Court set its request for permanent injunctive relief for a full trial on the merits and, after the trial, issue a permanent injunction against TDS in the same manner as requested in the City's Application for Temporary Injunctive Relief, *supra*.

50. All indispensable parties to this Lawsuit are joined as required under TEX. R. CIV. P. 39.

III. **BOND**

51. The City is willing to post bond in the amount which the Court determines is necessary and to serve as adequate security for the injunctive relief requested herein.

IV. **PRAYER**

WHEREFORE, PREMISES CONSIDERED, Defendant City of San Antonio respectfully prays that this Court:

- i) Grant the City's request for injunctive relief as described herein; and
- ii) Award the City's such other and further relief, general or special, at law or in equity, to which it is justly entitled.

Respectfully submitted

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*Attorneys for Defendant/Counter-Plaintiff
City of San Antonio, Texas*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on all counsel of record via email, according to the Texas Rules of Civil Procedure on this the 16th day of February, 2023:

James A. Hemphill
GRAVES, DOUGHERTY, HEARON & MOODY, P.C.
401 Congress Avenue, Suite 2700
Austin, Texas 78701

Via E-Mail: jhemphill@gdhm.com

Attorney for Plaintiff

/s/ Bonnie K. Kirkland
Bonnie K. Kirkland

CAUSE NO. 2022-CI-06061

TEXAS DISPOSAL SYSTEMS
LANDFILL, INC.,

Plaintiff,

VS.

CITY OF SAN ANTONIO, TEXAS,

Defendant.

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IN THE DISTRICT COURT

288TH JUDICIAL DISTRICT

BEXAR COUNTY, TEXAS

AFFIDAVIT OF DAVID NEWMAN

STATE OF TEXAS)
)
COUNTY OF BEXAR)

BEFORE ME, the undersigned authority, personally appeared David Newman, who, after being first duly sworn and cautioned upon his oath, deposes and states:

1. My name is David Newman. I am over 18 years of age, and I am fully competent in all respects to make this Affidavit. All statements herein are true and correct and within my personal knowledge. I submit this application in support of Defendant/Counter-Plaintiff’s Application for Temporary Restraining Order (“TRO”).

2. I am employed by the City of San Antonio as the Director of the Solid Waste Management Department (“SWMD”). I have worked for the City of San Antonio since 1997 and in the SWMD in particular since 2008. As Director, I oversee the daily operations of the Department as part of my duties.

Solid Waste Management Department

3. The SWMD manages the City’s waste collection services that are provided to its customers (the residents of the City). SWMD provides weekly curbside collection of residential garbage, recycling, and organics materials to over 368,000 customers, including collection of

recycling and organic materials. SWMD also provides curbside brush and bulky item collection two times per year. SWMD operates four bulky waste drop-off sites, three household hazardous waste drop-off sites, and two brush drop-off sites. Additionally, SWMD offers special collections such as dead animal collection from city streets, bagged leaf collection, and special out-of-cycle collections. SWMD also collects the downtown litter baskets and over 9,000 illegal dumping locations and over 250 miles of litter across the City. In total, the City collects more than 600,000 tons of waste each year.

4. Weekly curbside collections makes up approximately 480,000 tons of that total. After being collected by SWMD, depending on the material at issue, the material is transported to either a contracted recycling company, a contracted organics composting company, or a disposal site. SWMD currently has three contracts for disposal, including the agreement with TDS, which provide access to three disposal sites within the City. For curbside collection, collection workers are scheduled to work a 10-hour day and must complete his or her entire route each day before logging out.

5. Garbage routes are designed to be completed in two truckloads. The collection drivers will collect the waste from the customers on their assigned routes until the truck is full. Once full, the drivers travel to a designated dump site (geographically determined) to empty the load and then return to the route. The drivers then complete the collection of their route and, once the collection is finished, empty the second load at the disposal site to complete their day. Any delays in traffic or at the dump site greatly affect the drivers' ability to finish on time and provide the necessary service for the citizens of San Antonio.

6. Given the various services provided and the complexities of SWMD's operations, providing proper and efficient waste collection services is logistically complicated and requires

the detailed coordination of employees, equipment, and operations. To provide its services, SWMD employs more than 800 individuals operating out of twelve (12) locations. For curbside collections alone, we operate over 160 trucks daily. Additionally, there are approximately another 130 SWMD vehicles operated daily collecting other materials, including bulky waste/brush, litter, and dead animals. Given the necessary coordination to ensure timely service on a daily basis, any unforeseen complication can have a ripple effect significantly affecting operations.

7. In the 1990's, the City-owned landfill was coming to the end of its permitted life and new changes in landfill regulations were going into effect, so the City permanently closed all of its City-owned landfills. In 1993, after engaging in the bid procurement process, the City entered into three separate contracts with Waste Management, Inc., Browning Ferris (now Republic Services), and TDS related to the disposal of the City's regularly collected solid waste.

8. The City originally entered into a contract with TDS for landfill disposal in 1993 ("the Original Contract"). *A true and correct copy of the Original Agreement is attached as Exhibit B.* The Original Contract was set to expire in 1998.

9. As part of the Original Agreement, the City and TDS agreed to enter into negotiations concerning TDS's potential use and operation of the City's Starcrest Transfer Station ("Starcrest"). A transfer station is a site where recyclables and waste are collected from multiple sources, sorted, and bundled in preparation for processing or transport to a landfill. At Starcrest, SWMD would have its collection trucks (those nearby to the facility geographically) dump their collected loads at the facility. These loads would be dumped into larger tractor trailer trucks that would then transport the load to a landfill or another facility as appropriate (*i.e.*, for recyclables). By gathering multiple smaller loads into one larger load for transport, the City

could transport the waste or other materials to their ultimate destination more efficiently and cost effectively by making fewer trips. Third parties such as residents or commercial trash haulers could also dump waste at the facility for a proscribed fee (providing a revenue source for the City). The City had owned and operated Starcrest since July 1982. At the time, the City was using city-operated trucks loaded at Starcrest to haul waste to TDS's disposal site in Buda to satisfy the contractual requirements of the Original Agreement.

10. The Original Contract was amended in 1995 to extend the contract duration to September 30, 2025 ("the First Amendment"), which made some modifications to the tonnage requirements for both parties. *A true and correct copy of the First Amendment is attached as Exhibit C.* In 1998, the City and TDS finalized negotiations related to Starcrest and executed a second amendment to the Original Contract ("the Second Amendment"). *A true and correct copy of the Second Amendment is attached as Exhibit D.* Under the Second Amendment, TDS would operate Starcrest. The Second Amendment was set to expire on January 15, 2023, unless TDS chose to extend the contract to expire in 2025 to coincide with the expiration of the First Amendment.

11. A few years later, the parties executed a Memorandum of Agreement and Special Addendum (related to the transfer of the Permit for the transfer station). *True and correct copies of the MOA and Addendum are attached as Exhibits E and F.*¹ Together, these documents governed the relationship between TDS and the City and are collectively referred to as the Agreement. Under the Agreement, the City has an obligation to deliver a certain amount of solid waste to TDS for disposal annually (either via delivery to the landfill in Buda or dumping at

¹ In my affidavit submitted in support of the Application for Temporary Injunction, I unintentionally omitted reference to the Memorandum of Agreement and Special Addendum, which are referenced here for completeness and to correct that omission.

Starcrest currently operated by TDS). For its part, in addition to other requirements, TDS has an obligation to accept up to a certain tonnage from the City at the contract rate. In operating Starcrest, TDS could accept non-City waste (waste from commercial haulers or private citizens) so long as TDS gave city-haulers priority of service as set out in the Agreement.

12. On August 2, 2021, TDS sent the City a letter invoking the mediation clause of the Agreement. *A true and correct copy of the letter is attached as Exhibit G.* In the letter, TDS claimed that that the annual increases on the disposal rate were insufficient and attached two invoices to the City. One invoice was for alleged extra costs associated with bulky waste delivered to Starcrest by the City from January of 2013 through 2021. The second invoice was for alleged costs to make a repair at the facility in October 2017.

13. Per the Agreement, bulky waste is appropriate waste for the City to dispose of at Starcrest. Additionally, TDS had accepted bulky waste at Starcrest without complaint since 2013. TDS had also been billing and invoicing the City separately for any bulky waste dumped at the site as it deemed necessary, which the City had paid as received. Regardless, to avoid further issue until the dispute could be resolved, the City immediately ceased delivering bulky waste to Starcrest as of August 3, 2021, and has not delivered bulky waste to the site since that date. However, the City disagreed that it owed TDS any payment for either invoice.

14. On November 19, 2021, the City informally met with TDS to try to resolve the issues raised in TDS's August letter. In the meeting, TDS requested an increase in the disposal fee beyond that required by the Agreement and sought to change how future increases would be calculated. The City did not agree to the changes because the changes were inconsistent with, and not required by, the Agreement. Three days later, TDS informed the City that it would no longer accept dead animals at Starcrest on the belief that the City was collecting commercially

collected dead animals (*i.e.*, animals from vet offices and not off the street) and dumping them at Starcrest. I communicated with TDS to provide assurances that the City was not dumping commercially collected dead animals at Starcrest. After that conversation, TDS agreed to resume accepting dead animals on November 24th. However, two weeks later, TDS announced that dead animals could no longer be dumped on Saturdays. Additionally, TDS also announced that Starcrest would close earlier each weekday and would not be available after hours or on the weekends as it had been before.

15. On March 9, 2022, the City and TDS unsuccessfully mediated the contract dispute. The next day after the mediation failed, we began to experience significant delays in service at Starcrest. TDS reduced personnel at Starcrest and added additional steps for dumping. Where it had previously rarely taken our collection trucks more than thirty minutes to dump a load at Starcrest, the trucks now began to experience regular delays of more than an hour (with some incidents of trucks waiting almost two hours) causing huge delays in servicing the City's routes and increasing operational issues. The day after the mediation, TDS also stated that it would accept no dead animals on any day at Starcrest and has refused to accept collected dead animals since this date. TDS then filed suit against the City.

16. On May 16, 2022, the City sent its first Notice to Cure to TDS advising TDS to cure the service delays issues and to accept dead animals at Starcrest in accordance with the Agreement. *A true and correct copy of the Notice is attached as Exhibit H.* While there were minor improvements in the services times after receiving the Notice, long delays remained such that the City had to begin diverting trucks to other landfills for dumping to attempt to prevent the excessive delays from impacting operations. Additionally, TDS continued to refuse to accept dead animals. The parties later agreed to a second mediation.

17. In September 2022, pending mediation, the City sent a second Notice to Cure regarding TDS's failure to provide priority to City trucks as required by the Agreement and failure to maintain equipment at Starcrest. *A true and correct copy of the Notice is attached as Exhibit I.* SWMD's collection drivers were reporting that TDS was not keeping with the proper ratio of servicing the City's haulers before other haulers required by the Agreement (the ratio was 4:1). Also, a scale at the facility was reportedly broken. Both issues were (on top of the ongoing service issues) contributing to continued delays in service of the City's trucks. Because of the service issues and conduct of TDS, despite its best efforts, the City did not meet its tonnage requirements for 2022 for the first time during the decades-long duration of the Agreement.

18. On November 22, 2022, TDS sent its response to the City's default notices. *A true and correct copy of the Response is attached as Exhibit J.* The letter also served as TDS's Notice to Cure to the City regarding alleged defaults by the City related to the Agreement. The Notice gave the City until January 15, 2023 to cure the alleged defaults (including payment of over \$12,000,000 in alleged amounts owed). Per the Notice, if the City did not meet TDS's demands, TDS would deny the City access to Starcrest or, alternatively, would allow the City access so long as the City pays the standard gate rates charged to third-party customers (*i.e.*, not the reduced contractual rate in the Agreement). If the City refuses to pay the gate rate, TDS will prevent the City from using the Starcrest facility. Besides being inconsistent with the Agreement, using the public gate rate creates additional problems because the public gate rate uses a different measurement for disposal loads than the contractual measurement such that it would be impossible for the City to reconcile what amount should be paid for each load under the Agreement as opposed to what TDS will attempt to charge.

19. At the end of the November Notice, the letter also exercised TDS's option to extend the Agreement for an additional two years to 2025.

20. By separate letter, TDS also sent its annual notice of proposed rate increase to the City, which acknowledged what the rate should be under the Agreement while also demanding a higher rate. *A true and correct copy of the letter is attached as Exhibit K.* The City responded that the appropriate rate, and thus what the City will pay, is the rate set by the Agreement.

21. The City does not believe it has any obligation to pay the invoices sent by TDS or that there is any default by the City that needs to be cured. Therefore, the City did not meet TDS's demands in its November 22nd letter. On or about January 17th, TDS began to charge the City the public gate rate for all loads disposed at Starcrest. The City has received weekly invoices since then demanding paying based on the public gate rate. *A true and correct copy of one invoice is attached as Exhibit L.* However, because TDS has so far been providing weight tickets for each load, the City paid the invoices in accordance with the contract (paying on a per ton basis at the contractual disposal rate). Based on the November 22nd second letter, it is our understanding that TDS intended to block the City's access from Starcrest if the first invoice was not paid in full within seven days. However, the City and TDS entered into an agreement to maintain the status quo until the City's application for temporary injunction could be heard. That agreement is set to expire on February 22nd. A letter received from TDS makes clear that TDS intends to block access to the facility after the agreement expires unless prevented from doing so. *A true and correct copy of the letter is attached as Exhibit M.*

22. TDS's recent actions and threats create two immediate problems. First, charging the City the public gate rate is inconsistent with the contract as noted above and will make it impossible for the City to pay in accordance with the Agreement given the differences in how the

public gate rate and contract disposal rate are calculated (see ¶18 above). While TDS is currently still weighing trucks (allowing the City to calculate the proper disposal payments to be made), based on its recent conduct inconsistent with the Agreement, there is no guarantee that TDS will not suddenly change its practices and stop weighing. If it does that, TDS will create a situation where the City has no ability to track the tonnage dumped at Starcrest so that the City can properly issue payment per the Agreement.

23. Second, even more critically, denying the City access to Starcrest would impact SWMD's ability to complete daily collections in a timely and efficient manner, which will have a ripple effect throughout the Department's operations (including increased costs for equipment and personnel). The City contracted for three disposal sites, and contracted for priority of service at Starcrest, because it is critical that the City have sufficient disposal access to meet its daily operational needs and failure to have such access, even for one day (or as little as a couple of hours), impacts the City's ability to provide the services depended on by its residents and, ultimately, public health if it cannot meet those needs. Waste services is an essential City-service. If TDS were permitted to deny access to Starcrest and deprive the City of that disposal site, the City, and the public's health and safety, will be exposed to probable and imminent harm as the City's services will be immediately impacted.

24. The harm that would be caused by not having access to Starcrest would be unquantifiable. The City designed its trash routes to utilize specific disposal sites (one of the three used in the City) based on proximity. The three facilities are not geographically close but instead are located in different parts of the City. For example, for those trucks that utilize Starcrest for disposal on their routes, if diverted to the dump site at Republic, the diversion takes approximately an hour, and if diverted to Waste Management's site, the diversion is

approximately one and a half hours with no traffic. In addition to time, the longer trips increase the mileage on the trucks, fuels costs, and labor costs as the operators are on longer routes. The City's routes are designed to be completed and off route before heavy traffic periods begin. With these longer route times, drivers will then be subject to increased traffic and engaging with more cars on the roads increasing the risk of accidents.

25. Our employees would also be directly impacted. By design, the operators on the routes work 10-hour days. However, to try to complete their routes each day, with the added travel time to the other sites, employees who generally clocked out at 4:30 p.m. will now very likely have to work until 7:30, resulting in 13-hour days, or longer. This is not sustainable and creates significant risk of losing staffing in the near future if the problems continue. Given it can take up to a year to hire someone and for them to become proficient in operating these types of trucks, it is also not a problem that can be easily remedied.

26. The longer trips for disposal create other issues as well due to the timing. The routes were set up so that collections were done between 7:00 a.m. and 3:30 p.m., so that the majority were picked up while people were gone for the day. With the delays that diverting to the farther disposal sites would cause, there will be far greater interaction between the collection trucks and our customers and the public. Besides traffic as mentioned before, our operators will be having to try to complete their routes later while working in neighborhoods where children are now returning from school and others returning from work. There will be more cars parked on the street preventing access to the carts potentially preventing the collection of waste and other issues. The risk of an accident to both the operators and the customers, including the risk of both personal injury and property damage, will go up significantly with these increased interactions.

27. Finally, the timing creates problems for the equipment. The other two sites close at 5:00 p.m. and 6:00 p.m., respectively. If our trucks are unable to make it to the sites in time with their last load, the truck will have to hold the trash for the night. This creates a fire hazard and requires that truck to be isolated from other vehicles. Additionally, over time, the corrosive nature of the trash will cause damage to the trucks if this is a frequent occurrence.

28. If the City were denied access to Starcrest, the harm noted above would be immediate even if no other issues arose. However, should a truck need to be repaired (a very regular occurrence), a few operators call in sick, or any other problem arises, the result would be even more catastrophic. For all these reasons, it is critical to the City's operations to retain access to Starcrest.

29. I am a custodian of records for the SWMD. Attached to the Application are twelve documents:

Exhibit B — The Original Agreement

Exhibit C — The First Amendment

Exhibit D — The Second Amendment

Exhibit E — Memorandum of Understanding

Exhibit F — Special Addendum

Exhibit G — TDS's 08/02/2021 correspondence invoking mediation

Exhibit H — The City's 5/16/2022 Notice of Default to TDS

Exhibit I — The City's 9/16/2022 Notice of Default to TDS

Exhibit J — TDS's 11/22/2022 correspondence regarding "default"

Exhibit K — TDS's 11/22/2022 correspondence regarding 2023 rates

Exhibit L — TDS January 2023 Invoice

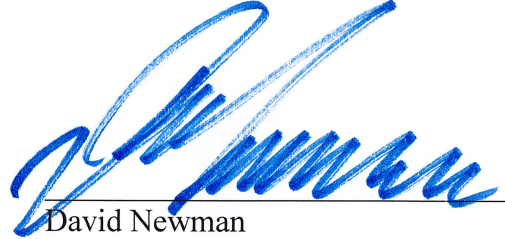
Exhibit M — TDS's 2/8/2023 correspondence regarding "default"

These documents are kept in the regular course of business, and it was the regular course of business of the City for an employee or representative with knowledge of the act, event, condition, opinion, or diagnosis, recorded to make the record or to transmit information thereof

to be included in such record; the record was made at or near the time or reasonably soon thereafter.

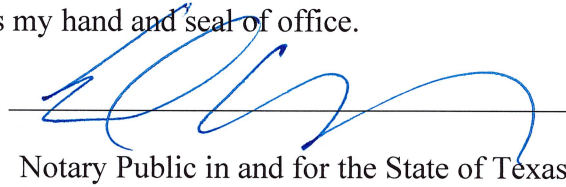
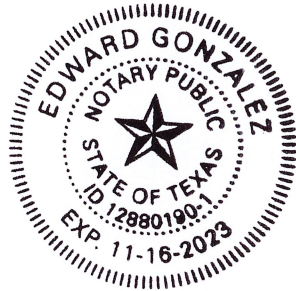
30. The attachments to the TRO, Exhibits B through M, are the originals or exact duplicates of the originals.”

Further affiant sayeth not.



David Newman

SUBSCRIBED AND SWORN TO before me, the undersigned authority, on this 16th day of February, 2023, to certify which witness my hand and seal of office.



Notary Public in and for the State of Texas